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Historical Inheritance of American Corporations

The growing fruit of the Industrial Revolution is claimed by two principal heirs: the great corporation, and the political state. By historical process beginning a century and a quarter ago, these two forms of collective ownership have emerged as sole claimants to the huge task of administering the chief enterprises by which industrial life is carried on. The commissar, the socialist board of administration, the specialized government agency on the one hand; and the Board of Directors, the corporation executive, the division heads or the technical advisory staffs: these are the representatives with power to determine and execute the projects and policies of that sector of the economy which depends on machines. The pattern in this sense becomes increasingly clear year by year. It is appropriate to begin with a brief historical sketch indicating how this came about.

Nor is the history merely a tale of the past. Apparently the organization of modern economics will have to absorb in the next few decades developments as great or greater than the sum of all the development since steam was first confined and set to turn wheels.

Until the end of the Eighteenth Century, economics were dominated by agriculture. The sun and the rain on the earth gave food. Animals or human slaves supplied power and transport. Steam, appearing at the end of the Eighteenth Century, was fairly put to use in the first quarter of the Nineteenth Century. Thus began the sudden explosion of human ability to control and

influence, beyond previous experience, the natural forces of their period. It was the first step in an evolution which was brilliantly described by the late Henry Adams in an essay entitled "The Rule of Phase as Applied to History". Taking his argument from the phases of matter--the ability to convert matter from solid to liquid, from liquid to gas and so forth, Adams considered that steam would be superseded by electronics--as in fact it was--at the turn of the present century. This, in an accelerating crescendo, would give way, Adams thought, to a phase of ether, by which he meant to describe the radio waves, familiar to us now and harnessed about the time of World War I. Probably atomic energy is a part of that phase. Beyond that, the historian philosopher believed we should reach a phase of abstraction--possibly pure mathematics. Only as we had taken about 1800 years of the Christian Era to reach the same, and about a century to travel from steam to electronics, he considered that we would reach the next phase in a much shorter period of time--roughly that proportion which the steam age bore to the previous 1800 years. In point of fact, if we reckon that we reached the radio ether phase in 1925, his guess was not wrong. In a still shorter time he predicted we would reach the next phase, whatever it was. For practical purposes, we did reach the atomic energy development in 1945. From there to the mathematical phase, Adams estimated a very short jump--a few years at best. One can surmise that the new Einstein equations may forecast a new verification of his prophecy; though that the future alone can tell.

It was foreseeable, foreseen, and inevitable that each of these changes would bring into existence new and powerful organizations of economic force. A different, possibly kindlier, destiny might have so arranged the engineering that each new development vastly enhanced the efforts of each individual acting by himself--would have immensely multiplied the power of the individual craftsman without relegating his organization into some collective group. But matters

fell out otherwise. The new force actually required and entailed large plants, large organizations, large markets and, by consequence, organizations built on large lines. At all events, engineers, businessmen and government alike estimated that this was the case and have acted accordingly, though with hesitation and reservations, later to be noticed. The large corporation, as we know it today, emerges directly from this line of history. So also does the socialized or the semi-socialized industry.

Standing near the mid-century mark, the fact is that the industrial world is divided into two classes of organization. In one great part, industry has been fully or partially socialized and is operated by subdivisions of the political state. In the other, it is operated by private collective groups, to which American law attaches the name of “the corporation”, which form the subject of consideration here.

I

Where did it come from, this collectivity known as the corporation? Perhaps no one really knows; historians have struggled with ancient and medieval history to seek its origin. Henry Osborn Taylor, a famous corporation lawyer before he turned to the more golden field of medieval thought, believed that the prototype of the modern corporation appeared at least as early as ancient Rome, and that the oldest collectivities probably had a religious origin. The Vestal Virgins were a corporation, in his view. He has traced a fascinating story in the introduction to "Marshall on Corporations"--a brilliant piece of work. Others, including Mr. Sigmund Timberg, have drawn heavily on the development of ecclesiastical bodies in the early Christian Era, bodies which, though religious in origin, became no mean economic factors as bishoprics, abbeys and special orders multiplied their strength before the Reformation. A very recent writer likes to consider the true origin as having taken place as a result of the thinking and organization work of Pope Innocent IV. Still others comment on the probable influence of the old Mediterranean ship owners who succeeded in creating a collective body having a kind of unity of its own, out of the many individuals who could and did jointly own the ships which plied out of Marseilles and other ports.

For our purpose we can leave these researches without great examination. The field is rich and splendid for historians; and no doubt will have great significance as case studies are made in the fate of these collectivities as they grew, attained first economic, then social, then political importance and at length became inevitably involved in the political struggles of their time. For Americans, the line of descent follows so clearly from England that we necessarily cross the Channel--and a gulf of several centuries to pick up our own direction.

It is a matter of dispute between British scholars whether the British Crown created corporations or found and assumed the control or pre-existing collectivities. Most students

incline to the latter view, and seem supported by the balance of evidence. Certainly there are in England corporations appearing to originate before ever King put seal to charter giving them legal recognition. The University of Oxford is perhaps the stateliest example.

What is clear, and important, is the preoccupation of the English King-state to bring these entities under its own control, and to propagate the doctrine that they could exist only by state creation. This, perhaps the first recorded struggle in the Anglo-Saxon world of corporations with a governmental organized society, set a pattern from which, as will appear, we have not yet escaped. Whether through fear of power which might challenge the state, or through desire to obtain revenue, or through the prehensile instinct which most governments have of seeking to determine the lines of social and economic development, the Tudor kings, and the Stuarts after them, vigorously insisted that there could be no corporations save by a royal grant. Lawyers and laymen alike were set to argue this point; books were written, and bought on the streets of London. Lord Coke set out the necessity of “lawful authority of incorporation” as arising from the common law, from authority of Parliament, or by the King’s charter. In Sutton’s Hospital Case in 1612, he so decided as judge, and substantially repeated the doctrine in his “First Institute of the Laws of England” more commonly called “Coke on Littleton” four years later. He left a little leeway: the corporation could exist by prescription.

