CORPORATE CONTROL
AND PRIVATE PROPERTY RULES

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As early as 1776 a warning was published that evils are inherent in the corporate structure, wherein directors are “managers rather of other people’s money than of their own.”¹ Not from a radical advocate of a “planned economy” came this analysis, but from the world’s most noted exponent of laissez-faire. Concerned, however, only with the risk of pecuniary loss to the stockholder, Adam Smith failed to envisage the even greater dangers which have actually materialized. The community itself is now affected by a condition in which a few individuals without personal ownership can control limitless economic assets—an inevitable result of the separation of ownership and control.²

This power to control without ownership, constituting, as will be shown, a new and significant form of property, is unregulated except for some recent New Deal legislation.³ Established social restrictions—the Law of Mortmain, the Rule against Perpetuities, and Restrictions on Accumulations—rules developed when economic assets were used by those who owned them, are inadequate in a corporate world where the old concept of property has been split into two parts: (1) ownership,


³ New Deal legislation has begun work in this field by prohibiting (in certain types of corporations) solicitation of proxies in contravention of rules prescribed by the SEC, which in turn require certain information to the stockholders on some of the matters on which they are asked to vote. The most direct attack upon concentration of control is made by the much maligned § 11 of the Public Utility Holding Company Act of 1935.
control with its accompanying power. The rules listed have been applied only to the former (stock ownership), possibly because it is within the old concept of property and permits utilization of the rules without change. Yet the magnitude of the new form of property interest (control) has consequences at least as undesirable as those feared from the older and more readily recognized forms of wealth. The need for regulation here is therefore as great if we wish to continue the social, economic, and ethical objectives evidenced by the rules which, applied to the control of private property, are today accepted by the most conservative.

The purpose of this article is (1) to point out characteristics of the new form of property which make it a critical problem, and (2) to suggest historical precedents for a remedial formula. Regulation of the internal control of corporations is simply another facet of the age-old struggle to keep property "unfettered"; it is not "unprecedented," as some critics have urged. Nor is such regulation "un-American." The Spirit of '76 was very wary of the corporate form, a reaction inevitable in a free people indignant at the previous award of corporate franchises as special favors and in the nature of monopolies. Regulation of the type now contemplated was not needed until the present century, when corporations are formed at will and complete separation of ownership and control is stark reality.

THE PROBLEM

The wealth accumulated in a few "legal" owners (the corporations) had, like a rolling snowball, increased in size to such an extent that when World War II began, two hundred corporations alone already owned physical assets representing more than half the total industrial wealth of the country, and the War is likely to hasten a clearly defined trend toward the inclusion of all industry.

4. The Constitutional Convention voted against giving the federal government the power "to grant charters of incorporation where the interest of the U. S. might require and the legislative provisions of individual states may be incompetent." II Records of the Federal Convention of 1787 (Farrand ed. 1911) 615, 616; III, 362-363, 375-376. During the French Revolution, all corporations, financial as well as religious, were abolished. Violet, French Law in the Age of the Revolution, Cambridge Modern History (1904) VIII, 726.

5. In 1909, the 200 largest non-financial corporations held 33\(\frac{3}{4}\)% of the assets of all non-financial corporations; in 1933, the proportion had risen to 60%. TNEC, Monograph No. 11 (1940) 4. On the basis of past performance, Berle and Means in 1932 predicted that by 1950 the 200 largest corporations will conduct 70% of all corporate activity, and within 20 years thereafter all industrial activity. The Modern Corporation and Private Property (1932) 40-41.

This growth in the size of corporations has naturally been accompanied by a tremendous increase in the number of stockholders which, paradoxically, has resulted in control of these giant corporations by a few individuals. The supporting pattern has been: increased size of the corporation, increased number of stockholders, lessened control by stockholders. In almost every large corporation, control is held by a group owning less than a majority of the outstanding stock,7 and the larger the corporation the smaller the percentage of the stock interest, if any, needed to secure control. No single stockholder holds as much as one per cent. of the stock in the country's largest utility, American Telephone and Telegraph Co. (assets: $6,092,697,837), or the largest railroad, Pennsylvania Railroad Co. (assets: $2,653,776,724), or the largest industrial corporation, United States Steel Corporation (assets: $2,123,435,264).8 Consequently, in such cases, the management exercises control with little or no ownership interest in the corporation.9

Thus has developed a new form of property—power independent of ownership.10 It has often been said that “property is power,” the very term “property” denoting legal relations, to wit, power over a thing. It is just as true that power (in the popular sense) is likewise a form of property.

Power (control) has a primary characteristic of conventional property—it may be enjoyed or used. It usually includes power of which the law takes no cognizance, but which individuals may exert to give themselves benefits such as they would have enjoyed had they personally owned the property they control, the power to draw for themselves all or part of the income from the operation of physical assets and even to draw upon principal. Omitting entirely opportunities for action regarded as illegitimate (and theoretically remediable in a stockholder's suit)—such as having the corporation deal with officers, directors, and other insiders, to their profit and at the expense of the corporation—we find certain perquisites of control which are still

7. This is the situation in seven-eighths of all the large corporations. TNEC, Monograph No. 11 (1940) 11-12, 21-22. The one-eighth presumably operated by genuine majority vote own only about 6% of the total wealth of the largest corporations. Id. at 22.
9. Even where a sizeable stock interest is possessed by the dominant stockholder, such as E. I. du Pont de Nemours & Co.'s 27% interest in General Motors Corporation, the pyramiding results in ultimate control of the last-named corporation with comparatively little investment by those exercising control. Cf. TNEC, Monograph No. 29 (1940) 139 ff., 938.
10. The term “power” as used herein is not to be confused with the “power” currently known in property law, e. g., power of attorney, power of sale, power of appointment.
considered legitimate by present community standards, some incidents direct and recognizable; others indirect or invisible, but equally important.

The direct benefits of control include (1) the ability to appoint oneself a corporate executive, one of the most secure sources of considerable personal income, since executive compensation, by and large, continues substantial whether times be good or bad, whether the corporation is earning or losing money;\(^1\) (2) the power to handle the financial operations, i.e., underwrite new financing of the corporation, normally a riskless activity on the part of those in control.\(^2\) Also direct, but less obvious, is (3) the power to give to oneself or an organization with which one is connected the lucrative business of acting as Bank, or Registrar, or Stock Transfer Agent, or Indenture Trustee, or broker, or lawyer, or accountant.\(^3\)

Invisible benefits of operating a company, as in politics itself, are partly derived from the power of patronage—an ability to designate: the individuals who will be given jobs, large or small, in the corporation; the companies which will be given business by the corporation; and the organizations which will be appointed to such lucrative posts as are not taken by those in control for themselves.\(^4\) In business, as in politics, those receiving patronage reciprocate by keeping their patron in power and, when the occasion presents itself, showing favoritism to him. Another important, invisible benefit of being in a position to control operations is the likelihood of being financed by other organizations, banking and non-banking, since, by a "logrolling" arrangement, loans by one institution are made to individuals who are directors or officers of others on the tacit understanding that the liberality (with other people's money) will be reciprocated.\(^5\)

Power (control), being a source of revenue, possesses a second important characteristic of conventional property—it has a definite monetary value, placed upon it in the market place, which is often more realistic than are legal theorists. During the last decade, control

\(^{11}\) TNEC, Monograph No. 11 (1940) 111. A professional "finder" testified that, among other values, "control" had a "salary and management fee value," meaning "that the purchaser had the power to award himself a salary or management fee for operating the company." SEC, Report on Investment Trusts and Investment Companies (1940) Pt. 3, c. 4, p. 1086n. Where control was transferred to a corporation rather than to an individual, the corporation acquired usually gave the acquirer a management contract. \textit{Id.} at p. 1086n.

\(^{12}\) \textit{Id.} c. 7, at pp. 2511-6, 2540, 2567.

\(^{13}\) \textit{Id.} at pp. 2516-8, 2540-1, 2568, 2576.

\(^{14}\) \textit{Id.} at 2536, 2541, 2571-2.

\(^{15}\) TNEC, Monograph No. 28-A (1941) 57.
of investment companies (e. g., through management contracts, or through common stock with voting power but without any value other than for purposes of control) was bought and sold like any commodity;\textsuperscript{16} handsome fees were paid to individuals who were regularly engaged in the business of acting as brokers in the sale of such control, Atlas Corporation alone admitting payment of over $1,407,900 in such commissions;\textsuperscript{17} even the conservative \textit{New York Times} carried a paid advertisement by one “interested in acquiring the controlling interest in an established licensed investment trust.”\textsuperscript{18} A notorious demonstration of the value of control dates back to 1910, when J. P. Morgan paid $3,000,000 for 51 per cent. of the $100,000 capital stock issue of the Equitable Life Assurance Society (then a stock company with dividends limited by law to 7 per cent. of the par value of the stock); the controlling interest, however, carried the power to dictate the investment of approximately $504,000,000.\textsuperscript{19}

Power (control) also has a third quality frequently found in conventional property—it can be disposed of by its possessor who has the ability to determine who shall enjoy it subsequently, as a result of sale or gift. Control of corporations without substantial ownership is perpetuated by a variety of practices: investment trusts, holding companies, pyramiding, bond issues, voting trusts, stock with multiple voting rights, non-voting stock, and failure of most stockholders to take an active part in the management even if they have a right to vote.\textsuperscript{20} Cross-ownership and circular ownership then make it impossible to dislodge those in control.\textsuperscript{21}

Even where these two devices are not used, the interlocking relationship between the largest corporations, banks, and insurance com-

\textsuperscript{16} SEC, \textit{Report on Investment Trusts and Investment Companies} (1940) Pt. 3, c. 4, pp. 1092-1237 (control through stock); pp. 1278-1293 (control through management contracts). In certain cases, there was an outright payment to directors for transfers of control, \textit{id. at} 1316-24.

\textsuperscript{17} \textit{Id. at} 1078.

\textsuperscript{18} N. Y. Times, Feb. 28, 1936, p. 33, cols. 4-5.


\textsuperscript{20} The devices are analyzed in \textit{Berle and Means, The Modern Corporation and Private Property} (1932) Bk. I, c. 5.

