Alternatives in Government Control of Economic Enterprise

Ralph F. Fuchs
Indiana University School of Law

Follow this and additional works at: https://www.repository.law.indiana.edu/facpub
Part of the Antitrust and Trade Regulation Commons, and the Business Organizations Law Commons

Recommended Citation
Fuchs, Ralph F., "Alternatives in Government Control of Economic Enterprise" (1936). Articles by Maurer Faculty. 1576.
https://www.repository.law.indiana.edu/facpub/1576

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.
ALTERNATIVES IN GOVERNMENT CONTROL OF ECONOMIC ENTERPRISE

RALPH F. FUCHS†

I

THE situation today which is thought to require governmental changes of a far-reaching character, involving primarily the development of administrative devices, is being diagnosed by learned writers and investigators. Its origins lie in the period when the Glorious Revolution in England and the American Revolution established substantial freedom of economic enterprise. The resulting competitive system has permitted great inequality of family incomes. This inequality has promoted the capital accumulation necessary to an expanding economic order and has not prevented an almost continuous increase in the welfare of the masses of the population. The rise of the corporate form of business organization has at the same time permitted a concentration of control of producing enterprises which far exceeds the possibilities of individual or partnership management. This concentration, although in specific instances it probably goes beyond the point of maximum efficiency, has on the whole been a necessary accompaniment of modern technology, without which the potentialities of large-scale, machine production could not have been realized under private ownership.

In the long run, however, the entire utility and value of accumulations of capital are dependent upon their actual employment in the production of goods that can be sold. Obviously goods can be sold only to purchasers who have the requisite wherewithal. That wherewithal necessarily is derived from the income from past sales of goods or services, the products of previous production.

† Professor of Law, Washington University.


2 Laidler, Concentration of Control in American Industry (1931), and Berle and Means, The Modern Corporation and Private Property (1932), summarize the available information in regard to the extent of large-scale corporate control.

3 Except in so far as credit expansion for greater or less periods of time supplies purchasing power which goes beyond the income from previous production.
vious income will be translated into purchases to the extent that the desires of the recipients lead them to spend it, either for consumable goods or for capital goods. Capital goods, however, will not be purchased unless there exist real or supposed income-creating uses for them in the production of consumers' goods or further capital equipment which can be sold. Ultimately the utility of capital goods and the demand for them are dependent upon the existence of an effective demand for the consumers' goods which are the end-purposes of all production. If, therefore, the income from a given cycle of production passes partially into the hands of accumulators of capital and if the prospect is that future wage, interest, rent, and profit payments, upon which the market for the products of this capital depends, will create only an inadequate market accompanied by further accumulations of capital funds, the income in question will not be spent. Thus the money offered for the products of current production will be diminished by the amount of capital funds unsuccessfully seeking investment, and the producers who receive money will be correspondingly less able to purchase the products of future production. Such is the situation which prevailed even in 1929 when the economic system in the United States was operating at approximately only eighty per cent of capacity and large classes of people were going without the necessities of life.

During the depression, of course, conditions have become much worse.

Thus the vice in the economic order of today lies in a maldistribution of income which withholds many necessities of life from millions of people, prevents full utilization of existing productive equipment, and causes accumulations of capital funds to go begging for safe investment. It follows that the remedy is a redistribution of income such that the purchasing power of the masses will be correctly proportioned to the accumulations of capital that come largely from the surplus receipts of individuals who are paid the larger incomes. Such a redistribution could be effected in two principal ways within the framework of a money economy: either

---

4 Nourse and Associates, America's Capacity to Produce (1934) 421. This publication of the Brookings Institution and its companion volumes, Leven, Moulton and Warburton, America's Capacity to Consume (1934); Moulton, The Formation of Capital (1935); and Moulton, Income and Economic Progress (1935), present a diagnosis of present economic conditions, based upon carefully assembled data, which, it is believed, supports the statements in the text.
the wages and other earnings of the receivers of small incomes might be increased without corresponding price increases or the prices of goods and services might be reduced without corresponding reductions in the earnings of the receivers of small incomes. Needless to say, neither alternative has proven sufficiently acceptable to the managers of American business during the period which has followed the disappearance of the frontier.