But time and the Stuarts were on his heels. They argued the continuance and overmastering right of the King and, by consequence, that the corporation was essentially an arm or instrument of the state itself. The King could grant; the King could take away; the King therefore could enter or intervene in the ordering of the corporation. Certainly Queen Elizabeth had held this view in her time: the colonial companies which she envisaged were very clearly branches of government and her Scotch successors merely sustained the dogma. The British

East India Company and its famous, though less successful contemporary, the South Sea Company, were collectivities for the combined purpose of profit-making enterprises and political government. An anonymous writer in Queen Anne's time insisted that the general intent and end of all civil corporations was for better government; either general or special--"Special Government is so called because it is remitted to the Managers of particular things, as Trade, Charity and the like; for Government whereof several Companies and Corporations for Trade were erected." By the time Blackstone came along, the doctrine was settled so far as he was concerned: "But, with us in England, the king's consent is absolutely necessary to the erection of any corporation, either impliedly or expressly given" (thus, the "Commentaries" in 1766) and in 1780, during the American Revolution, Comins states concisely that "A corporation is a Franchise created by the King."

So stood the law when the United States was winning its independence; and in that state it was transmitted to the new republic. The Crown had won its fight with collectivities of spontaneous or private consensual origin; the state was master. Because the corporation was an instrument of and an act of the state, it was regarded in the new country with a kind of fear almost precisely opposite to the fear which exists today. Now, questions are asked whether enterprises so great as those we see should be substantially independent of state control. Then, the erection of such enterprises was considered to be dangerous because they give too great power to government. Americans then as now were vigorously skeptical about the desirability of too much government intervention in the patterns of life.

A slight but significant debate on the subject in the Constitutional Convention in 1787 sufficiently indicates the position. By the Revolution, the thirteen states had respectively succeeded to the rights, privileges and prerogatives of the Crown, including the prerogative of

creating and chartering corporations. A proposal was made, not to delegate this right to the newly conceived Federal Government, but at least to endow the Federal Government with similar power. It was voted down in committee; the principal argument which is recorded in Madison's notes suggests the reason. The Federal Government with such power could make and create "monopolies", and hamper the states in their own trading arrangements. The delegates to the Constitutional Convention, it seemed, took a dim view of corporations anyway. The Federal Government accordingly was given no power in this sense; an amusing thought when one sees the number of Federal corporations operating out of Washington today.

There were at the time not more than a few dozen corporations in all of the thirteen colonies combined; and up to 1800 the state legislatures were certainly not enthused to create any more. It must be remembered, of course, that six decades previous the South Sea Corporation had given rise to that enormous speculative inflation called "The South Sea Bubble", and that, on its collapse Parliament had passed legislation in a spirit not wholly unlike that which prevailed in the American Congress in 1933. An angry House of Commons, stimulated by a still angrier group of plucked speculators substantially prohibited the further formation of corporations in England; and for the balance of the Eighteenth Century few were brought into existence. Probably the same view prevailed in the American colonies; in any event, the young United States took over no substantial accumulation of corporate structures. The field was virtually open.

## II

But the steaming breath of the Industrial Revolution was hot on the backs of businessmen and lawyers. The barriers created by the South Sea Bubble Acts began to give way in England in the first ten years of the Nineteenth Century; and in the second and third decades here the old prejudices went by the board. States, one after another, enacted special legislative charters, not infrequently including monopoly privileges for one or another type of enterprise. Despite the reluctance of the Constitutional Convention to endow the Federal Government with this power, the Congress assumed it by enacting in 1816 a Federal corporate charter for the first Bank of the United States with the privilege of issuing bank notes. The constitutionality of the action was challenged in the famous case of McCullough v. Maryland; was defended by Daniel Webster, and was sustained by Chief Justice Marshall on the ground that Congress had the right to create appropriate instruments to execute its Constitutional powers. Controlling banking and currency was a Federal power; the corporation was an appropriate and legitimate instrument; therefore, the Federal Government had a right to create it. Probably John Marshall never foresaw the application which would be given his doctrine, nor dreamed of the day when a Federal corporation should be held immune from State laws and amenable to Federal law alone, as the Supreme Court appears to have held a few years ago in United States v. Allegheny County (322 U.S. 174 [1944]).

The pressure under which the Congress acted in 1816 was, of course, the urgent need for a more or less uniform system of currency and credit. More widely spread industrial pressures acted on the several states. Their legislatures began to grind out special charters at the petition of groups of enterprisers of all sorts. In form, these charters suggest that the petitioners' lawyers had looked up the old Royal Grants; and that the legislatures indulged certain very modern fears. In 1818, for example, Massachusetts chartered the Maine Flour Mills, but limited the total



property which they might hold to \$50,000, of which they might hold land not to exceed \$30,000 in value and it had to be in Kennebec County! Since it was to mill flour, the corporate name had to be clearly printed on every barrel or half-barrel of its product; a \$2.00 penalty for each unprinted barrel was imposed on the corporation. Equally, anyone counterfeiting the mark could be held to pay \$20.00 per barrel to the proprietors. The next twenty-five years brought the sunburst of special charters of all kinds: textile mills and now the new-fangled railroads, factories of all sorts. Practically all were severely restricted in their powers; our great grandfathers had not the slightest intention of allowing these fictitious collective persons to roam the world, possessing indefinite wealth or to dominate the commercial industrial scene.