\textsuperscript{21} Cross-ownership exists where Company \textit{A} owns voting stock in Company \textit{B}, and Company \textit{B} owns voting stock in Company \textit{A}. Circular ownership exists where there are more than two companies, and the ownership runs around in a circle: Company \textit{A} owns voting stock of Company \textit{B}, \textit{B} of \textit{C}, and \textit{C} of \textit{A}. Both cross and circular ownership are limited by § 20 (c) of the Investment Company Act of 1940, 54 Stat. 789 (1940), 15 U. S. C. § 80a-20 (c) (1941), and also by N. Y. \textit{Insurance Law} §§ 85, 86, confined, however, to investment companies and insurance companies, respectively.
panies assures the same result. The five largest insurance companies (having assets of over fourteen billion dollars) are interlocked with 23 large commercial banks (having assets of almost sixteen billion dollars), and with 122 smaller banks, and with 534 business corporations. These banks or insurance companies are themselves run by a self-perpetuating group. Commercial banks and such savings banks as are owned by stockholders are admittedly operated by directors elected by the controlling stockholders, not by the depositors who contribute most of the funds. Mutual savings banks, common in the Eastern states, have no stockholders, are owned by the depositors, and are managed gratuitously by Trustees; the depositors, however, have no vote, and consequently the first Trustees are self-perpetuating. Life insurance companies, likewise, may be either stock or mutual. If stock companies, they are admittedly operated by directors elected by the controlling stockholders, not by the policyholders. Mutual life insurance companies do theoretically give every policyholder one vote, but rarely do any of the millions of policyholders (other than company employees) even attend a meeting; as a practical matter it is impossible to change the management in a large mutual life insurance company, and as a result, the management is self-appointing and self-perpetuating. And these self-perpetuating managements of banks and insurance companies have the almost exclusive power to finance and thereby determine control both of the giant industrial corporations

22. Charts showing the interlocking directorates may be found in National Resources Committee, The Structure of the American Economy (1939) I, facing pp. 158 and 162. It is no secret that the railroads are dominated by the bankers. TNEC, Monograph No. 26 (1941) 146. In addition to interlocking directorates, sometimes reinforced by stock ownership, there may be less obvious affiliations, such as "gentlemen's" agreements, banking "ethics," and various intangible personal ties. A startling example of banking "ethics" will be found in TNEC, Hearings (1940) Pt. 28, pp. 15,230-4.
23. TNEC, Hearings (1940) Pt. 13, p. 7066 (Ex. 1345); Monograph No. 28 (1941) § 4; Monograph No. 37 (1941) 37-38.
24. N. Y. Banking Law § 246 (2).
25. Of the 26 billion dollars in life insurance assets, 22 billion are in mutual companies. TNEC, Monograph No. 37 (1941) 38-39.
27. TNEC, Hearings (1939) Pt. 4, pp. 1296, 1391-2; Monograph No. 28 (1941) 16-23.
28. Since 1906 when New York enacted the law prescribing procedure for an election at least once every two years, there have been only 5 contested elections in New York, only one of which was successful—in the case of a relatively small company. TNEC, Hearings (1939) Pt. 4, p. 1405.
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and of their potential competitors, the smaller enterprises. This power to finance is frequently exercised to keep the financial aristocracy a closed circle by excluding outsiders who attempt to enter this self-constituted economic class: for example, the motion picture producers and many of the investment trust founders were displaced by nominees of bankers (from the original aristocracy), who now control the ventures and enterprises inaugurated by the "upstarts."

Corporate management's power to continue in office has resulted in a clearly defined trend towards selection of the leaders of industry on an hereditary basis. In a number of cases, control without ownership is actually handed down from father to son, and may be expected.

30. As of 1937, there was $26,427,000,000 in the savings departments of commercial and savings banks, and $26,266,000,000 had been accumulated for the protection of life insurance policyholders. TNEC, Monograph No. 37 (1941) 120. Banks, insurance companies and charitable foundations together took almost 88% of seven large bond issues in 1936-8. TNEC, Hearings (1940) Pt. 24, pp. 13,005, 13,021-35. Mention should also be made of another source of control, more direct than the banks or insurance companies, whose funds usually cannot go into equity investments. Trust departments of national banks administer individual trusts with assets which on June 30, 1940, aggregated $9,345,419,682. Of this, 78.73% were under private or living trust agreements, and the balance under court trusts. The statistics also disclose that 30.83% of the total was invested in shares of stock. U. S. Comptroller of the Currency, 78th Annual Report (1941) 23, 142-144. Since national banks have not gone into the trust business "in a big way," it has been estimated that in the case of state banks the figure is much higher. TNEC, Hearings (1940) Pt. 9, pp. 3729-3731.

31. The Morgan and Rockefeller interests are now in firm command of the eight major producing companies. NUGENT, Motion Pictures (1941-2) 11 AMERICAN SCHOLAR 37; see also TNEC, Monograph No. 43 (1941) 7.

32. There are now inter-relationships between the Morgan interests and Atlas Corporation, between the Rockefeller interests and Equity Corporation. These two corporations took over many of the original investment trusts, some solvent and larger than the absorbing corporation. SEC, Report on Investment Trusts and Investment Companies (1940) Pt. 3, c. 4.

33. The self-perpetuating character of corporate management recalls the early practice (circa 1399) to keep a feoffment to uses effective as long as should prove necessary. The early grant was to a "wall" of trustees, the number being large enough so that on the death of some of them, there would always be survivors who could name successors and thus perpetuate the group and keep the "trust" alive. See 3 MAINLAND, COLLECTED PAPERS (1911) 336.

34. "To the extent that business leaders of the present generation are drawn from the 'big business' class, inbreeding may be said to characterize the group responsible for the control and direction of American business." TAUSSIG AND JOSLYN, AMERICAN BUSINESS LEADERS (1933) 97; cf. 238. The survey by the Harvard University Department of Economics revealed that of 8,398 business leaders responding to a questionnaire especially designed to disclose occupational origins, 56.7% are sons of "business men" (30.6% being sons of major executives or owners of large business, and 26.1% being sons of minority executives or owners of small business), 13.4% are sons of professional men, 12.4% sons of farmers, and only 10.8% sons of laborers—skilled or unskilled. Id. at 82-84. Weighting the responses with the number in each class at about the time the business leaders were born (Census of 1880), it appears that for every 10,000 married males in that stated class in 1880, business men—owners or executives—contributed 70 business leaders of 1928; professional men—40.8; clerks or salesmen—20.7; farmers—44, and laborers—skilled or unskilled—contributed only 7.1 business leaders of 1928. Id. at 91. The statistics also revealed that more and more of the present business leaders are being recruited from the "big business" class, since a distribution of occupational origins according to present age showed that wholly disproportionate numbers of the younger business leaders are sons of "major executives" and "owners of large business." Id. at 98.
to be for many generations to come. While opinion may vary as to whether America is "ruled" by thirteen families, or sixty families, or a few hundred men, or a few thousand men (grouped in eight corporate interest groups), there can be no denying that a comparatively small financial aristocracy, popularly known as "Big Business," completely controls economic wealth far exceeding its own funds, and is enabled by the nature of the corporate structure to perpetuate its control and the power thereby afforded. While it may be urged that even if control were actually exercised by holders of a majority of outstanding stock, the absolute number of individuals exercising control would not be much higher, since statistics show that a total of only 75,000 persons (6/100 of 1 per cent. of the population) owns one-half of all corporate stock of all U. S. corporations owned by individuals, it must be remembered that the other half of corporate stock is owned by eight or nine million individuals who collectively have an equal right to exercise control. Their failure to do so has resulted in a striking parallel to the "bossism" resulting from opportunities for exploitation afforded by the wide diffusion of theoretic control in politics. Yet at the present time, the "captains of industry" in actual control in corporations are less responsive to the owners than are the "political bosses" whose control in politics has for so many years been the target of reformers.

In addition to the characteristics of control without ownership just considered (duplicating characteristics in conventional property where control and ownership are joined) are a number of special characteristics not found in any other forms of property and therefore presenting additional reasons for at least as much regulation as is applied to recognized forms of property.

The most dangerous feature of the corporate form is that it enables one man or small group of men to control (and pass on the

35. Of respondents who stated that their fathers were major executives or large owners, 45.3% of present business leaders were connected with the same business concern as that in which the father was owner or executive, most being in business with a gross income of between $1,000,000 and $5,000,000 per annum. Id. at 108, 110.

36. TNEC, Monograph No. 29 (1940) xvi, 115 et seq.
37. LUNDBERG, AMERICA'S 60 FAMILIES (1937).
38. BERLE AND MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932)
46, n. 34.
39. NATIONAL RESOURCES COMMITTEE, STRUCTURE OF THE AMERICAN ECONOMY (1939) I, 160. Fortune Magazine estimates that 30,000 persons constitute the "managers" of our business economy. The 30,000 Managers (Feb. 1949) 21 FORTUNE 58; these managers, however, are ultimately controlled by a much smaller group. Id. at 108.
40. The technical name for the group is "the corporate community." NATIONAL RESOURCES COMMITTEE, STRUCTURE OF THE AMERICAN ECONOMY (1939) I, 158.
41. TNEC, Monograph No. 29 (1940) xvii, 13. Individuals received two-thirds of all dividends paid. TNEC, Final Report of the Executive Secretary (1941) 165. Hence, they probably own two-thirds of the outstanding stock.
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control of) far more wealth than would be possible if he or they controlled only wealth directly owned. The percentage of corporate voting stock necessary to control effectively all the wealth of the corporation may be as little as 10 per cent. The Henry Ford family, which is believed to be the richest in this country, controls only its own wealth—$624,975,000. The Rockefeller family, on the other hand, with personal wealth valued at only $396,583,000, controls corporations with aggregate assets totalling nearly $4,500,000,000. Three family groups—the duPonds, the Mellons, and the Rockefellers, with shareholdings valued at less than $1,400,000,000, control fifteen corporations with aggregate assets of over $8,000,000,000.