Thus the government and the people whose agent it is, confronted with concentrated economic power as Henry VII and Henry VIII were confronted by the power of the barons, must consider ways and means of securing the service of the commonwealth by those who participate most largely in it. The choice of ways and means necessarily involves prediction as to the working of alternatives, and these alternatives involve more largely legal and administrative than economic considerations. Where the economist deals primarily with the effects of alternative policies upon welfare as that is commonly understood, the lawyer and the political scientist are concerned with the mechanisms whereby particular policies can best be furthered. Statesmanship, of course, embraces the choice of policies and of methods in terms of the values which it is deemed important to serve. In the present situation the policy which is essential if the values made possible by large-scale production are to be realized has been pointed out.

5 These alternatives are discussed in Moulton, Income and Economic Progress, op. cit. supra note 4, cc. 7 and 8. Such measures might or might not result in an actual diminution of the earnings of the receivers of large incomes. If business activity were stimulated as a result of increased markets, the decreased unit costs incident to fuller utilization of productive capacity might offset the effect of wage increases or price decreases.

6 Commons, The Legal Foundations of Capitalism (1924), especially cc. 1–3, and 7–8, develops in intriguing fashion the analogy between the power of modern property and the power of feudalism, together with the role of government and law in dealing with them.

7 There is overlapping here, of course. Thus, while the necessity of directing a greater portion of the national income into consumptive channels in order to stimulate production is a matter of economics, and while such questions as the relative effectiveness of unionization and legislation as means of increasing the earnings of labor present problems of administrative effectiveness, the question of whether profit-seeking enterprises will be more likely to increase wages or to cut prices as a matter of business policy turns both upon economic analysis of probable financial consequences and upon estimates of the probable response of business administrators to situations confronting them.
Lawyers and students of administration fail in their primary function if they neglect to explore the question of ways and means upon a scale as large as the problem presented. In so far as knowledge is lacking it must be obtained, and rapidly.

There may be said to be five possible alternative ways and means of effecting a distribution of income in the United States which will correctly proportion expenditures for consumers' goods and the accumulation of capital. These are (1) resolute maintenance by government of competition in various lines of production so as to induce the continued prevalence of minimum prices; (2) continuous regulation of business by administrative agencies of government so as to compel the observance of policies which will lead to the desired distribution of income; (3) control of private productive enterprises by managements in which competing claimants to the benefits of their operation are represented in due proportion; (4) operation of government-owned enterprises by corporations established for that purpose, and (5) direct ownership and operation of productive facilities by the government. The first of these ways would represent a return to conditions that once prevailed in most fields of economic activity and still prevail over limited areas. The second would represent an extension of previously-known methods of administrative control over the existing economic system. The last three ways would represent excursions into new methods of conducting economic affairs for which, however, there are precedents even in capitalist nations.

Appraisal of the five suggested alternatives with reference to the attainment of the desired policy must be made in terms of such experience as has been had and in terms of theoretical workability as indicated by the distribution of rights, powers, and duties among individuals whose reaction to them in the manner intended, without generating self-defeating conflicts of interest or stalemates in procedure, may or may not be forthcoming. It is, of course, not necessary that one or the other alternative be adopted to the exclusion of the remainder. It is quite possible, for example, that a workable system might be found to comprise free enterprise and competition among handicraftsmen; private ownership of marketing enterprises on a proprietary or cooperative basis, with regulation simply of competitive practices; detailed regulation or democratic producer control of private manufacture of finished products; licensed individual enterprise in agriculture, subject to
no further governmental regulation; operation of basic industries by government-owned corporations; and direct governmental provision of certain essential services. Quite possibly, however, particular control devices will operate differently on a limited scale from their operation over a wide field. Obviously a small regulatory or managerial unit can be more easily keyed to continuous efficiency than a large one, but numerous small units will present greater variety of performance. Standards which prevail in a community where the tone is set by one type of control will affect the contemporary operation of a different type, as the corrupting influence of private wealth has tended to destroy governmental standards, thus making it hazardous to predict the success or failure of large-scale operations on the basis of small-scale experience. Similarly, governmental control of particular aspects of private enterprise with no provision for dealing with collateral consequences may be quite different from identical control in the presence of means of providing for such consequences.