The close connection between corporate charters and local legislatures of necessity brought the corporate mechanism into vivid contact with local politics. Then, as now, political leaders, lawyers who knew their way around state capitals, and politicians willing to pick up fees and contribution to the campaign fund were familiar figures. A corporate charter, especially with limitations, could be and frequently was swiftly outgrown. There was an unpleasant doctrine of law known as “ultra vires” which cast a shadow on the business transactions of a corporation acting beyond its powers or in violation of a limitation. Need for amendment or enlargement of powers was steady; few prosperous and growing corporations could afford to be out of touch with the state government. Otherwise stated, they had to be in politics--and were.

Whether the scene be in Washington, D.C., Albany, N.Y., Boston, Mass., Concord, New Hampshire, or Richmond, Virginia, the story was the same. The commercial corporations were looking out for their interests--one may assume that there were plenty of politicians, lobbyists, disbursers of favors and their like who were ready to assist. The recorded history of the Second Bank of the United States makes it wonderfully clear that this corporation, in its origin, as again

in its demise, at the hands of Andrew Jackson in 1836, was almost necessarily in politics throughout its entire history. A foretaste of things to come: the railroads, shipping companies and other enterprises appear to have assumed as a matter of simple course that they must make their way in a political world. As they grew great, they found it necessary to attempt to dominate that world, at least so far as it impinged on their own preserve. The sagas of the latter-half of the Nineteenth Century in this respect indeed have become almost classic: Mr. Winston Churchill's novel of the Boston & Maine Railroad, "Coniston", carried forward by its sequel, "Mr. Crewe's Career", gives a popular picture well substantiated by the facts on which the story was constructed.

Behind the legal dilemma, the Industrial Revolution continuously expanded. The little textile mill now became a big textile mill. The small railroad aspired to cross the state, to penetrate the West, to meet the Great Lakes, still later to cross the continent. To do this effectively meant bringing under one control, if not under one charter, and-to-end fragments of railroads all the way along. The spirit of expansion was strong; legal obstacles such as charter limitations must not be allowed to interfere with serious business. Better to act beyond your powers than not to act; and, anyhow, what was the real importance of the Court-made law of ultra vires? Simultaneously with a steady drift towards ever wider charters and legislative elimination of limitations which looked reasonable when the charter was granted but strangely odd a few years later, came the employment of the best of the American Bar to break down the "ultra vires" doctrine. Both barriers gave way almost at the same time.

On the legislative side, a wholesale disgust at the maneuvering and corruption attending the granting, revision and renewal of special charters led to revolution. These special charters, democratic substitutes for the Crown grant--were unpleasant things at best. They purported to be

special privilege, granted by a legislature representing all the people to the favored few. The movement took the form of a doctrine that special charters (the only kind theretofore known) were inherently bad; that the privilege of doing business as a corporation ought to be available to any one and, by consequence, that states should have a general incorporation law permitting any business group which fulfilled its formalities to obtain a charter from the state. (General incorporation laws for churches and charities had been known in America since 17\_). The privilege of doing business as a corporation thus became generally available; of course, any other or additional special privilege had to be sought from the legislature itself. The first “general corporation law” for business purposes is commonly credited to the state of New York, in the year 18//; though questions of definition can be raised: that act applied only to manufacturing corporations. By 1900, not only were general incorporation laws practically universal, but many states had included clauses in their state constitutions forbidding the granting of special charters. We had run full circle. Popular demand was that the State legislators, successors to the old British Crown Grant should abandon their grip upon and their control of the corporate privilege.

But was it merely a Crown power which was being eliminated? In one sense, this was true. In another, the legal doctrine was sweeping away those initial attempts at social control of the corporation which our ancestors thought necessary. After a classic constitutional struggle, New Jersey, thereby acquiring the title “Mother of Corporations”, passed a general incorporation act in 1875 giving the widest powers to those who availed themselves of it, and took leadership as an incorporating State. The doctrine that other states must give full faith and credit to governmental acts was invoked to permit Jersey corporations to do business elsewhere; other states were not sorry to do this, since it meant additional activity and property for taxation. Limitation on size was abandoned. A corporation no longer had to have a severely defined

“single purpose”: any number of associated enterprises might be gathered under the collective corporate roof. The big corporation was clearly on its way--not as a special privilege as in the case of the early railroads, but as an accepted proposition in American commercial and economic organization.

We may end this section by noting the steady decline of the effective doctrine of ultra vires. Courts, from having been astute to assure limitation of corporations in the early part of the Nineteenth Century, became almost equally astute to find ways of eluding galling and frequently obsolete restrictions. Either the right of any person to assert that a corporation had acted beyond its power was cut off in some fashion (usually by erection of a judicial theory that he was “estopped” from raising the point, or the corporate powers were construed as including power to do all acts “incidental” to the main purpose. Of the “incidents” of an enterprise there is no end. A Florida railroad was permitted to engage in the hotel and winter resort business, since this “incidentally” provided traffic for its line; and so on ad infinitum, depending on the commercial views of the Courts. Only where the limitation coincided with some pretty clear policy of the state was it given teeth and vigor.

From a business point of view this was as it should be. The corporate clothing of the early Nineteenth Century did not fit the burgeoning industry of the second half; and the community, perhaps wisely, decided that it would rather have economic growth than social control.