The corporate form not only increases the amount of wealth which may be controlled far beyond the amount of wealth directly owned by the "controller," but also practically assures that the capital once contributed to a corporate venture will continue to be part of a much larger sum and handled by whoever handles the larger sum. Great personal wealth is subject to drastic cuts by heavy inheritance taxes. Contrariwise, the size of a corporation is never affected by the death of its stockholders. Another factor limiting the size of personal wealth is the likelihood of dispersion on the death of its owner. If the possessor has several children, each usually gets some part. Whether wealth be in corporate form or not, each heir thereafter has a lesser sum than that possessed by the deceased. But, if the wealth is in a corporation, the size of the corporation is unaffected by the fact that blocks of stock therein are divided among several new owners. All the assets of the corporation continue to be wielded as an entirety, and if the heirs co-operate, they can retain control of the corporation and

42. TNEC, Monograph No. 20 (1940) c. 6. Statutes now declare that there is a presumption of control when one owns 10% or more of the stock of a public utility corporation, or 25% or more of the stock of an investment company. Public Utility Act of 1935, § 2 (a) (7) and (8), 49 Stat. 866, 15 U. S. C. § 79b (a) (7) and (8) (1941); Investment Company Act of 1940, § 2 (a) (9), 54 Stat. 791, 15 U. S. C. §§ 80a-2 (a) (9) (1941).
43. TNEC, Monograph No. 29 (1940) 116. The death and will of Edsel Ford, subsequent to preparation of this article, have altered the Ford family status. The statement in the text should be considered modified in the light of note 49a infra.
44. Id. at 116, 126. This does not include probable control by the family over the Chase National Bank, the country's largest bank with assets of more than two and a half billion dollars; John D. Rockefeller, Jr., is its largest stockholder, his brother-in-law is Chairman of the Board. Id. at 129; also see National Resources Committee, Structure of the American Economy (1939) I, 311.
45. TNEC, Monograph No. 20 (1940), xvi, c. 7.
46. This is repeatedly demonstrated in England where high "death taxes" have compelled the sale of many landed estates. E. g., N. Y. Times, February 10, 1929, Sec. 1, p. 2, col. 6.
47. J. P. Morgan & Co., Incorporated, when it adopted the corporate form, stated that it was doing so "in order to perpetuate the business." N. Y. Times, February 16, 1940, p. 1, col. 3, p. 20, col. 2. Converting the partnership into a corporation prevented a partner voluntarily or by death terminating the partnership and thereby reducing the capital of that noted firm.
all its assets. Ingenious men have developed practices that will assure control remaining in the channel they select regardless of division of beneficial ownership among their heirs and whether they co-operate or not: A controlling block of common stock in a large corporation is frequently transferred to a family holding company, which "has the advantage of permanence over the trust," and power therein can be centralized in a very small number of individuals since the dominant stock interest in the holding company controls the vote of the entire block of stock owned by the holding company, while beneficial interests are allocated through bequest of preferred non-voting stock.\textsuperscript{48} Another recent practice is to put into a family charitable foundation a block of common stock large enough to swing control—the founder hoping his foundation will vote the stock to keep control in the family.\textsuperscript{49} Moreover, a bequest to a charitable foundation is tax-exempt and therefore avoids the possibility of loss of control which might result were a controlling block of stock bequeathed to individual beneficiaries who would have to sell part of the stock to pay the inheritance taxes.\textsuperscript{49a} Already, personal and family holding companies, and trusts and estates, own approximately 40 per cent. of the total of the twenty largest record shareholdings in the two hundred largest corporations.\textsuperscript{50}

Finally, it must be remembered that an individual who loses his money thereafter has none. This wholesome result, however, does not follow in the case of a man or clique running a corporation. When losses force a corporation to default on its obligations, the result is reorganization, at the expense of creditors and stockholders, but usually not at the expense of the management, who normally continue in truly perpetual control.\textsuperscript{51}

The combination of ability to control more wealth than is directly owned, removal of this greater sum thereafter from the possibility of direct ownership by individuals, and the realistic unlikelihood of changing those in control, however bad or inefficient their management, tends toward a condition which must affect the fundamentals of our entire economic order. While one may not admit that "bigness is badness," one cannot with equanimity envision "bigness" so big as to embrace all

\textsuperscript{48} TNEC, Monograph No. 29 (1940) 74, 101-102. Quotation (italics supplied) at 101.

\textsuperscript{49} Id. at 131, c. 7.

\textsuperscript{49a} This situation was recently demonstrated in the case of Edsel Ford. If his 41\% stock interest in the Ford Motor Company had been left to individuals, the heavy inheritance taxes would have necessitated sale to the public or some syndicate of much of this block of stock. He made a tax-exempt bequest of most of the stock to the Ford Foundation, devoted to "scientific, educational and charitable purposes." \textit{N. Y. Times}, June 4, 1943, p. 23, cols. 5, 6.

\textsuperscript{50} TNEC, Monograph No. 29 (1940) 74-77.

\textsuperscript{51} Repeated railroad reorganizations have amply demonstrated this practice.
economic wealth, and perhaps compel abandonment of our democratic state.

The power of control is therefore even more the concern of the community than was great personal wealth in earlier eras. Existence of the problem cannot be disputed. Its solution depends upon our objectives, immediate and ultimate, an analysis of which is facilitated by studying existing restrictions upon conventional property, their historical development, and degree of success.

OBJECTIVES

The ultimate objective—the unifying principle—underlying all present restrictive rules (sometimes called social restrictions) is apparently a desire to keep as much property as possible "unfettered," so that it be in a condition to pass into the hands of large numbers of people. Starting with the 1217 Magna Carta,52 contemporaneous with the beginnings of common law itself, we have had one or more rules of varying effectiveness but all designed to accomplish this same end, although for different political reasons at different times. The Law of Mortmain, a result of the conflict between Church and State, was first enacted to prevent lands getting into the hands of religious houses, where they might be expected to remain perpetually, since the Church never died, never alienated, and if acquisitions were unrestricted would ultimately possess all land. The Rule against Perpetuities, in turn, was first inspired by the conflict between the State and the landed aristocracy who wanted to keep intact their landed estates (then the basis for political and social power). The Law of Mortmain had been statutory because the interests of king and landed legislators coincided; the Rule against Perpetuities was set up by the judges (servants of the king) when the interest of the king and the landed legislators came into conflict. Both the mortmain and the perpetuities rules were based primarily upon the sovereign's political interest in keeping land in many hands and therefore out of the clutches of one or a clique which might become too powerful a rival. As the interests of sovereign (state) and legislators again coincided (as in our democratic state) we again find legislation enacted better to aid in keeping property unfettered.

More readily apparent than the ultimate objectives just indicated are the immediate objectives of the various restrictive rules governing direct ownership of great wealth. The Law of Mortmain was designed to prevent too much land getting into the power of a single, undying

52. Second re-issue of Magna Carta, 1217, 2 Hen. III, c. 43, later repeated in the better-known issue (1224-1225) 9 Hen. III, c. 36.
owner; there being no limit on time, quantity was limited. The Rule against Perpetuities, in turn, endeavored to prevent wealth being kept in certain directed channels for too long a time (placed restrictions on efforts to prevent disposition by subsequent owners of either specific property or a fund of money); here quantity was not limited, but time was. Because accumulations threatened to increase quantity to too dangerous proportions, special statutory rules endeavored to keep accumulations within even stricter time limits. Reduced to catch titles, the three immediate objectives are therefore (1) size limitation, (2) time limitation, and (3) accumulations limitation. That such objectives are considered desirable is evidenced by accepted law in every one of the forty-eight states. These objectives are also the purpose of corporate control. It seems appropriate, therefore, to seek guidance from past experience with accepted methods for achieving these objectives.

I. Size Limitation

The Statut' de Viris Religiosis in 1279 forbade sales or gifts of land to religious houses without the king's license and expressly stated its objects to be the prevention of lands passing "ad manum mortuam" (giving rise to the current term "mortmain"). This early law was confined to land and to religious houses because land was the principal form of wealth in an agricultural community and religious houses were owners who never died. Unless such acquisitions were restricted, it was feared that all land would ultimately pass into the possession of the clergy. Despite this law, land in the possession of the Church at the time England dissolved the monasteries, amounted, according to some estimates, to one-third of all the land in England.

The Law of Mortmain was extended to cover other types of undying owners. An early subject was the corporation which, like the Church, possessed the quality of deathlessness and therefore had been utilized to evade the first mortmain law. Subsequent legislation therefore proceeded to subject corporate bodies, which were "as perpetual

53. 7 Edw. I.
54. The name "Mortmain Acts" is generally applied to the first seven statutes listed in the Schedule appended to the English Mortmain and Charitable Uses Act, 1888, 51 & 52 Vict., c. 42.
55. "If posterity had continued at this rate, to build and endow Religious Houses, all England would, in short time, have turned one entire and continued Monastery; and the inhabitants thereof become either Friers, or Founders. Where then should be any Souldiers to fight the Kings battles? Seamen to steer his ships? Husbandmen to plough the Kings land? or rather any land of his to be ploughed by husbandmen?" Fulcher, Church History of Britain (1655) Bk. 3, 77. The marginal summary for this passage read: "The Church ready to eat up the Common-wealth."
as people of religion," to the same disability of mortmain as religious houses; the statute listed "guilds and fraternities . . . cities, boroughs and other towns, which have a perpetual commonalty, and others which have offices perpetual." 57 The current English Mortmain Act prohibits any corporation from holding land without license from the crown or Act of Parliament. 58 Such license in turn is granted by the 1929 Companies Act, which authorizes unlimited holding of land by all corporations except those "formed for the purpose of promoting art, science, religion, charity or any other like object not involving the acquisition of gain by the company." 60 The corporations described in the exception clause must receive special license from the Board of Trade, which in each case specifies the amount of land which may be held. English law, now as 700 years ago, is concerned primarily with landholding by non-business corporations, probably because they do not take the risks of trade and consequently are unlikely to lose land once acquired. The English law of mortmain (as developed prior to the American Revolution) did not carry over to this country, except in Pennsylvania. 61 Sporadically, laws called "mortmain" 62 have been enacted in some states which limit (but do not prohibit) testamentary gifts for religious or charitable purposes. 63 Although these laws apply equally to all forms of property (real and personal), nonetheless religious, philanthropic, or educational foundations in this country now possess assets totalling nine billion dollars. 64 Closer to the original mortmain policy but no more successful than in England have been efforts in a few states to limit landholding by corporations (all, not merely religious or philanthropic). Ineffective is mere declaration in the state constitution that a corporation shall hold only so much real estate as may be necessary or proper for carrying on its legitimate business, 65 and one state has repealed the futile con-

57. (1591) 15 Rich. II, c. 5.
60. Ibid. and Schedule 2.
63. E. g., restrictions which limit the proportion of one's property which may be left to charity by will when certain near relatives survive, N. Y. Decedent Estate Law § 17.
64. §9,293,500,000, as of 1932. Wood, Struthers & Co., Trusteeship of American Endowments (1932) 6.
To permit enforcement, it must be supplemented by detailed statutory provisions for escheat of real estate held contrary to the prohibition. Two states which by statute formerly restricted the holding of land by real estate corporations, have recently abandoned that type of restriction. One state, however, still prohibits, and two others still limit the corporation's holding of agricultural lands. These strictures upon corporations may account for the popularity in these states of the so-called Massachusetts Trust—whereby title to land is vested in trustees who manage it for the benefit of beneficiaries with interests represented by transferable certificates. Also possible are other methods of evasion, such as the creation by a single holding company of a number of separate corporations, each to hold the maximum amount of land permitted. Repeal or evasion of these half-hearted attempts at restricting a now unimportant basis of power is inevitable while law ignores more serious conditions.