II

The school of thought in the United States which pins its faith upon the restoration and maintenance of small-scale free enterprise as a means of avoiding both undue concentration of control and undue concentration of wealth continues to command numerous and important adherents. Few there are who arise to deny the

---

8 In a prophetic address as President of the American Economic Association in 1887, Professor Henry Carter Adams foresaw the discrediting of government through the influence of wealth which afterward took place. 1 Publications of the Amer. Econ. Ass'n, no. 6.

9 Perhaps the principle difference between the New Deal legislation and previous regulatory measures lay in the apparent effort of the former to provide for simultaneous control of most of the important aspects of economic activity, with attempted fairness to the various affected interests. See Fuchs, The Constitutionality of the Recovery Program (1933) 19 St. Louis L. Rev. 1, 6-11. Had the New Deal's administration been equal to its advance analysis and planning, popular and judicial support might have increased rather than diminished.

10 Woodrow Wilson, The New Freedom (1913), is commonly taken as the classic twentieth-century expression of this point of view. Wilson, it is true, devoted much time in his addresses to bringing out the need of preserving the open door of opportunity to enterprising young "Jacks" who might slay the less hardy giants of immoderately large-scale corporate enterprise. He was, however, careful to disavow any intention to place an arbitrary limitation upon the size of business undertakings (p. 166). And, on the
soundness of traditional *laissez faire* economic theory under the assumed conditions, although the need of policing competitive practices, especially as they affect the consumer, seems clearly to require incorporation into the theory. It is the plain lesson of history, however, that small-scale enterprise on the whole does not maintain itself in the presence of machine methods of production. Whether by reason of the requirements of modern technology or by reason of opportunities for rigging the market, or both, the growth of large-scale corporate control has continued at an augmented rate. It will require governmental measures if this tendency is to be checked.

The chief governmental measure thus far employed to cope with the trend toward concentration of industrial control has been, of course, the Sherman Act. The line between legality and illegality having been laid down in the Act in terms that were incapable of precise application, the courts, to whom enforcement was entrusted, necessarily proceeded to the best of their ability to decide cases without other aids than such criteria as they were able to develop for themselves. As respects combinations of ownership it

other hand, his figure of the locomotive (pp. 281 *et seq.*) with its “parts so assembled and adjusted that friction is reduced to a minimum,” is as perfect a figure of speech as could be devised in praise of a planned, coordinated economic order.

11 See, for example, Norman Thomas, The Choice Before Us (1934) 16.

12 Sussman and Ganer, Standards and Grades of Quality for Food and Drugs (1935) 2 U. Chi. L. Rev. 578; Regier, The Struggle for Federal Food and Drugs Legislation (1933) 1 Law and Contemporary Problems 3; Crawford (1933) Technical Problems in Food and Drug Law Enforcement, 1 id. at 36.


15 Whatever may have been the shifts in Supreme Court dicta regarding the Act’s literal interpretation as prohibiting “every” contract, combination, or conspiracy in restraint of trade on the one hand or its construction as prohibiting only “unreasonable” contracts and combinations on the other hand, (see the writer’s Legal Control of Petroleum Production (1931) 16 St. Louis L. Rev. 189, 203) it is obvious that, unless merger were to remain entirely outside the scope of the Act, literal interpretation was possible only if the phrase, “restraint of trade”, had a restricted meaning as applied to combinations of ownership; for otherwise all partnerships and corporations would have been condemned. But there was no common law doctrine of restraint of trade in relation to ownership of businesses. Holmes, J., dissenting, in Northern Securities Co. v. United States, 193 U. S. 197, 405-406 (1904).
is evident that no criteria which furnish either guidance to business men or measures of economic desirability have been worked out.\textsuperscript{10} It seems evident that the ordinary courts could not be expected to develop such criteria. The judges are numerous, non-expert in economic analysis, and dependent upon litigants and counsel of varying resources and ability to furnish the necessary facts.

The alternatives to judicially-developed criteria of legality are either definite legislative prescriptions or standards which are to be administratively applied. No serious proposal for exact legislative enactment has been made, nor is it likely that any will be. Nothing short of a mathematical specification of, say, the percentage of an industry or trade that might come under one control, would be susceptible of anything like uniform judicial enforcement. In view of the varying conditions in different industries it manifestly would be impossible for the legislature to go farther than lay down a formula for administrative application.