### III

Even as the special charters and limited incorporation acts went by the board, however, a new influence was pushing in. Fear of unlimited corporate size and of unlimited corporate power had not ended, even though the old method of social control had been abandoned.

In this case, surely, there was ample reason for public concern. The Civil War, like all wars since the Industrial Revolution, had proved a forcing house for industry; and had increased the monetary base. The combination of these factors, taken together with migrations to the Western states, set the stage for a vast rough-and-ready transportation and industrial expansion. The roaring days of Vanderbilt, Gould, Harriman and (perhaps the soundest of them all) James J. Hill were matched by the less spectacular but equally formidable expansion of mining, steel fabrication, textiles, and presently, oil. The most violent operations in the corporate field were, of course, the great railroad monopolies. The two Adams brothers, Henry and Charles Francis, returned from European diplomacy to practice law in New York, and, as Henry put it, took to pamphleteering because no one would hire them at \$3.00 a day. They tackled the corporate operations of Jay Gould, publishing a series of articles which later were gathered in a volume called "A Chapter of Erie". The book had an effect not unlike another book later to be published in 1928 by a Harvard professor, William Z. Ripley, "Main Street and Wall Street". The Adams brothers proved quite simply that, as corporation law had developed, taken together with the political manipulations of the time, a mere investing stockholder had no substantial power to protect himself in the large corporation as it was now appearing. Legal rights he might have; position and ability to make them valid, he did not. His real run for his money was on the New York Stock Exchange; but there he encountered a string of formidable professional operators whose names became famous as the Nineteenth Century ended.

Lawyers were the experts in the field of creating-and wrecking--corporate organizations and of manufacturing and pulling to pieces corporate securities. No better documentary evidence of the time exists than a privately printed two volume book, "The Cravath Firm", compiled and published by the successor of these men, Robert Swaine. As a combination piece in the strategy of using corporation meetings, Courts, injunctions, receiverships, hearings and litigations, the performance of the American Bar was brilliant, and generally profitable both to the lawyers of the Corporation Bar and to their clients.

But it did not command the moral respect of the country. Glad as the average citizen was to see railroads span the continent and factories dot the landscape, he entertained a solid doubt where all this would end. The multimillionaires who were also corporate managers and apparently capable of dominating local and national politics might indeed be lords of creation. But it was not a regime that any one much admired. One suspects there was sharp division between the attitude towards constructive and basic industrial development on the one hand and the feeling towards a political power system on the other.

Transportation was clearly the basic factor at this time and it was there that the signs of shifting to another technique first appear. The steady and growing complaints of the tyranny of monopolist railroad administrators rose from a minor to a major note in the political disharmony of the 80's and finally arrived at the legal and political conclusion: the passing of the Interstate Commerce Act and the creation of the Interstate Commerce Commission in 1887. It was a poor and feeble thing, with little power and substance; but the Commission stood as a symbol that at least in railroad transportation the national power might be dominant over the uncontrolled private management. Certainly it conclusively demonstrated that, as well as a private and property interest, there was also a public interest in economic development; that free enterprise

and public planning and control are not opposites but, in some yet unexplained way, closely linked together. Effective, the passage of the Interstate Commerce Act of 1887 certainly was not; symbolically at least, it played a part.

And a distinctly American part, for one must remember that in this period a similar revolt was going on in Europe. There it took the form of a strong Socialist movement--a movement sufficiently significant as to require the careful attention of men like Bismarck. In Europe, men talked of a class war. In America, they talked of monetary readjustment and of getting the distribution of powers capably made. The Populist and Granger movements of the 70's and 80's never accepted the dogma and never attained the power, of the European class movement. For the American revolt was not designed to enthrone the proletariat: few, if any, Americans would admit for a moment that they were proletarians. It was rather a design to break up concentration of power at the focal points--power of government was conceived, not as concentration but as distribution.

Almost simultaneously, this same movement crystallized in a second piece of major legislation, likewise directed at corporations though cast in a quite different form. This was the Sherman Antitrust Act of 1890--an act specifically aimed against concentration of power and directly outlawing monopolies. Again it was more a legislative gesture than an enforced reality; but at least in the light of hindsight, a clear trend can be discerned.

With these two plain indications, a third great strand of thinking was being interwoven. This was an intense, growing feeling that power was unduly concentrated in the great centers of finance, and that a knot of interests in New York unwarrantably combined a set of related powers. The great investment banking houses, notably J. P. Morgan & Company and Kuhn, Loeb & Company, had established control over the major avenues to the market for investment

capital--investment capital then being indeed an absolute essential for industrial expansion. They likewise were thought to control (as indeed they undoubtedly did) the major operations of the New York Stock Exchange. In considerable measure they were also in position to influence and often directly to control the operations of the commercial banks. Even the Treasurer of the United States was forced to resort to them in time of panic or crisis as Cleveland resorted to the Morgan firm in the Gold Crisis of 1893. Their members or nominees sat on every principal Board of Directors. Their word was law in the railroad world. They had repeated, in a word, the concentration of financial power achieved by Nicholas Biddle three-quarters of a century earlier, and they were beginning to encounter the same political sparks. Even as the various states, with popular approval, were liberalizing their corporation laws in respect of power of corporate operations, a national feeling was gathering against the concentration of financial power in the New York district. Even as New Jersey, New York, Massachusetts, Delaware and others, successively enacted laws for general incorporation and increasingly permitted corporate managers wider powers, the growing cry against financial domination carried on through corporate mechanisms acquired political strength.