More important than the now almost academic question of a corporation's power to hold land, is the serious potential danger from the corporation—still the same as that sought to be controlled by the Law of Mortmain—an undying owner with wealth so great as to endanger the nation economically and politically. This danger is of comparatively recent origin insofar as business corporations are concerned. When a Special Act of Parliament or of the legislature was required for the creation of a corporation, the capitalization (including maximum size) of the corporation was invariably set forth. General corporation laws, making it possible for all to incorporate under the same conditions, included among general restraints a limitation on size.

66. Cal. Const. (1879) Art. XII, §9, was repealed in 1930.
68. Ohio Code Ann. (Throckmorton, 1949) §§6623-134, permits a real estate corporation to have perpetual succession; this law in 1927 replaced Ohio Gen. Code (Page, 1926) §§8648-8650, which had limited duration of a real estate corporation to 25 years and one renewal. Pa. Stat. Ann. (Purdon, 1938) tit. 15, §4183, gives the text of a law which until its repeal in 1933 limited real estate corporations to a capitalization not exceeding $600,000 and prohibited holding more than 500 acres of land in cities or boroughs and more than 10,000 acres outside.
72. N. Y. Laws 1811, c. 57, p. 111, believed to be the earliest general incorporation law, permitted incorporation for certain designated manufacturing purposes to be effected by simply filing a certificate in the office of the Secretary of State (§1). The maximum life of the corporation was to be twenty years (§2); the capital stock was not to exceed $100,000 (§5); purchase by the corporation of stock in another was prohibited (§7).
Now, however, only one state places any limitation upon the size of corporate capitalization. The absence of any limitation in all other states has resulted in the creation of Gargantuan corporations, unlimited in scope, resembling and quite properly referred to as empires. The multi-billion dollar capitalization of these corporations varies so much from the amounts which fifty years ago were considered the maximum which "big business" might accumulate without danger to the community, that one may well pause to take stock.

We have already noted that the two hundred largest corporations, largely inter-controlled, now own more than half the total industrial wealth of the country, and it has been predicted that these giant corporations must be broken up if we are to avoid the eclipse of capitalism. The usual panacea, taxation, is of no avail. Unless discriminatory, heavy corporate taxation hurts the smaller corporations first and may compel them to abandon the corporate form—a result not desired. On the other hand, even discriminatory taxation of already existent large corporations, if held constitutional, would have no effect upon those whom we are seeking to control, viz., those who have control without ownership.

With respect to corporations hereafter to be formed, by merger or otherwise, an easier solution is at hand. The size of corporations has not been limited by the anti-trust laws because they bear only on the question of monopoly and empower the government to act only after monopoly has been effected through acquisition of shares of stock in a competitor; the anti-trust laws leave the government helpless if monopoly has been effected through the acquisition of assets of a competitor. The result of our existing anti-trust law has been more

73. TEX. ANN. REV. Civ. STAT. (Vernon, 1925) Art. 1302.
74. This practice was fostered by New Jersey, whose first general corporation law placed no limit upon capitalization. N. J. Laws 1849, p. 300 et seq. By 1899, of the 121 industrial corporations in the United States with a capitalization exceeding ten million dollars, more than half had been incorporated in New Jersey. KEASEY, New Jersey and the Great Corporations (1900) 13 HARV. L. REV. 198, 201.
75. The maximum capitalization permitted in states where maximums were specified (ranging up to $10,000,000) were listed in Stimson, Digest of Corporation Laws, printed as Appendix to U. S. INDUSTRIAL COMMISSION, TRUSTS AND INDUSTRIAL COMBINATIONS (1900) 272-273.
76. DOUGLAS, DEMOCRACY AND FINANCE (1940) 15.
77. Double taxation (taxing the income of the corporation and the income of the stockholder) has already caused many smaller enterprises to change from the corporate form to a partnership. Time, Dec. 15, 1941, p. 96, col. 3.
to allay public fear than either to prevent monopoly or to limit the
size of corporations. A more direct approach is therefore needed.

Accordingly, it is submitted, legislation should require approval by
a federal administrative agency for the formation of any future cor-
poration, through merger or otherwise, whose assets will exceed a cer-
tain amount (if it also has more than a fixed number of stockholders,
say one hundred). The tentative maximum is a subject for debate;
two careful writers, over a generation apart, both recommended
$5,000,000. The possibility of exceeding the tentative maximum
will obviate the objection to a rigid maximum capitalization (of
$25,000,000), recommended in 1909 by the National Conference of
Commissioners on Uniform State Laws formulating a Uniform Busi-
ness Corporation Act. Before permitting the tentative maximum to
be exceeded, however, the administrative agency should consider the
unlikelihood of democratic control if the larger capitalization is
approved, as well as the recognized dangers of monopoly and ineffi-
ciency. Since increased size of corporations was the first stage in the
pattern culminating in lessened control by stockholders, direct limi-
tation of size seems one hopeful means of changing the pattern.

II. Time Limitation

The statutory "Law of Mortmain" to keep too much land from
going into the hands of an undying owner and remaining there was
followed by measures to keep property (land or money) from remain-
ing too long subject to the control of a dead owner. While the specific
conditions inspiring what is known as the Rule against Perpetuities are
not in all instances paralleled by conditions in corporations, both situa-
tions involve the same basic problem—that control may be continued
beyond one lifetime.

80. TNEC, Final Report of the Executive Secretary (1941) c. i; Monograph No. 21 (1941).
81. This is the same figure as was suggested by BRANDEIS, OTHER PEOPLE'S 
MONEY (1914) 86, and by Professor Handler in TNEC, Monograph No. 38 (1941) 88.
on U. S. L. (1909) 170-172. The report stated: "It is fully realized that a general
limitation upon the maximum capital of corporations will introduce a new era in the
history of corporation law," and the report noted that at the time only three states im-
posed a maximum. The Second Tentative Draft (1911) 14-15, repeated this state-
ment, and recommended setting a maximum, but in this draft the specific maximum
to be prescribed was left blank. No provision setting any maximum appears in the
et seq.
83. Medium-size business was found most efficient in a study employing two tests:
(1) cost of producing a unit of product, and (2) rate of return on invested capital.
TNEC, Monograph No. 13, Relative Efficiency of Large, Medium-sized and Small
Business (1941) 14. See also TNEC, Final Report (1941) 292, 318; Final Report of
the Executive Secretary (1941) 26-27, 81, 140-141.
Restraints on alienation may be direct or indirect. Direct restraints on alienation, however short, are generally voided by conventional property rules. Yet direct efforts to perpetuate the control of a corporation are sanctioned. The courts have uniformly held valid charter restraints on alienation requiring that before stock is offered for sale, an opportunity to purchase it upon certain terms be first given to the issuing company, or to its directors, or to other stockholders.\textsuperscript{84} Most courts have also held valid similar direct restraints in a separate agreement or in a by-law.\textsuperscript{85} These have been justified with the explanation: "There seems to be no greater objection to retaining the right of choosing one's associates in a corporation than in a firm."\textsuperscript{86} While this reasoning may have been sound forty years ago, it certainly is not a realistic one at the present time, when its effect is to prevent free choice by the stockholders and to perpetuate power.

A restraint on alienation may result not only from a direct restraint on alienation, but also indirectly as a consequence of the creation of interests which do not purport to, but whose existence, nevertheless, does reduce alienability. The courts first held these indirect restraints void, then valid, and finally compromised—holding the indirect restraint valid provided it does not result in inalienability for too long a period.\textsuperscript{87}

Society recognizes the natural desire of man to protect those dependent upon him. He may feel keenly the inexperience or improvidence of his children or more remote descendants, and he may fear that property given them outright will soon be lost or dissipated, leaving them without resources in their old age. The individual's inclination is to tie up the property so that it cannot be lost by the objects of his bounty. Since he may not appreciate the consequences to the community were everyone to follow without limitation the same practice, restrictions are required to establish the point of balance between the natural desire of the individual in his own case and the interest of the community. These restrictions have become known as the Rule against Perpetuities.

\textsuperscript{84} Borland's Trustee v. Steel Bros. & Co., Ltd. [1901] 1 Ch. 279.
\textsuperscript{85} Searles v. Bar Harbor Banking and Trust Co., 128 Me. 34, 145 Atl. 391 (1929), listing authorities both ways; see also Barrett v. King, 181 Mass. 476, 63 N. E. 934 (1902).
\textsuperscript{86} Barrett v. King, 181 Mass. 476, 479, 63 N. E. 934, 935 (1902).
\textsuperscript{87} The simultaneous existence in different persons of separate rights of present and future enjoyment over the same subject matter is not peculiar to Anglo-American Law. Under the pre-Nazi legal systems of both France and Germany, successive interests appeared to be possible of creation if the future limitation must occur within 30 years or refers to a person living at the time of the settlor's death. \textit{Perpetuities in French Law} (1912) 13 J. SOC. COMP. LEG. (N. S.) 47; \textit{German Civil Code} (1900) § 2109.
The Rule is a compromise and therefore, despite the implications of its name, is not a rule only against dispositions by which property is made inalienable forever. "Perpetuity" is a word of art which has now been used for over three centuries to red-flag an interest which transgresses the bounds which the law has set; and the term appears even in a number of state constitutions which declare that perpetuities and monopolies are contrary to the genius of a republic and shall not be allowed, except for eleemosynary purposes.