In the Clayton Act an attempt was made to provide a standard to be administratively applied in cases where one corporation had acquired capital stock in another. Such acquisition was forbidden “where the effect . . . may be to substantially lessen competition between the corporation whose stock is . . . acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.”\textsuperscript{17} Enforcement was entrusted to the Federal Trade Commission.\textsuperscript{18} This enactment has failed for a number of reasons. In the first place it is easily circumvented by other forms of merger than stock acquisition. In the second place the Supreme Court has insisted upon a high degree of judicial review of Federal Trade Commission determinations in stock acquisition cases and has exercised its powers of review in such a manner as virtually to paralyze the Commission’s efforts at enforcement.\textsuperscript{19} In the third place the

\textsuperscript{10} The excellent summary of the facts in the principal combination cases, contained in Handler, Industrial Mergers and the Anti-Trust Laws (1932) 32 Col. L. Rev. 179, demonstrates the lack of any correlation between discoverable fact-states and decisions as to legality.


statutory standard of legality is largely worthless when it comes to distinguishing between economically beneficial and economically harmful consolidations of corporate control. The first two defects probably could be remedied by statutory changes.\textsuperscript{20} It is the third defect which is crucial.

The vice in the section of the Clayton Act which is under discussion lies in its condemnation of all substantial lessening of competition through stock acquisition, without regard to consequences. Congress might have condemned stock acquisitions which in the judgment of the Federal Trade Commission would diminish competition to the point of making it possible harmfully to maintain prices or depress wages, perhaps providing for advance determinations by the Commission, and have extended the prohibition to other forms of business consolidation. If it had, the Commission would have been given a control coextensive with the problem attacked, and the door would have been open to approval of mergers that promoted efficiency without adding to that maldistribution of income which, as has been seen, is the basic evil to be overcome. Whether such a formula could be administratively applied in a satisfactory manner is, of course, an open question. If Congress laid down the further statutory guide that it was its purpose to bring about the observance of such price and wage policies as would achieve the proportion between profits and wages which should be found most conducive to the complete utilization of productive capacity and of the facilities of interstate commerce, there would certainly be a basis from which to start in applying the law to particular cases. The question then would become one of whether the economic results of past business mergers could be ascertained with sufficient certainty to furnish a basis for forecasting the consequences of future consolidations—making due allowance, of course, for possible changing factors such as technological improvements, developments in labor organization, and the like. That question cannot be answered here.

Even assuming, however, that economic science has progressed to the point where fairly accurate prediction of the consequences

\textsuperscript{20} Statutory limitation of the scope of judicial review within the present governmental framework would, of course, have to conform to constitutional requirements. The present discussion, however, which deals with the practicability of alternative means of control, must envisage constitutional as well as statutory changes when necessary. If it proved to be unconstitutional to give the Commission a sufficiently free hand, the Constitution could be amended.
of business mergers is possible, there would remain obstacles to the carrying out of measures such as the one proposed. Prediction of the sort here involved is based upon a handling of data in which atypical instances are outweighed in the calculations. There is a clear possibility of error in prediction unless such instances are recognized as they arise and are dealt with on a separate basis. It is questionable whether the Commission could recognize atypical instances in the cases before it or, if it could, whether it would be practicable to make allowance for them; for the factors which make an instance exceptional are likely to be both elusive and ephemeral. Thus the intent with which a merger was sought to be effected might be quite different from the intent usually prevailing and might greatly modify the probable consequences; but intent is manifestly difficult to ascertain and subject to easy change. It appears that such factors ought to be disregarded if administration is to be effective. So long, however, as the psychology of a system of private property continues to prevail, it is at best doubtful whether such disregard can be permitted. If, for example, it appeared in a particular case that the owners or managers of businesses sought to be merged sincerely believed that efficiency would be furthered by the consolidation and if some or all of them apparently were moved by enthusiasm for the creation of an institution that would better serve the needs of all to whom it ministered, the courts if not the Commission would strain hard to prevent a blocking of the merger. Or if, as the Supreme Court felt the situation to be in the *International Shoe Co.* case, a failing business could be saved by incorporation into a consolidated enterprise, it would require extremely resolute official action to forbid a merger that would be legitimate according to all ordinary ethical standards, even where there was a statistical probability of harmful long-run consequences. At any rate, a clear expression of legislative intention to be ruthless, and a virtual elimination of judicial review, by constitutional amendment if necessary, would

---


22 So long as any judicial review remains, it will be possible for the courts to reverse administrative decisions almost to the extent they desire, since the categories of matters to which such review may extend can be expanded or contracted quite freely. If there is judicial review, it almost necessarily extends to questions of jurisdiction, and any determination necessary to a decision can be said to be jurisdictional. Thus whether there is involved in a
be essential to the success of such a program. None of the public advocates of preserving small business enterprises thus far has had the hardihood to propose such thoroughgoing legislation.