Yet it would have seemed in 1900 a futile political movement. Williams Jennings Bryan's oratory had not convinced the country; President McKinley was triumphantly elected, and his chief supporter, Mark Hanna, was himself a major figure in the industrial and financial combinations of the time. Big businesses, then a solid reality and an identifiable group, were dominant in politics as well as in economics. They had successfully weathered and perhaps even absorbed the Democratic Administration under Cleveland; they had dominated, nominated and elected in McKinley a President of their own thinking and persuasion; their influence made policy for the government and chose the men who would execute it.



The Interstate Commerce Act had become virtually a dead letter; the Sherman Antitrust Act had had one or two spectacular applications but clearly was not influencing the general course of events. Economic development was flowing fast and furiously into the growing corporations, and a novel corporate power introduced by New Jersey--the power of one corporation to hold stock in another--had opened the way for the evolution of the modern "holding company" and the pyramided formation by which a relatively small amount of capital could get working control over a congeries of related enterprises. Isolated state opposition--a feature appearing strongly in a far-away state called Wisconsin--was not a major factor. True, the Supreme Court had made some disturbing decisions: Munn v. the State of Illinois had held that certain kinds of enterprises necessary to the public interest such as grain elevators, could be regulated by legislative act so that the Constitution did not guarantee unlimited right to private property. But this could be successfully countered by political action; the Constitutional power is not too dangerous if legislators do not pass that kind of law.

Corporation lawyers had their own way, and their major function was that of constructing or enlarging corporate organisms, of acquiring new enterprises, or consolidating loosely held ones into tight, well-knit concerns. For the rest, they handled the diplomatic or personal relations between the great enterprises and the titanic financiers.

IV

Then, by an accident of history, the scene changed. President McKinley died by the bullet of a demented assassin. A self-willed, unpredictable figure, Theodore Roosevelt, presided in his stead.

This picturesque young man had shown some predilection for considering the complaints of those who objected to the course of concentrated financial and corporate power. As Governor of New York, he had had an effective voice, and one had to take him seriously in politics. The political High Command of the Republican Party had found it wise to put him out of action by nominating him for the powerless, dead-end office of Vice President--a designation he had sought to side-step in vain. Now, he was cock-of-the-walk.

Perhaps even then no major consequence would have ensued at once. But his emergence as President coincided with two phenomena which powerfully affected the development of corporation law. One was the clear and unimpeachable fact that certain railroad managements, led in part by the great financial leaders, had become corrupt. The corruption appeared in the form of discrimination in rates by which they gave to their favorites low transportation charges, enabling them effectively to wipe out competitors. This was an abuse of power which struck home to every village and growing town over the entire country. It was the kind of thing that could be politically understood. The other phenomenon was a dangerous mishandling of the commercial banking machinery, due partly to inherent defects in the banking structure, and partly to a lack of understanding (as we think today) of what banks should do and be.

At all events, a wave of anger over railroad rebates coincided with a short but frightening financial crash, the Panic of 1903. In its light, the power of the concentrated financial-business group in New York appeared both dangerous and ineffective; and political power, as the only available alternative, moved in.

The railroad rate bill, now on the statute books as “The Interstate Commerce Act of 1903”, plumped squarely for Federal regulation of railroads and their rates, and forms the heart of railroad control legislation of today. Though the New York Tribune solemnly asserted the rights of private property and insisted that Theodore Roosevelt had fastened himself to the wheel of “Communism” (even then that particular form of opposition seems to have been popular), the Congress passed, and the country cordially welcomed, the new power.

This meant that, while a state could charter a railroad, giving to the railroad corporation full faculty to do many and various things, there was an overriding limitation of its power--the power of political regulation. (Even then there were not wanting men who believed that railroads should be owned outright by the political state.) Nor was the principle limited to the railroads. Movements appeared everywhere in the country for control of rates and practices in the new and burgeoning electrical industry, which was growing by leaps and bounds, usually under the magic name of Edison. It had taken the country a full three-quarters of a century to adapt its laws to steam, at least as applied to transportation; but the thinking was almost immediately applied in greater or less strength to its successor, electricity. The country was beginning to develop the pattern we now have: the unlimited business organization known as “the corporation”; combined with limitation of its powers through over-all regulation.

Even more direct in application, the Attorney General of the United States remembered, and now began to enforce, the Sherman Antitrust Law. This law did not aim at size. It aimed at monopoly, and at an ill-defined target called “restraint of trade”. This was immediately interpreted as meaning a free price system, presently expanded to include free access to markets. As it presently appeared, the dreary length of anti-trust proceedings meant that effective Court action was to be long delayed; but the mere institution of actions had sudden and powerful

results. For one thing, the anti-trust laws could be enforced criminally, and possible jail sentences gave pause to any one. For another, a degree of dissolution embarks an enterprise on an unchartered sea; no one quite knows what the effects may be. Financiers, bankers and investors, certainly in those early days, had to pause to consider the possible dangers. Wall Street lawyers like Root, Knox and Wickersham appearing as Attorney Generals showed a surprising tendency to enforce the law as it stood, forsaking the contentions which they had made in private practice. Actions were successively started against the attempt to combine the control of two great railroad systems and a holding company--the Northern Securities case, decided in 1904; the Standard Oil Company and a string of less spectacular defendants. Theodore Roosevelt bequeathed the legacy of anti-trust enforcement to his supposedly conservative successor, Mr. Taft; and Taft's Attorney General, George Wickersham, actually began more anti-trust actions in the four years of his administration than had been commenced even in the Theodore Roosevelt era.

