

1924

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## Recommended Citation

Willis, Hugh Evander, "Private Ownership -- Its Characteristics and Legal History in the United States" (1924). *Articles by Maurer Faculty*. Paper 1243.

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# PRIVATE OWNERSHIP—ITS CHARACTERISTICS AND LEGAL HISTORY IN THE UNITED STATES

HUGH E. WILLIS

What is meant by private ownership, and what has been its legal history in the United States?

There have been, in the past, five characteristics of private ownership.<sup>1</sup>

1. Voluntariness. By this is meant that any person is free to engage in any kind of business sanctioned by law. He may buy something and hold it, or sell it; or as is generally the case from it or by it produce something else, either by his own capital and labor, or by his own capital and labor hired of others, or by his own labor and capital hired of others. Groups of people also may unite their capital and hire labor, or unite their labor and hire capital, or some furnish labor and some furnish capital. Laborers and capitalist are free to come together in any way they choose. It is true capitalists have generally associated themselves and employed laborers, but laborers are free to constitute the enterprise and hire capital, and laborers and capitalists are free to start a common enterprise, and recently this practice has been becoming more frequent than formerly.

In the early history of our country this characteristic of private ownership was practically without restriction, but through the decades one kind of business after another has been denied to private enterprise and generally taken over for public ownership, until today the characteristic of voluntariness is confined within much narrower bounds, and bounds growing ever narrower. The industry of communication and transportation has largely passed out of the realm of private ownership. The conveyance of letters and parcels and the construction and maintenance of roads are matters of public enterprise. The transmission of telegrams and telephonic communication are still businesses open to private individuals in this country, though not in most other countries; and railroad transportation is also in the hands of private individuals here, although it has been taken away from individuals in fifty of the seventy countries possessing railroads. Services which minister to the public health, like water supply, drainage of cities, street cleaning, and medical services are coming increasingly under public control. In the case of medical practitioners the development has here not gone as far as it has in some countries of Europe. There a majority of all medical practitioners have been brought into government pay. Various improvement enterprises, like the drainage of marshes, embankment and dredging of rivers, construction of sewers, of dykes and of irrigation

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<sup>1</sup>John M. Clark: *The World Tomorrow*, (1922).

systems, are matters almost exclusively for government. Nearly the whole industry of education has within a century passed out of the hands of private capitalists, as has the industry of recreation, which brings within its scope public parks, zoological gardens, public libraries, public concerts, etc., and our governments, state and national, have become some of the largest producers of books and other printed matter. Various branches of banking, such as the postal savings banks and the Federal Reserve System have become public. Private ownership is being denied more and more in the industry of making and distributing light, heat and power, whether by gas, electricity, or water under hydraulic pressure, and public ownership is making significant inroads into the territory of housing, forestry, agriculture, mining and even into manufacture and distribution.<sup>2</sup> Taken all together this makes a formidable list of things which are denied to private ownership, and it constitutes a remarkable limitation upon voluntariness as the first characteristic of private ownership. Yet the list will continue to grow. Even now one of the political problems of the country is whether or not the express, telegraph, telephone and railway business of the country shall be conducted under private ownership or under government ownership. However, even if these and many other enterprises should cease to be private and become public, we should not have socialism. Still the greater number of forms of ownership would be open to private enterprise and within these the characteristic of voluntariness would apply.

It is also beginning to be suggested that the government should prohibit some private enterprises in which it does not propose to enter itself, like those which are useless, or harmful, and that it should prohibit overcrowding in the professions and other non-productive vocations and businesses.

2. Government Interference Negative. This is given as a second characteristic of private ownership. By this is meant that under private ownership the government tells people certain things that they shall not do, but leaves them, either as individuals or groups, to decide for themselves the positive things that they shall do, as for example what to produce, how much and by what methods, as well as the price to be charged. Nineteenth century theory thought the social interest could best be secured in this negative fashion, but though this may have been true then it certainly is no longer true. If it is essential to private ownership that it shall be free from governmental interference except in a limited negative way, then there is no such thing as private ownership, because the notion that governmental interference shall be only of this sort has been outgrown. Of course government has not completely

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<sup>2</sup>Laidler, *Public Ownership Throughout the World*, (1918).