The Rule against Perpetuities was never promulgated as an entirety. An interest was declared objectionable; others were likewise held objectionable; still others were not; and in an attempt to rationalize these various rulings, by the inductive method, the "Rule" was evolved. The period of time, substantially identical in all rules which "tie up" or "pocket" property, is considerably shorter than "perpetuity." More significant than the classes of interests to which the Rule applies or the precise period of time within which these interests may lawfully be permitted to continue is the broadening application of the Rule to include all types of property, the only exceptions heretofore having been due to statutory loop-holes or inadequacies.

Although

88. The name of the Rule may be attributed to the use of catch-titles by early reporters: Le case inter Dillon & Freine, communement appel' le case de perpetuities, ou Chudleighs Case, 1 Co. 113b, 120a (K. B. and Ex. 1589-1595); The Duke of Norfolk's Case, or the Doctrine of Perpetuities, 3 Ch. Cas. 1 (1681-1685).

89. In this and the following footnote the first citation is to the constitution now in force, the second is to that in which the provision first appeared: ARK. CONST. (1874) ART. II, § 10; (1836) ART. II, § 19. N. C. CONST. (1876) ART. I, § 31; (1776) DECLARATION OF RIGHTS § 23. OKLA. CONST. (1907) ART. II, § 32; ibid. TENN. CONST. (1870) ART. I, § 22; (1796) ART. XI, § 23. TEX. CONST. (1876) ART. I, § 25; (1845) ART. I, § 18. Wyo. CONST. (1890) ART. I, § 30; ibid. Provisions against perpetuities also appear in ARIZ. CONST. (1912) ART. II, § 29; ibid. VT. CONST. (1913) § 59; (1777) c. 2, § 34.

90. This exception is specified in the following: CAL. CONST. (1879) ART. XX, § 9; (1849) ART. XI, § 16. MONT. CONST. (1889) ART. XIX, § 5; ibid. Nev. Const. (1864) ART. XV, § 4; ibid. The law is the same whether the exception be specified or not. Mortmain policy is designed to limit the size of charitable gifts, but to the extent that they are sanctioned, "being for objects of permanent interest and benefit to the public, they may be perpetual in their duration, and are not within the rule against perpetuities." See Russell v. Allen, 107 U. S. 163, 167 (1882).

91. The period of the common-law Rule now appears to be any number of lives in being, plus twenty-one years, plus as many periods of gestation as actually occur. The period specified in states with statutes on the subject ranges from ten years plus the minority of a beneficiary (LA. GEN. STAT. ANN. [Dart, 1939] § 9850.4), to two lives in being at the creation of the interest plus the minority of a beneficiary (N. Y. REAL PROP. LAW § 42, Pers. PROP. LAW § 11), to any number of lives in being plus thirty years (WIS. STAT. [1939] § 230.15). Actuarial figures indicated that the difference between a period measured by "lives in being" and one restricted to "two lives" is negligible—the last survivor of 50 measuring lives all aged 20 will die approximately 18 years after the survivor of two lives of the same basic age.

92. At common law and in most states, the same period is applicable whether the property involved be real or personal. However, there are five states where a statute has been enacted applicable to reality, but the common law is still in force as regards personality. Where this situation prevails, the doctrine of equitable conversion may cause real property to be treated as if it were personal, or vice versa.
land alone was important 350 years ago when the Rule first began to take form,93 economic development has caused a broadening of the Rule to include all newer forms of wealth, despite the fact that the immediate consequences of tying up property vary with the different types. Realization of these diverse effects should make us less reluctant to cover the newest form of wealth—power of control in corporations.

A

One type of wealth which may be “tied up” is land (real property or chattel real), and the first objection to the original “perpetuity” (imposition of a future contingency on land) has always been under-utilization. When the owner is in danger of losing his land on a contingency beyond his control, the property is not as fully utilized by the owner of the present estate as it would be if his title were indefeasible. A second objection in a democratic state is political and was advanced by Bacon some 350 years ago: If all lands were tied up, “lands should rest in certain families, and others could be but their farmers,” 94 a condition not conducive to good citizenship.

The readily observable consequences of tying up land make it easy to understand why restraints were so quickly imposed upon fettering this form of wealth. The consequences were less obvious, but no less serious, in the newer types of wealth which thereafter became significant.

B

A second type of wealth subjected to the Rule was personal property. Chattels real (leases of real property) are functionally the same as land and are generally so treated.95 Chattels personal, i.e., heirlooms, furniture, tools, machinery, factories, are not a problem since, being subject to loss and deterioration, future interests therein are rarely attempted.96 There is, however, another kind of personal property—money or securities—now the principal form of wealth.97

93. The earliest legislation proposed was “to take awaie future uses creatinge perpetuities of lands in speciale cases.” The complete bill is reprinted in 7 Holdsworth, History of English Law (1929) 545-7.
94. Bacon, Argument in Chudleigh’s Case (translated from the Law French and reprinted in Bacon’s works) (Spedding ed. 1861) XV, 172.
95. In states where different rules apply to real and personal property, or where different rules were once prescribed, the statutes usually declare applicable to chattels real the provisions relative to future estates in real property. Ariz. Code Ann. (1939) § 71-112; Mich. Comp. Laws (1929) § 12,943; Minn. Stat. (Mason, 1927) § 8053; Wis. Stat. (1939) § 230.23.
97. See Sabbarton v. Sabbarton, Cas. temp. Talbot, 245 (Ch. 1736), involving shares of stock, and Jee v. Audley, 1 Cox Cases in Eq. 324, 325 (1787), extending the Rule to what we now consider personal property—a cash bequest.
In considering the consequences of tying up money or securities, we must remember that they are not actual wealth in an economic sense, but only nominal (or paper) wealth; in fact, merely evidence of legal rights. From the point of view of the community whether A or B possesses the money or securities is generally not so material that its continuance for a lifetime will have sufficient influence on the community to require interference. The situation is not the same as when A owns land which he himself cannot improve and cannot sell. There is not the same social waste when capital is invested in securities which A is unable to sell when an advantageous offer is received; the capital is being used in some enterprise although A may prefer investing it elsewhere.98

Yet there are objections to tying up a fund of money or securities, if there is no power to change the constituent assets therein. These objections follow a fortiori from those analyzed in the next subsection, where a trust property is “pocketed” with power to change the constituent assets therein contained.

C

In many jurisdictions, the technical forms of wealth considered under the preceding two subsections have been converted, in part, into a third form of wealth, concealed behind the curtain of a legal estate. Statutes frequently authorize the sale of real or personal property free of any interests therein, although the proceeds thereafter stand in place of the property sold and the interests of other beneficiaries therein are duly safeguarded.99 The situation is then the same as where such power is granted directly by the settlor or testator creating a trust.100 This type of wealth, therefore, may be illustrated by the familiar indestructible trust wherein there is no restraint on the alienability of specific property—where the trustee has an unlimited power to pass a title free of the trust, although the proceeds remain subject thereto. The trustee may constantly buy and sell, changing daily if he sees fit, the nature and character of the property committed to his care. Meanwhile the funds of the estate are being employed in productive enterprise.

98. An exception exists where securities really represent ownership of land, title being in a wholly-owned corporation for some special reason, such as limitation of liability. Such ownership functionally is identical with ownership of land.


100. The court may authorize a sale of trust assets, even in the absence of statute and despite express prohibition against sale in the will. Matter of Pulitzer’s Estate, 139 Misc. 575, 249 N. Y. S. 87 (Surr. Ct. 1931), compiling the authorities on this proposition.
Yet it cannot be denied that for the period of the trust, a quantum of wealth is withdrawn from subject to normal risks and losses, since the original assets or those received in exchange therefor cannot be freed from their special character as an “estate” and restored to the status of property owned outright by individuals who can spend or lose principal as well as income. This legal immunity and the correlative loss of opportunity to others to share in the country’s wealth, if permitted to continue indefinitely, would discourage individual effort, since the utmost industry would be of no avail if all the country’s wealth is beyond reach. Destroyed would be the democratic principle that the deserving will share in all the available wealth of the country and will some day own something of their own.\textsuperscript{101}

A trust is therefore objectionable, even if all equitable interests therein are vested, unless the trustee has an unrestricted discretionary power to terminate the trust,\textsuperscript{102} or unless the beneficiary who has an absolute and indefeasible equitable interest may compel termination of the trust and acquire the principal.\textsuperscript{103} In England the only restraint tolerated\textsuperscript{104} was that imposed on property conveyed to a woman “for her separate use” and was valid if for a period shorter than 21 years after lives in being, but void if it might last beyond that time.\textsuperscript{105} Many American jurisdictions go much farther, and sanction the creation of indestructible trusts, frequently for all classes of beneficiaries including those who are competent and have reached their majority.\textsuperscript{106} As a result, in states with a statutory Rule in which the courts refuse to compel termination of a trust even where all persons beneficially interested are of full age and join in demanding its termination, such trusts

\begin{footnotesize}
\begin{enumerate}
\item[101.] TNEC, Final Report (1941) 9, 15; DOUGLAS, DEMOCRACY AND FINANCE (1940) 15; see also note 94 supra.
\item[103.] Pulitzer v. Livingston, 89 Me. 359, 36 Atl. 635 (1906).
\item[104.] Any \textit{cestui} other than a married woman, could, on attaining majority, compel termination of the trust. Saunders v. Vautier, 1 Craig and Ph. 240 (1841).
\item[105.] \textit{In re} Ridley, 11 Ch. D. 645 (1879); cf. Herbert v. Webster, 15 Ch. D. 610 (1880) (notwithstanding Rule, \textit{cestui} takes subject to restraint). Now, the Law Reform Act, 1935, 25 & 26 Geo. V, c. 30, § 2 (2), voids any future attempt to restrict anticipation or alienation by a woman, if a corresponding restraint could not be attached to the property of a man.
\item[106.] Spendthrift trusts, which by their nature must be indestructible upon attack by the beneficiary, are recognized by judicial decision in many jurisdictions. Nichols v. Eaton, 91 U. S. 716 (1875). In a number of states spendthrift trusts are expressly authorized by statute, CAL. CIV. CODE (Deering, 1937) § 867; N. Y. REAL PROP. LAW § 103; N. Y. PERS. PROP. LAW § 15. On suit by competent adult beneficiaries holding vested and indefeasible interests, trusts have also been held indestructible simply because the settlor or testator so directed, and despite power in the beneficiary to alienate his equitable interest. Shelton v. King, 229 U. S. 90 (1913); Claffin v. Claffin, 149 Mass. 19, 20 N. E. 454 (1889). In the latter case—indestructible trusts that are not spendthrift—the beneficiary can alienate his interest, but the assignee cannot compel termination of the trust. Stier v. Nashville Trust Co., 158 Fed. 601 (C. C. A. 6th, 1908); Young v. Snow, 167 Mass. 287, 45 N. E. 686 (1897).
\end{enumerate}
\end{footnotesize}
are held invalid if they exceed a period identical with that of the "Rule against Perpetuities." An indestructible trust limited to continue beyond the period prescribed is invalid regardless of power in the trustee to sell or exchange the trust property for other assets to be held upon the same trust, whether the power be given in the trust instrument, or, in its absence, by remedial statutes.