A young barrister named Louis Brandeis, making his way in Boston with the good-natured friendship of New England aristocrats like Oliver Wendell Holmes, not only powerfully argued the case for regulation, but was stating directly that great size in business could be a danger to democracy. When his essays on "The Curse of Bigness" are read today, the argument against the big corporation is surprisingly like the arguments frequently made against "big government" and bureaucratic domination. But he, and the entire school of thought which crystallized around him, did not undertake to touch the corporate organization as such. Rather they felt for general rules and limitations--limitations which formerly appeared only in the ancient special charters and special corporation acts. Then, as now, the liberal was no Socialist.

The third great strand of thought, dealing with financial mechanisms, was not absent though its course for a time ran silently. A wealthy Rhode Island manufacturer, Nelson Aldrich, had been seriously scrutinizing mechanics of American banking. There is no particular reason to assume that governmental and political aspects of concentration of financial power worried him very much. What did concern him was the fact that the banking machinery frequently broke down; his own experience of this was vivid in 1903, and still more vivid in the Panic of 1907. As Senator from Rhode Island, he was so placed that he could do a good deal. What he actually did was to study, painstakingly and elaborately, the mechanism of the European central banks. Over several years he accumulated a library on the subject (which has found its resting place at the Harvard School of Business Administration) and he endeavored to evolve a compromise between the European system of central banking and the American system disparate units. In his view, there had to be some central planning and balance unit which could coordinate the supply of credit with demand for it, and with government policy. But, stout conservative that he was, he wanted a system clear of politics and, consequently, in private hands. Regional central banks, owned by the commercial banks and guided by a central board in Washington appeared to be the solution. Through the Taft Administration he and his associates considered various possibilities of legislation; the drafts which he had made served in major measure as the basis of the legislation passed, under the leadership and name of Carter Glass, in the early days of the Woodrow Wilson regime.

The central theme of this legislation deserves study, because it appears to be the forerunner of the pattern appearing more rapidly today. Not only were certain additional powers and certain additional limitations needed creation and control of the supply of money, but credit was to expand and contract with the demand for it. Thus, there was needed a central planning

and control mechanism. Whatever the merits or demerits of planning in other enterprises, there was no question that planning was needed in the monetary field. It is a standard reserve banking cliché that a central bank must be prepared to act “counter-clockwise”:-when a commercial bank is under pressure to contract its loans, the reserve bank should exert influence to expand; conversely, when credit is running very free and easy, the reserve bank should consider tightening the strings. Policy is made on the basis of elaborate statistical studies and reports, so that almost hour by hour the central bank can keep track of the movement, rise and fall, of goods in relation to money. Also, separation must be made between the capital operation and the current credit operation, though the two are now recognized as more intermixed than older doctrine used to admit. It was terribly clear after the Panic of 1907 that some reorganization would be necessary: indeed, the method of that reorganization was a major political issue in the Taft administration.

All of these problems, and others with them, came together in the political campaign of 1912. Woodrow Wilson proclaimed the doctrine of “the New Freedom”, drawing on all of the inherited revolt against great corporations bequeathed to him by William Jennings Bryan. He also attracted the support of those serious groups who had acquired growing misgivings on the administration of finance. He was able to capitalize on the results of an investigation of uncontrolled corporate activity in the field of life insurance--the Armstrong investigation in New York City carried on by its brilliant counsel, Mr. Charles Evans Hughes,- The “New Freedom” as he conceived it was quite clearly and obviously a program designed to satisfy grievances and doubts of those who suffered at the hands of, or were fearful of the outcome of, the growing industrial and financial concentration.

The election of 1912 made the “New Freedom” political doctrine, and legislation immediately followed. After a stiff fight, the Federal Trade Commission Act was finally passed, taking over the work of a more or less innocuous bureau, the old Bureau of Corporations. Its charter was to prevent unfair methods of competition in commerce and unfair deceptive acts or practices therein. More specifically, it was empowered to investigate and require reports from corporations, to investigate compliance with anti-trust decrees, and to “make recommendations for the readjustment of the business of any corporation alleged to be violating the anti-trust acts”- -a power which has proved of less practical effect than its wide statement would imply. At the same time, the anti-trust acts were stiffened by the so-called “Clayton Act”, making illegal certain defined forms of concentration. It became illegal for a corporation to purchase a controlling stock interest in a competing corporation. Once more there was a tendency to reimpose through general legislation some of the limitations imposed on corporations by older, stricter state laws. And a lengthy series of anti-trust prosecutions, many of them begun in President Taft’s time, wound their long way through the Courts. The Standard Oil Company was dissolved; though the United States Steel Company fared better, ultimately receiving what amounted in practice to a clean bill of health from the Supreme Court of the United States.

The course of politics was interrupted in 1914--as it usually is--by the violent impact of a foreign war. Domestic problems frequently are shelved in wartime; so it proved in the United States. Even more important, the close of the world war found the country on a different political tack--that of “normalcy,” “business as usual”, and the search for a new level of prosperity. The relatively short post-war depression of 1921 was followed by recovery swift enough to avoid major political repercussion; the endeavor of the New York Federal Reserve Bank to ease the British situation may have given an inflationary tendency its start. Speculation

became the mode. In any event in the roaring 20's, corporate problems were no great concern of American public opinion until the peak of the boom.

There can be little doubt that the great corporations did use their opportunities, both for production and for concentration. Again the war had proved a forcing house for new inventions, leadership this time settling on internal combustion engines, electronics, motion pictures and chemicals. From this era comes the great growth of the General Motors Corporation, rescued from a stock-market plaything and made into a huge and enormously successful manufacturing operation. General Electric strode into the vast field of electronics of all kinds. Radio Corporation of America was constructed, largely under the influence of the United States Navy. The severed portions of the Standard Oil Company grew until some of the units far transcend in size their original parent.