supplanted the individual in the management of his business; it still leaves most things to him, but whenever the legally recognized social interest requires it government may interfere affirmatively as much as negatively. Business may and is compelled to meet positive duties in matters of safety, sanitation, accident compensations, minimum wages, and hours of employment. Certain industries whose continuous operation is essential may be required so to operate, even though injunctions have to be resorted to. Certain businesses called public callings, are under legal obligation every moment of their existence to serve all of the class they hold themselves out to serve, with adequate facilities, without discrimination and for reasonable compensation, and the national and state governments have established regulatory commissions whose sole business it is to see that the business of these public callings is conducted according to these principles. These are pretty serious limitations upon a business which calls itself private. Of course these particular limitations apply only in the case of public callings, but when it is realized how big a class this is the limitations seem all the more important. The class includes all of the inns, or hotels, all of the railways, both steam and street, the express companies, the telegraph and telephone companies, such public utilities as gas and electric light companies, all common carriers, and probably all of the big trust companies, like the beef trust, the sugar trust, Standard Oil Company and the United States Steel Company.<sup>3</sup> In the case of these big trusts the government has not as yet undertaken regulation, but the right exists if they are virtual monopolies and the government is likely to begin to exercise its right at any time. During the recent war the government embarked upon a policy of general price regulation in the case of all businesses, not simply in the case of those engaged in public callings. This policy has been dropped, but it would not be surprising to see the government embark again in peace time upon some policy of general price regulation, so that not only the employee shall have a living wage, but the employer shall have only a living profit, and the consumer shall have to pay only a fair (living) price. Hence private ownership does not mean today what it once did. It no longer means freedom from governmental interference in an affirmative way.<sup>4</sup>

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<sup>3</sup>Wyman, *Public Service Corporations* (1911).

<sup>4</sup>Another analogous method of affirmative governmental interference with private ownership is by means of taxation. There is a social interest against too great concentration of wealth, and one way by which government prevents this is by means of the excess profits tax and the graduated income and inheritance taxes, levied on the principle of ability to pay. In the same way private ownership is subject to the exercise of the power of eminent domain. Most of the illustrations given in the text above are illustrations of the exercise of the police power, but there are many other illustrations though mostly negative which have not been given. No part of the law is characterized by greater growth than is that of the police power.

We have social problems here which only the government can solve. Private parties can never solve them. They can only fight each other, but no ultimate solution will be worked out in this way. Ultimately it will be better for all concerned to have the government solve the problems. Such regulation is not a menace to private ownership; it is the only sure way of preserving private ownership.

Individualism may be directed toward selfish, unsocial ends, or towards unselfish, social ends; therefore it should be regulated and controlled so that it must be directed toward the unselfish and social. Destructive instincts should be restrained, while altruistic ideals should be encouraged.

3. Management of Business by Investors of Capital. This is given as another characteristic of private ownership. It means that those who furnish the money run the business. They may have borrowed the money, still they run the business. They own the plant and materials, hire laborers and managing officials, sell the product, pay the debts, and pocket whatever is left over. Big business enterprises are conducted more and more by corporations. Many parties may have interests in the business,—stockholders, bondholders, laborers, consumers, the state. But, except in the case of public callings, only stockholders are members of the corporation and capable of directing the policies of the concern. All others must say their say as outsiders through the channel of contract, or in the case of the state through the channel of legislation. This may have been a characteristic of private ownership once, but it is now fast becoming obsolete. Today the average owner of stock in a modern corporation is not required to perform any intellectual function in industry outside of that of investing. The interest of many is nothing more than a momentary one, for they have purchased stock simply to sell it again for speculation, not because they are interested in the business. When this is true why should the management of the business be confided solely to the stockholders? It has become an obstacle to efficiency. It has resulted in soldiering on the part of labor, and to mismanagement on the part of capital. People are coming to realize more and more that the best results are obtained where there is some common expression and safeguard of the interests of all engaged in the common enterprise. As a result representation in industry, or industrial democracy, in one form or another, is coming to take the place of the old system of management of business by the investors of capital. Already upwards of three hundred of the largest business concerns of the country have adopted this form of organization, and the movement is growing.<sup>5</sup> Laborers are demanding it more and more. Men who are told that they are good enough to participate in the running of the gov-

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<sup>5</sup>*Industrial Democracy* (1919) 72 *Annals American Academy of Political Science* 23; 81 *Ibid.*, 167; (1920) 90-92 *Ibid.*

ernment, are beginning to think that they are good enough to participate in running business. If they are fit for political democracy, they cannot see why they are not fit for industrial democracy, especially when they realize that they know very little about government but they probably know more than anyone else about the business with which they are connected. But this change in the management of business does not destroy private ownership; it only puts it on a better basis. Under industrial democracy business is still characterized by private ownership. The management is simply put on a partnership basis instead of an employer-employee basis.