D

"Property" in the sense of the power to produce a change in given legal relations—the type of property considered in the preceding three subsections—has long been subjected to the Rule against Perpetuities. Efforts in individual cases to circumvent the Rule, while to some extent successful in England, have been unsuccessful in this country, where the Rule has accomplished its purpose. True, litigation has been increased by statutes even more restrictive than the common law, but the public policy of unfettered property has been consistently maintained.

For over three centuries the courts have applied rules to keep property "alienable" and "unfettered." The gradual clarification of what

107. At common law, direct authorities on this point are scarcely to be expected, since invalidation of most interests would be explained as due to non-vesting. At common law, the problem could, however, arise where a life estate vested in a "cessui" within the Rule, but a spendthrift restraint on his interest extended beyond the Rule. In cases which sanction restraint, it by implication is valid only if it does not exceed the period set by the Rule against Perpetuities. See Shelton v. King, 229 U. S. 90, 95 (1913); Colonial Trust Co. v. Brown, 105 Conn. 261, 279-281, 135 Atl. 555, 562-3 (1926); cf. Cleary, Indestructible Testamentary Trusts (1934) 43 YALE L. J. 393. In fourteen states, including New York, where the statutory law in terms restricts limitations which "suspend the absolute power of alienation," the problem posed in the text may arise in a number of situations, and the law is well settled to the effect stated. Infra note 108.

108. The cases in states with a statutory Rule are legion, commencing with Hawley v. James, 5 Pa. 318, 444-5 (N. Y. Ch. 1835), aff'd on this point, 16 Wend. 67, 163-4 (N. Y. Ct. of Errors, 1836). Field suggested that this decision be codified [Proposed] Civil Code of the State of New York reported complete by the Commissioners of the Code (1865) § 228. The recommendation was adopted by a number of the "code" states where the statute now expressly provides: "The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust, or to sell it and reinvest the proceeds to be held upon the same trust, is a suspension of the power of alienation," e. g., CAL. Civ. CODE (Deering, 1937) § 771, applied in In re Estate of Walkerly, 108 Cal. 627, 636, 41 Pac. 772, 778 (1895).


110. In England, the practice of "strict settlements" and the conventions of the landed class did keep most land in the same family for hundreds of years,—until after World War I.

111. At a Public Hearing on proposed changes in the New York law of perpetuities, not one of the witnesses questioned the efficacy of the New York law; some protested that the law was too stringent. N. Y. Leg. Doc. (1933) No. 55, passim. Franklin D. Roosevelt, Governor of New York, vetoing bills designed to weaken New York's rules limiting suspension of ownership, referred to the economic policy "which has worked so well in this state." N. Y. Leg. Doc. (1931) No. 69, p. 123.

112. Gray, Rule against Perpetuities (4th ed. 1942) § 750, reports over 800 New York cases since 1830.
is embraced within these terms eliminates the early explanation that the object of the rules was merely to keep land alienable and thus avoid under-utilization. The already accepted scope of the rules indicates a policy far more embracing. Inclusion of intangible property (a quantum of wealth) indicates that the ultimate target of these restrictions is not merely physical assets as such, but the "power" which usually accompanies them. If so, "power" without property would seem equally a cause for concern.

The new form of property—power independent of ownership—is subjected to no time limitation. On death or retirement of one in control, his "power" is not cut down by inheritance taxes, nor divided among many heirs. It passes to his successor pursuant to the conventions of his class—much as the conventions of the landed class enabled the "strict settlement" to be effective in some English families for over two hundred years. This type of ownership, therefore, can be continued forever in a group made up of individuals who are succeeded from time to time by others—but with identical background and training, so that to all intents and purposes the group is unchanged. The absence of limitation upon power to perpetuate control would not be so serious were it not for the fact that in more than half the American states corporate existence may be perpetual,113 i. e., the corporation may last as long as the institution of private property.114

In such states, the potential consequences are just as serious as the results sought to be avoided by the arbitrary time limits placed by common-law or statute over "tying up" land and wealth directly owned. The Rule, we have seen, is applied to an express trust despite

113. In 1928, when the Uniform Business Corporation Act was recommended for enactment, it was reported that "in twenty-eight American jurisdictions corporate existence may be perpetual." 9 U. L. A. (1932) 62, Commissioners' Notes. This number has since been raised by other states which previously prescribed a maximum period of years. E. g., COLO. STAT. ANN. (1935) c. 41, § 6 (3); WASH. REV. STAT. ANN. (Rem. Supp. 1940) § 3803-11 (2) (b). It should be noted that in California, the period set in the corporate charter cannot be less than perpetual, CAL. CIV. CODE (Deering, 1937) § 292, whereas in most states the incorporators have the choice of specifying perpetual existence or any shorter period, e. g., N. Y. GEN. CORP. LAW § 14 (1). However, even in those states which prescribe a maximum period for corporate existence, varying from twenty to one hundred years, this may usually be extended by amendment or renewal.

114. The possibility of a corporation's holding land in perpetuity (in the literal sense) is, in fact, likely. New Jersey's first business corporation, The Society for establishing useful Manufactures, organized in 1791, which in 1795 discontinued its unprofitable manufacturing ventures, today still owns part of the lands which it originally purchased, including much of the present City of Patterson; the land has meanwhile enhanced in value enormously and being corporate-owned, not subject to reduction by inheritance taxes or dispersion among heirs. Business corporations are of comparatively recent origin. But an ecclesiastical corporation, The Cathedral Church of St. Paul, London, still holds title to a farm of approximately 2,406 acres in Tillingham, Essex, transferred to it 1,332 years ago. This record and the experience of religious, educational, and philanthropic corporations in New York City forecast a long-lived future for business corporations.
full power to sell and reinvest the trust residuary interest. And very close is the similarity in object and operation of both the express trust and the corporation:

**Express Trust**

*Designed* to separate legal title to property from the beneficial interests in it in order:

1. to preserve the property intact for successive beneficiaries;

2. to relieve the beneficiaries of the burdens of care; and

3. to secure competent management.

**Corporation**

*Designed* to separate legal title to property from the beneficial interests in it in order:

1. to assure permanence, the enterprise not being terminable by the death, insolvency, or withdrawal of a member;

2. to limit liability, a result of the distinction that only corporate property is liable for corporate debts;

3. to secure efficient management, the directors alone governing policy; and

4. to make investment simple, the shares of capital stock being transferable, and readily bought and sold, or pledged.

The beneficiary is entitled:

1. to an accounting;

2. to income, if any; and

3. to principal, if any has been assigned to him by the settlor, at the time specified, or earlier by court order.

The stockholder is entitled:

1. to a right of action for an accounting;

2. to dividends, and if none are declared, to compel their declaration; and

3. to return of his investment at the time specified, or earlier by voluntary agreement of all stockholders or by court order.

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115. The term “express trust” will hereafter be used to avoid confusion with a “Trust” (in the sense of a combination in restraint of trade). The latter originated as an “express trust”—to form, in effect, an unincorporated joint stock company at a time when it was impossible to incorporate with gigantic capitalization. The procedure for combining a number of competing concerns under one management was to have the stock of each of these corporations turned over to certain persons called “trustees,” who in exchange issued “trust” certificates similar to shares of stock in corporations; the “trustees” were elected by the certificate-holders (who had previously held stock in one or more of the corporations involved) and, in turn, the “trustees” elected and controlled the directors of each of the corporations in the combination. This ingenious expedient became unnecessary when restrictions on corporate capitalization were abandoned by the states.
In view of the parallels of the express trust and the corporation, why is the one limited and not the other? 116 Perhaps the answer lies in their historical development. Both the express trust and the modern corporation came into use at about the same time, in the seventeenth century, the very period in which the Rule against Perpetuities also began to take form. But although 1602 is the date assigned as the origin of the modern corporation (in which the corporation, not the shareholders, owns the property), 117 varying forms of corporations had been known long before, including religious, municipal, and trade guild corporations. 118 Since in the seventeenth century "corporations" were therefore known and were already subject to the Mortmain Acts, 119 the Rule against Perpetuities may have been considered as unnecessary for them as for charitable trusts. 120 Certainly omission of the corporation cannot be interpreted as an attempt to favor it. There is no doubt that at the time of the American Revolution, corporations were in disfavor with, if not odious to, the populace. 121 American failure to impose limitations on corporations is thus probably due more to a feeling that they were already under restraint than to a desire to leave them unchecked. And, in truth, they were under restraint. Since a Special Act of the legislature was required for the creation of each corporation, every application for a charter was independently considered. 122 When in accordance with the democratic spirit, general incorporation laws made it possible for all to incorporate under the same conditions, general restraints were at first imposed, including limitations on size and duration. 123 Today, as a result of competition between the state legislatures the typical general corporation law imposes no limitation on size, as we have seen, and

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116. Both the express trust and the corporation present problems only where comparatively large sums are involved. A protracted trust is rarely attempted except where great wealth is involved; and only where the assets of the corporation are very large does it usually act as a buffer between the legal owners and the assets.

117. Prior to the 1602 charter to the Dutch East India Company, it seems that the individual investor had a property right in the capital of the organization itself. KUEN, COMPARATIVE STUDY OF THE LAW OF CORPORATIONS (1912) 39-49, 48-50.