This was straight industrial growth. In other fields, concentration through financial means far outstripped actual growth facilities.

A number of huge pyramids in the electric light and power company field were constructed, largely by creating corporations which exchanged their stock for stock of operating companies; the Associated Gas and Electric Company, the North American Company, the Niagara-Hudson interests, are merely illustrations. Speculation in the stock market gave shares an apparent value, enabling corporate managers to use them as a sort of self-created currency with which to buy properties. The Van Sweringen Brothers were able to enter the picture, controlling a string of associated railroads. Less spectacular groupings were appearing in other fields.

By now, the law most favored by corporate managers was the corporation law of the state of Delaware--a law considerably more lax than those of other states. Yet for purposes of



convenience still greater powers of financial manipulation and operation were desired. The laws of Delaware were really drawn by a group of corporation lawyers in New York City. These agreed among themselves as to desirable changes, and had a convenient method of transmitting their wishes to the Delaware Legislature which, at that period, was almost invariably ready to comply. In 1928, and finally in 1929, a series of amendments to the General Corporation Law of Delaware were drawn in New York and promptly passed by the Delaware Legislature. Students of corporation law realized then that the effect (so far as legislation could accomplish it) was to leave the controlling corporation manager incontestably master of the situation. He not only held the almost unlimited operating powers already gained, but now acquired almost unlimited powers in respect of the issuance of shares, change in participations, and the handling of the income stream within a corporation. In fairness it should be said that the primary motive for the Delaware laws of 1929 was probably to speed up the process of acquisition, and of concentration--to make it easier to create pyramids and, once created, to weld them into solid organizations. It was a high-water mark, alike of the market inflation of the 20's and of the reach for power by corporations.

Then came the deluge. The stock market collapse of 1929, the growing financial wreckage, the Pecora Investigation, the political repercussions, are a matter of familiar history. Yet it is of interest that throughout the entire crashing period and the days of the Rooseveltian New Deal which followed, no serious attempt was made to overhaul corporation laws as such--and, for that matter, no serious attempt has been made yet. What did occur was an irresistible insistence that the situation be brought under control by quite general legislation. Reliance on the business enterprises themselves to carry on the growing, shifting process of production and distribution where they appeared able to do so was never really questioned.

So in 1933, on the financial side, the Reconstruction Finance Corporation,-in effect a government capital bank,-was rapidly expanded to take over and perform the functions which the investment banks clearly could not meet. Attempt was made to police the issuance of securities, though the principle was to require full disclosure through the newly-created Securities Commission, now the “Securities & Exchange Commission”. The principal forms of stock rigging and fraudulent manipulation of stock markets were forbidden by the Securities Exchange Act in 1934.

Only in one respect was there a direct attack on the problem of operation: the Public Utilities Holding Company Act of 1935. Using the Federal control of Interstate Commerce as its Constitutional base, Congress called for a simplification and breaking down of the holding company systems and the limitation of physical systems to “a single integrated public utility system”, and such other business as might be reasonably incidental to it. The Securities and Exchange Commission was given power to require simplification of unduly complicated structures, equitable distribution of voting power among security holders, molding of the spare parts of such corporations and their subsidiaries into an acceptable integrated system, and to compel reorganization to achieve these ends.

Here was a clear invasion of the unlimited power of the corporation which had grown up since the decline and fall of the doctrine of ultra vires, and the enactment of unlimited state law.

The importance of this precedent can not be overlooked. It leaves the corporation as an entity where the state law leaves it; but it compels action by the corporation in accordance with an over-riding standard set by Federal law. It squarely attacked the power of concentration--an attack which was successful in the case of utilities probably because physical integration had not taken place. The paper created by holding companies could be dealt with,-not easily, but at least

effectively. Interruption of operations on the ground would have proved far more difficult. Abuses of the corporate system are commonly created in a period of rapid financial expansion, and certainly the public utility holding company chains had been the conspicuous sinners in the 20's. Worse, in the depression which followed the stock market crash, they had endeavored to shore up their position in many cases by practices of more than dubious honesty. Their attempts to move into politics, doing in the Federal field what the old railroad systems had done a generation previously in state systems, had been exposed by a Senate investigating committee headed by Senator (later Supreme Court Justice) Hugo Black. Unlike the Interstate Commerce Act of 1887, which had scarcely coped with the problems created by the Gould-Vanderbilt-Drew days, the Public Utility Holding Act was effective, and achieved its result. In its own way, public opinion had set metes and bounds to corporate power in the public utility field, at least for the current period.

The three strands we observed are clearly visible in this period.

In finance, the Reconstruction Finance Corporation became--and potentially still is--a senior control over capital banking. The more so since one of the by-products of the period had been to require divorce of commercial banking from investment banking activities, the principal motive being to assure that commercial banks should not risk their depositors' money in flotations in which their affiliates were interested. The Federal Reserve increased its power to control the supply of credit, and to steer credit away from speculation and toward operations. The Federal Reserve Board in Washington became, for all substantial purposes, an effective central control and planning board in the short-term and commercial credit field; the Reconstruction Finance Corporation might have done the same thing in the capital banking field

(as in fact it did during World War II for strictly war purposes), had not the Second World War interrupted the process.