4. The Profits Test. By this is meant that the test of whether or not people shall produce, what they shall produce, and how much; whether or not they shall buy or sell, etc., is, Will the income from the sales yield a profit? The other contrasting test is social service. The latter test may have some influence on people entering the learned professions and now and then on others, but for the most part the thing which makes private individuals engage in any private enterprise is the inducement of expected profits, and the thing which makes them stay in any enterprise begun is the realization of profits. Organization for profit has some advantages. It, for example, eliminates such waste as that caused by padded payrolls, but it also makes possible the greatest waste (except war) of modern industrialism, that of unused productive powers. This waste includes not only the idleness of men but also that of plants. One of the greatest complaints against the coal operators is the fact that they do not provide regular employment to their miners. In twelve other important industries recently investigated by Mr. Stuart Chase<sup>6</sup> two-fifths of the buildings, machinery and other physical facilities were on the average never used. The test of profits also leads private enterprise into the production of many useless and harmful commodities. Mr. Chase<sup>6</sup> estimates that thirty per cent of the productive capacity of the workers goes into the production of such things. The profits test, however, will continue and may always continue to be a characteristic of private ownership. Hence the immediate thing to do is to try to eliminate the evils connected with it. So far as it leads to the production of useless and harmful things, the remedy lies in governmental prohibition. So far as it leads to other wastes some other power must work out a remedy in the interest of efficiency. Perhaps this remedy may be found by those who will be taken into the management through industrial democracy as above referred to.

Yet, what ought to be done is to substitute service for profits. There is no more reason why the building of a school house should be a carnival of private profit than that teaching in it should be; or the manu-

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<sup>6</sup>Chase, *The Challenge of Waste*, (1922) 24.

facture of munitions, than shooting them; or the refining of sugar, than prescribing it for medicine. This is Christianity, and if Christianity is ever adopted service will take the place of profits.<sup>7</sup>

5. Right to Advantages of Superiority. This is the fifth and last characteristic of private ownership. By this is meant that anyone, who by producing more cheaply or otherwise can make more money than another, is entitled to keep the difference as a sort of property right. This has been an incentive to efficient management. It has also made private enterprise devote a large proportion of its energy, not to supplying services to the community, but simply to wresting business away from competitors. Where one has an advantage from location or from control of a natural resource it seems unfair, as well as wasteful. Still we have not as yet entirely learned how to do without this stimulus to efficiency. Men are becoming so afraid of the effects of competition that they are rapidly adopting new forms of cooperation, and this bids fair to eliminate some of the evils of this feature of private ownership. Systems of inter-plant and inter-department rivalry are being tried out to eliminate other evils, but up to date they have not accomplished much, because the superior managers have absorbed the value of all the superior efficiency. The Transportation Act of 1920 practically abolished this feature of private ownership so far as concerns the railroads of the country.

In this short survey we have seen that failure to restrict the extension of private ownership of property has been one of the fundamental and striking characteristics of government in the United States and it still continues to be. But we have seen how more and more limitations have been placed by law upon private ownership, both with respect to the objects of such ownership and with respect to the other characteristics of such ownership. Many things which were formerly open to private enterprise are now denied to it. Probably development in this direction will and should continue until not only certain useless and harmful forms of enterprise are denied to private ownership, but also some other forms of enterprise, like the express, telegraph and telephone business, and perhaps the railway business, will be taken over by the government. Government regulation of private enterprise has had a remarkable growth, and growth in this direction will probably continue for some time to come. It is now the philosophy of law and economics that social interests are secured better in this way than by the policy of *laissez faire* which was peculiar to the nineteenth century. Remarkable changes also are taking place in the nature of the management of

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<sup>7</sup>Woodrow Wilson's *The Road away from Revolution* (1923). Also see 38 *The New Republic* 8 for a comparison of the Post Office Department with other businesses in the matter of effective service, in spite of the absence of the profit motive, executive independence, competition and labor unorganization in the Post Office Department.

business; and the profits test and the right to the advantages of superiority are beginning to be challenged. We have outgrown the "traditional too-complete privateness of private capital, but we have not outgrown the freedom and adaptability that go with voluntary association in industry." Private enterprise must be socialized in function and obligation, not by transferring ownership to the state, but by modifying the scope of the rights, privileges, powers and immunities included in private ownership.