118. Id. at 43-47.


120. Supra note 90.

121. Supra note 4.

122. The result may be gleaned from a contemporary report, List of All the Incorporations in the State of New York, except Religious Incorporations, with a Recital of all their important particulars and peculiarities, Reported to the Assembly pursuant to a resolution thereof (1819). This report shows specification of the purpose of each corporation and considerable variations in their life and capitalization, with no uniformity even in the same field. Although a few corporations were given perpetual charters, most were limited to a term of years, the maximum being 75 years. The list of manufacturing corporations prior to 1817 discloses a maximum life of 42 years and a maximum capitalization of $750,000.

123. Supra note 72.
in half the states, no limitation on duration, which may be perpetual
regardless of whether the corporation continues to serve any desirable
function and regardless of intracorporate abuse.\textsuperscript{124}

The argument which may be advanced that the corporation is ter-
minal by vote of the stockholders is not valid. Concentration of
control usually makes the situation almost identical with that of the
releasable contingent remainder in \textit{Matter of Wilcox}.\textsuperscript{125} There, it will
be recalled, the \textit{power} of alienation is not restrained, but \textit{alienation}, in
fact, is \textit{postponed}.\textsuperscript{126} Here the “pocketing” of the assets by a corpo-
ration is theoretically terminable by vote of the stockholders, but in
practice assets once turned over to a very large corporation whose char-
ter gives it perpetual duration are much less likely ever to return to
direct ownership by individuals than that the parties will get together
in a \textit{Matter of Wilcox} type of situation. It is usually within the power
and usually in the interest of the management to prevent termination of
the corporation’s existence despite the fact that termination may be in
the interest of the stockholders generally.\textsuperscript{127} If the corporation is suffi-
ciently large, not even insolvency will cause it to be liquidated; per-
petuation of ownership by the same legal owner (the corporation) is
assured by modern reorganization practice, because of the impossibility,
as a practical matter, of selling a billion-dollar enterprise. Thus, by
the corporate device, property is, in practice, completely “pocketed,”
just as effectually as by creation of an express trust, and the “pocket-
ing” will normally far exceed the maximum period permitted express
trusts. Both the beneficiary of an express trust and the stockholder
are equally incapable of causing the restoration to circulation of the
physical property being operated for their benefit.

\textsuperscript{124} Cf. HORNSTEIN, \textit{A Remedy for Corporate Abuse—Judicial Power to Wind
Up a Corporation at the Suit of a Minority Stockholder} (1940) 40 \textit{Col. L. Rev.} 220.
\textsuperscript{125} Matter of Wilcox, 194 N. Y. 288, 87 N. E. 497 (1909).
\textsuperscript{126} Alienation is rendered unlikely where a contingent future interest is created
in favor of a presently ascertainable person who is to take only upon the happening of
some event in the future. For while in such case the contingent interest is now releas-
able and alienation is at all times possible, a complete title could be given only by con-
current action of the person having the defeasible title and the person having the
executory interest. Such concurrent action is unlikely because the parties will be un-
able to agree upon the proportionate value of their respective interests. Alienation is,
therefore, considered restrained in such a situation, and it is immaterial whether the
invested future interests be legal or equitable. Abbiss v. Burney, \textit{In re Finch}, 17 Ch. D.
211 (1881); \textit{In re Ashforth} [1905] 1 Ch. 535. Similarly under “suspension of
alienation” statutes: Matter of Wilcox, 194 N. Y. 288, 87 N. E. 497 (1909), (1909)
Ry., 226 N. Y. 347, 123 N. E. 736 (1919). In the latter case, the court conceded that the
interest in question “technically” come within the statute, but frankly re-
lied upon the desire of the New York Revisers “to restrict, not to extend, the limita-
tions which a grantor might impose.” Walker v. Marcellus and O. L. Ry., \textit{supra} at
\textsuperscript{127} HORSTEIN, \textit{supra} note 124. We should not be misled by the technical ter-
mination of one or more corporations by merger or consolidation; the “corporation”
continues as a buffer except as to stockholders who have a right to demand appraisal
and who exercise their right.
In view of the resemblance of the problem to that of an indestructible trust, one's first thought is, by analogy to the Rule against Perpetuities, to suggest limiting the duration of a corporation to a short, fixed term—perhaps 25 years. But what would be the result of such a limitation? The corporation will not actually cease business: usually its existence will be extended as was done in the early days when corporate existence was limited to a period of years; if not, it will probably transfer its assets to another corporation formed for the purpose of taking it over.

Since our object is not to shorten the life of a corporation qua corporation, but to dilute concentration of control, cannot a more direct method be found which will accomplish this without the economic upset which must accompany abrupt termination of corporate life? It is wiser not to cripple the corporation, a desirable institution, but rather to prescribe for its weakness—susceptibility to concentration of control.

At present, the small stockholder has little power, a result of the evolution of the corporate organization and abuse of voting power. Prior to Professor Berle's explanation of control without ownership, if the mind of legislator adverted at all to the status of stockholders, it was easily set at rest by the assumption that stockholders were capitalists, able to bargain for themselves, and without need of legislative protection. The now fuller recognition of the problem makes it clear that even legislation will have hard sledding.

Federal regulation is the most likely solution, the weakness of other remedies having been demonstrated in an earlier article.128 Details of such regulation, which are beyond the scope of this paper, could obviously prohibit the complicated structures whose principal object is to separate ownership from control, could require equitable voting rights and certain disclosures to all stockholders. These fundamental practices to prevent the corporation's being so complete a buffer between the real owners and their property would render less likely perpetual control by an undeserving management.

III. Accumulations Limitation

The third in the series of measures to limit undesirable consequences from the ownership of great wealth dealt with the accumulation of income, a practice which ties up wealth completely—so completely that what may start as a moderate sum will, in the natural course

128. HORNSTEIN, Legal Controls for Intracorporate Abuse—Present and Future (1941) 41 Col. L. Rev. 405.
of events, grow to such proportions that it can endanger the national economy. “Accumulation” may be defined as the conversion into principal of income derived from property—rents and profits of real property, interest of money, dividends upon stock, and other produce of personal property—whereby the property is augmented and produces still more income.

In the absence of statute, accumulation may be directed to continue for the same period as is allowed by the Rule against Perpetuities.\(^1\) By statute, England and some states in this country have restricted further both the period and the purposes for which accumulation may be ordered,\(^2\) spurred on by England’s spectacular *Thellusson* Case,\(^3\) which first called attention to the serious danger inherent in accumulation. In that case, the testator directed accumulation of income from an estate valued at £600,000. Within the period prescribed by the testator, which according to actuarial tables of life expectancy might last between 65 and 80 years, the resultant fund, all of which might go to one person, was expected to be so large as to “give its possessor the means of disturbing the whole economy of the country.”\(^4\)

It is not necessary to add many illustrations to demonstrate the consequences possible were accumulation in fact unlimited. Simple savings bank accounts in Boston have multiplied a hundred-fold in the last 116 years.\(^5\) A startling presentation of the potentialities of prolonged accumulation appears in *When the Sleeper Wakes* by H. G. Wells. This novel pictures a young man of moderate wealth who falls into a cataleptic trance which continues for 203 years. Meanwhile two millionaires bequeath their fortune in trust for him. As his trance continues, the sleeper’s estate absorbs nearly all the existing wealth of the world and his trustees rule the earth, supreme in his name. When the sleeper wakes, he finds his wealth the cause of a social revolution.

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\(1\) Thellusson v. Woodford, 11 Ves. 112, 146 (H. L. 1805).


\(3\) Thellusson v. Woodford, 11 Ves. 112 (H. L. 1805). The Illinois statute was likewise enacted after probate of a will directing accumulation for a long period of a very large estate, the huge Marshall Field fortune aggregating $125,000,000.

\(4\) Thellusson v. Woodford, 11 Ves. 112, 114-115 (H. L. 1805). The computations of life expectancy are given in Hargrave, A Treatise on the Thellusson Act (1842) 6-7. The Thellusson trust failed to assume the proportions feared because of the costs of litigation, the expenses of management, and a Private Act of the House of Lords which, in 1833, authorized a lease of all the property involved to the testator’s then eldest male lineal descendant at a fixed rent. *Id.* at 12-16. The last measuring life ended in 1856, fifty-nine years after the accumulation began and the estate was divided between two great-grandsons of Peter Thellusson. See Thellusson v. Rendlesham, 7 H. L. Cas. 429, 433 (1859).

\(5\) Bennett, Mutual Savings Banks (Feb. 25, 1933) 44 United States Investor 225-230.
The law of accumulations, like that of perpetuities and many other prosaic laws, has come to the attention of the public principally through the publicity attendant upon attempted evasions. These naturally have the spotlight thrown upon them. Unnoticed, but far more important, are the untold millions who do confine their testamentary dispositions within the limit the law allows. This salutary result of law is so often overlooked that too many people, learning of a successful evasion, unjustifiably conclude that the law is ineffective.

Obvious were and are the economic and political dangers in the case of prolonged accumulation, as a result of which "estates" may attain huge proportions. The consequences differ only in degree where an express trust "ties up" only principal of wealth without directing the accumulation of income. "Accumulation" then takes place indirectly if the assets of the estate consist of stock in a successful industrial corporation whose profits are not declared as dividends and consequently not paid over to a beneficiary entitled only to "income."