Regulation of the credit concentrations (aside from utilities) was matter of issue in the closing days of the peace between wars; but since the depression did not really lift until war expenditures recreated activity, the problem was not an active political issue. Growth was still lacking in certain lines; the old processes went forward; the preoccupation of the country was rather to stimulate than to control activity. Indeed experimentation with the National Recovery Act, which tentatively accorded business groups and trade associations the right to do their own planning and regulation, encountered both Constitutional and political objections. It was clear that competition was still the chief regulatory force to be relied upon; the relative stagnation of the 30's did not thrust the problem to the force. Corporation laws stood as they were: though the Federal government was supposed to be unfriendly to business; the immediate abuses of the 20's had been coped with; and an angle of relative rest had been attained.

Yet there were signs of a smoldering intellectual current, still present, whose effects are unforeseen. In 1938, Mr. Justice Black had ventured, in a slashing dissenting opinion, to question the proposition that corporations were entitled to the protection of the Fourteenth Amendment. The due process clause, he thought, did not apply to them. Mr. Justice Brandeis had endeavored to uphold the right of a state to discourage size by graduated taxation; his opinion in the Florida Chain Store case, officially known as Liggett v. Lee, was a careful examination of the dangers of concentrated corporate power. Senator O'Mahoney steadily pursued the hope of maintaining a relatively small business as the norm of the country's economics.

What the outcome would have been without the advent of World War II, no one can say. The vast shadow emerging out of Germany which blacked out peace in the world ended at once speculation along this line. The necessity of hasty rearmament, followed by the requirements of an all-out war, made production the principal desideratum.

And there was no question that the great corporate organizations were in the best position to energize production for rapid results. The Federal Government, through the Reconstruction Finance Corporation, and its subsidiaries, was prepared to advance capital. The needs of the Armed Forces guaranteed the market. The production engineer who could build a plant in ninety days and start producing within six months was the man of the hour. He actually was found on the production staffs of the great basic corporations; and he went to work with the full power of the Federal Government behind him. The financier and the corporate lawyer now took second place. It was unnecessary to seek legislative assistance to enlarge corporate powers. It was unnecessary to cobble up corporate mechanisms to obtain additional capital in public markets. It was unnecessary to make terms with investment banks. Straight production operations were called for and the Federal Government was prepared to finance. The lawyer, the financier, and the banker and mobilizer had had their day. Plant managers were supreme.

VI

This is the position of affairs in mid-Century.

The position of corporate management has been fortified, so far as corporate entity and power are concerned, by acquiescence to the state statutes like the Delaware law of 1929. Much, indeed, of the libertarian Delaware doctrine has found its way into the statutes of more conservative New York and has been imitated by statutes of states like Nevada and Arizona. The Courts have not undertaken, in the face of this legislation, to set themselves up as arbiters of business action: the presumption is indulged that duly taken corporate action is in the best interest of the enterprise. Only the most flagrant violations are checked by litigation route. Indeed newer technical hurdles are interposed between a complaining stockholder and Court review: for instance, the New York statute requiring that a plaintiff stockholder having less than a stated percentage of the stock or an interest of \$50,000 in value, shall file a bond to indemnify the corporation for expenses of litigation and its attorneys' fees. This has not given rise to general complaint from the property holding side, largely because there has been a distinct advance in the care and ethics of the corporate management group. The loose dishonesties of the 20's appear not to have been repeated in the 40's. Community practice and pressure rather than corporation law have been the major factors; and the Securities & Exchange Commission regulations, together with the tightened requirements of the stock exchange, require disclosure of corporate operations. For the time being, the questions prevailing between corporate managers and investors have reached an angle of relative rest.

But an angle of rest has not been reached in the newer, deeper question which is essentially the question of political power. The Government, the public and corporations alike recognize the intimate relationship between proper functioning of the great corporation, the economic well-being of the country and, with it, the political safety of elected officials. A

shortage of steel becomes a political, quite as much as an economic, issue. Failure of the coal industry to work out a productive relationship with its labor induces Government action as a matter of course. In longer view, corporations such as insurance companies, destined for indefinite growth, study uneasily the possible questions which that growth may raise. The problem of maintaining stable conditions in supply, price, employment, distribution, without creating cartels for the purpose, poses the prevailing issue. For these results involve planning; yet private planning is outlawed by the anti-trust acts and public planning is an unsolved enigma. The corporations which would most like to stay out of politics are confronted with the riddle of how to achieve a result, attainable, in part at least, only through use of Government powers.

Competition, in theory at least, is conceived as the chief curb on undue corporate powers. Yet few, if any, industries really accept the theory without reserve. A Federal law substantially controls prices in the sugar refining industry; an interstate treaty controls production in the oil industry; an elaborate Government support program maintains the aviation industry; Government regulation forbids competition in certain respects in the banking field; at bottom, Government policy exercised through armament orders probably plays a major part in the electronics industry. The great "yardstick" utility enterprises introduced by President Roosevelt in the Tennessee and Columbia and Colorado Valleys outline a measure of control of the now reorganized utilities. Lesser devices have appeared in other situations.

Outstanding is the fact that wherever corporate economic power is concentrated beyond a certain point, a combined control and planning device, in one form or another, has appeared.

This is not Socialism: and it is not doctrinaire. It is rather a pragmatic approach. American corporation law has to be judged against background in which, comparatively, the corporate entity as such is allowed power over operations and over finances almost without limit.

But from these entities as they grow in size certain results are sought. Failure to attain those results energizes democratic solutions.

In a sense, we are once more running full circle. The Government, for all practical purposes, no longer creates a corporate entity. It can, it does, hammer out certain criteria of the results expected from concentrated corporate power. The criteria are not written as limitations in a Crown Grant charter. They are written into the over-riding, regulatory law of the land, and in demands of public opinion. The property of the corporation and of the investor is, in form at least, left untouched. But the exercise of its power is increasingly conscripted to achieve certain defined public ends.



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