In the case of the corporation, the danger of accumulation presents itself even where no express trust at all is involved, a possibility peculiar to the corporate form and directly related to concentration of wealth. In corporations, accumulation results not from affirmative direction, but from negative action—failure to declare cash dividends and thus distribute the corporate profits. The corporate

\[134.\] In recent years evasions of the spirit of the restrictions on accumulations have been principally through so-called charitable bequests. Since a gift to charity is not subject to either the Rule against Perpetuities or restrictions on accumulations, we occasionally find a bequest directing accumulation for a long period of time until what may have been a moderate sum to start with, will theoretically be large enough to do something spectacular. E. g., $2,500,000 to be held in trust at compound interest until sufficient to pay the British national debt, which according to then computations (1927) would have taken 196 years—if the debt remained stationary meanwhile, N. Y. Times, June 24, 1943, p. 4, col. 5; $50,000 to be kept intact for 200 years at compound interest, and the then anticipated sum of $160,000,000 to be divided among certain educational, cultural and municipal organizations, some now in existence and others to be then established, N. Y. Times, June 19, 1929, p. 40, col. 4; $1,500 to be held in trust and intact for 150 years at which time the anticipated $1,500,000 is to go to Dartmouth College, N. Y. Times, Dec. 22, 1929, Sec. 1, p. 18, col. 3. These plans were possibly inspired by the comparatively successful efforts of Benjamin Franklin, who bequeathed £1,000 to Boston, and a similar sum to Philadelphia, to be held by trustees, which sums should be let out on interest at five per cent. to young married mechanics. Accumulation began in 1791. The Boston fund by 1930 amounted to $488,846, N. Y. Times, Aug. 12, 1930, p. 4, col. 3. The Philadelphia fund at the end of the first hundred years amounted to $98,362, see Franklin's Admx. v. City of Philadelphia, 2 Pa. Dist. Rep. 435, 438 (1893); the Philadelphia fund, pursuant to Franklin's direction, was then divided, and approximately $70,000 was devoted to "public works," while the balance was continued to be let out at interest; and, as of December 31, 1941, amounted to $159,291.

\[135.\] A stock dividend is clearly accumulation since it impounds profits of the corporation as part of the permanent capital.

\[136.\] During 1909-1926, the average savings (profits not turned over to stockholders) by corporations was over 40% of their income. KING & EPSTEIN, NATIONAL INCOME AND ITS PURCHASING POWER (1930) 285-287 (Table XC). Figures for the period 1926-1936 disclose corporate saving even during the depression, except for a single year (1932). TNEC, Monograph No. 15 (1941) 44 (Table 19).
profits "saved" are then reinvested and the assets of the corporation increase.\(^\text{137}\) Whether the larger corporations "save" more of their profits than smaller corporations is not clear.\(^\text{138}\) Corporate saving, however, creates an especial problem in the case of the larger corporations where separation of ownership and control is prevalent and wealth of others may thereby be used by those in control to gain further control of more wealth of others. For example, the undistributed profits of E. I. duPont de Nemours & Co. were used to acquire a controlling interest in General Motors Corporation.\(^\text{139}\) Where undistributed profits are used in this manner, it enables those in control of the primary corporation to extend their own corporate power more than if they had simply caused the primary corporation to declare dividends and then used their own share in new ventures. The increased economic wealth permits expansion of the scope of the business and, sometimes, the acquisition of entirely unlike enterprises.

To attack this situation, which is at least as serious as that sought to be limited by the ordinary restrictions on accumulations, the federal government in 1936 instituted an undistributed-profits tax\(^\text{140}\) in part "to encourage the distribution of corporate profits so that the individual recipients could freely determine where they would reinvest in a free capital market."\(^\text{141}\) In action, however, it was found that the undistributed-profits tax discouraged legitimate business expansion, and also operated inversely with corporate size—"the larger the corporation, the smaller the tax, and the smaller the corporation, the larger the tax."\(^\text{142}\) This tax was therefore abandoned in 1940.

Also unavailing is a provision in the current Federal Internal Revenue Code\(^\text{143}\) imposing a substantial surtax upon the net income of a

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\(^{137}\) The possibilities are indicated by the Ford Motor Co., which represents an original total investment of $60,000. No other capital has gone into this corporation, but the profits have been reinvested, and the assets of the corporation in 1917 totalled $704,923,000 (TNEC, Monograph No. 29 [1940] 346), despite payment of huge sums pursuant to court order directing a declaration of dividends. Dodge v. Ford Motor Co., 204 Mich. 459, 170 N. W. 668 (1919).

\(^{138}\) Berle and Means compared available figures for the years 1922-1927 and concluded that the larger corporations save more of their profits than smaller corporations. \textit{The Modern Corporation and Private Property} (1932) 41-42, 360. The TNEC figures for the years 1931-1936 would appear to indicate precisely the contrary. TNEC, Monograph No. 15 (1941) 19, 44-45. The latter set of figures was influenced by the fact that during one of the years, 1936, the greater distribution of corporate profits by the larger corporations was necessary to escape the undistributed profits tax, \textit{infra} note 140.

\(^{139}\) TNEC, Monograph No. 29 (1940) 121; see also id. at 129-130.

\(^{140}\) Revenue Act of 1936, 49 Stat. 1648, §§ 14 (b), 102. In 1936 and 1937, the tax ranged from 7 to 27% in accordance with the relative magnitude of the undistributed taxable profits. In 1938 and 1939, the tax was 2.5%.

\(^{141}\) Roosevelt, Message to Congress, April 29, 1938; TNEC, Hearings (1939) Pt. 1, p. 191. The tax was also intended to be a revenue producer, 80 Cong. Rec. 3119 (1936).

\(^{142}\) TNEC, Monograph No. 9 (1941) 77, c. 5.

corporation whose earnings are permitted to accumulate beyond the reasonable needs of the business, since this penalty is confined to cases where the accumulation is for the purpose of avoiding individual surtax payments by stockholders, and such would not be the situation in the case of a large "public" corporation where ownership and control are separated.

Aside from the attempted remedy by taxation, there has always been available the stockholder's right to sue in equity to compel a declaration of dividends, but the paucity of cases in the reports indicates that ordinarily stockholders do not think it worthwhile to attempt enforcing this "right." Relief is unlikely in any but the most flagrant case.

Not only the stockholder in the corporation is affected. It has been suggested that the corporate "saving" of much of these profits (and the inordinate expansion to which it leads) is the cause of depressions.

To avoid excessive saving, a corporation should come within the jurisdiction of the federal agency heretofore suggested if undeclared profits put its capital above whatever figure is determined upon as the tentative maximum. Nor should a "public" corporation be permitted, without special leave to "save" profits amounting to more than 10 per cent. of its capital in any year, and it should not be permitted to "save" any profits after a reserve of 100 per cent. has been accumulated.

CONCLUSION

Modern industrial accomplishments could have been and can be obtained without the financial abuses in their train. In fact, it was conclusively demonstrated by Mr. Justice Brandeis that every one of our most important industries started as a "little business" in which professional financiers declined to stake any money. Not until the

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146. AMOS, ECONOMICS OF CORPORATE SAVINGS (1937) (Vol. 22, No. 2, Illinois University, Studies in the Social Sciences) 75-86. For a provocative analysis see also TNEC, Final Report of the Executive Secretary (1941) c. 12.

147. Cf. J. P. Morgan & Co. letter to the Pujo Committee, dated Feb. 25, 1913, that "practically all the railroad and industrial development of this country has taken place, initially, through the medium of the great banking houses." N. Y. Times, Feb. 28, 1913, p. 7, col. 3.
business was a success did the professionals demonstrate any interest, and then it was to seize control from those who had nursed it along. This seizure was made possible by the promotion of gigantic corporations, ultimately financed by many small investors, whose numbers continue to increase. The result is an institution, comparable with the feudal system, wherein economic assets again are no longer (directly) owned or controlled by those who work with them.

Those vested with corporate power too often misuse it. They do not always conduct business in accord with the correlative legal and social responsibility which directorship or officership in a large corporation should entail. How shall this responsibility be enforced? How shall financial exploitation be controlled?

Futile is reliance upon the stockholders themselves, who have been largely lulled into the belief that they are “partners” under an ingenious form of capitalism. Even where stockholders have been spurred to action, distressingly inefficient have been their attempts to enjoin or redress clear “legal” injury, and one cannot be surprised at the rarity of efforts to control policy. Moreover, social progress cannot depend upon the courts alone, which are concerned with adjudicating specific cases and with remedying past abuses. At best, they tinker and patch. Broad, constructive action—formulation of a plan for operation, rather than haphazard sporadic redress—is best provided by legislation, supplemented and applied by an administrative agency.

National regulation of corporations engaged in interstate commerce, which would clearly be constitutional, may take the form of a federal act prohibiting state corporations from using the mails or any means or instrumentality of interstate commerce (1) unless registered with a federal agency, or (2) unless in possession of (a) a federal

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148. Brandeis, Other People's Money (1914) c. 7.
149. In the larger corporations, it is estimated that there has been a 64% increase in the number of stockholders over the number in 1929. Time, Dec. 21, 1942, p. 92, col. 2.
150. The pattern of business-class control, described in Lynd, Middletown in Transition (1937) c. 3, appears strikingly similar to that of the feudal lord.
152. Hornstein, supra note 128.
license\textsuperscript{155} or (b) "a certificate of statutory compliance"\textsuperscript{156} to be issued only if the charter of the corporation satisfies certain specified standards, such as have been indicated earlier in this article. The registration, license, or certificate could be revocable upon violation of the standards prescribed.

To spare the national government regulation of all the hundreds of thousands of existing corporations, a national law should be applicable only to a "public" corporation, defined as one having assets exceeding five million dollars in value\textsuperscript{157} and having more than one hundred stockholders. So large a corporation, regardless of the service it supplies or the product it produces, is as much a matter of public concern as are public utilities, and rules can readily be formulated to prohibit conduct which experience has proved conducive to concentration of control.

In post-war America, an important stumbling block to true democracy will be the concentration of economic power resulting from separation of ownership and control. The status quo, continuing unchanged, must inevitably result in concentration of all economic wealth in a small group—a plutocracy.\textsuperscript{158}

The happy compromise is clearly some degree of government regulation. Complete laissez-faire overlooks the distinction between "liberty" and "license," and is inconsistent with an avowed intention to "promote the general welfare." The political state which permits the existence of giant corporations owes it citizens the duty of at least such supervision as will prevent abuse which may imperil the stability of the state itself.

The decision will prove no less important than did that on the issue of slavery, the issue of monopoly, the issue of labor. Failure to see the importance of the present problem is sheer blindness. Failure to meet it squarely and soon would be tragic.

\textsuperscript{155} S. 3072, same as H. R. 9589, 75th Cong., 3d Sess. (1938), introduced by Senators O'Mahoney and Borah.

\textsuperscript{156} S. 10, 78th Cong., 1st Sess. (1943), introduced by Senator O'Mahoney. Senator Borah had died before this bill was introduced.

\textsuperscript{157} Supra note 81.

\textsuperscript{158} "So great a proportion of all national savings and all national wealth have fallen under the control of a few organized enterprises that the opportunity of those individuals who will constitute the next generation will be completely foreclosed unless, by common consent of leadership in business and government, we undertake to reverse the trends responsible for the present crises." TNEC, Final Report (1941) 9.