Public utility holding companies, however, by a noteworthy addition to the regulatory acts of Congress, may not acquire the securities or utility assets of any business if the Securities and Exchange Commission finds that "such acquisition will tend toward interlocking relations or the concentration of control of public utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors or consumers." Each existing holding company, moreover, is to be compelled "as soon as practicable after January 1, 1938" to limit its operations to a "single integrated public utility system." Although this legislation is the product of public indignation over numerous abuses and would have been impossible without strong executive leadership, its successful operation might provide a model for similar handling of other types of concentrated corporate control. Whether its operation can be successful will be dependent upon the adequacy of administrative techniques that are the products of numerous prior developments in governmental regulation.

particular case the "public interest" which the Federal Trade Commission Act requires the Commission to find before instituting a proceeding against unfair competition, has been declared to be a jurisdictional question upon which the courts may reverse the Commission. Federal Trade Commission v. Klesner, 280 U.S. 19 (1929). Similarly, the proposition that the courts may reverse an administrative determination which is not supported by substantial evidence may be made the basis of an adverse decision through the simple device of denying to statistics upon which the administrative body has relied the pertinence and therefore the character of evidence. In addition, the failure of the administrative body to give credence to the opinions of certain witnesses may be said to justify reversal on account of procedural error. The two latter devices were made use of by the Court in the International Shoe Co. case, supra note 21, in order to overcome the significance attached by the Commission to certain figures concerning the geographical distribution of the sales of the concerns involved, and to give effect to the testimony of certain corporate officers. Instances are numerous in other fields of administration. See, for example, Kwok Jan Fat v. White, 253 U.S. 454 (1920); Lloyd Sabaudo Societa v. Elting, 287 U.S. 329 (1932).


As an alternative to preserving competition in industry and trade it is theoretically possible, of course, to compel the observance of desired economic policies through governmental regulation of private businesses, be their size what it may. The trend toward regulated capitalism in the United States and western Europe has been too marked to require demonstration here. As respects railroads and other public utilities and banks it has gone to great lengths in this country. As applied to competitive practices it is accepted on all sides as desirable. In the National Industrial Recovery Act it was sought to sweeten thoroughgoing control of virtually all phases of business operation by coating the regulation with the designation “codes of fair competition,” which apparently was thought to be reminiscent of the more palatable control of competitive practices. The Supreme Court has nevertheless seen through the protective covering. Recent measures extend ostensibly permanent regulation to new phases of business activity.

Many of the measures thus far adopted, however, deal with the symptoms rather than with the causes of the national economic disorder. Unfair competitive practices are stimulated by rivalry in the capture of shrinking markets. To forbid them while failing to check the relative inadequacy of consumer purchasing power is to assume a difficult task of repression. Similarly, the policing of securities markets in which owners of capital funds are seeking avidly for opportunities for sound investment that do not exist in sufficient quantity presents a greater problem than would the control of a market in which the investor could be more discriminating. The Agricultural Adjustment Act, of course, was an avowedly

temporary law for restricting production to the measure of inadequate consumer purchasing power. To replace such fragmentary, surface regulation with legislation designed really to direct the flow of income into the channels required by a healthy economic system would be to set up a bureaucratic control of an extent heretofore undreamt. Price and wage policies, at least, would require dictation throughout industry and trade. The protection of legally-conducted enterprises against subversive competition doubtless would call for licensing of business undertakings. To supply a background for intelligent prescription in particular trades and industries and to open up new areas of opportunity, a national plan of production and distribution, mandatory upon regulating agencies whose scope was more limited, probably would be essential. It seems obvious that administrative action as distinguished from flat legislative prescription would be necessary in order to supply needed flexibility.

Procedural difficulties at once suggest themselves. The enterprises to be regulated would remain private. Even without regard to constitutional requirements, common decency and ingrained conceptions of due process of law would call for notice and hearing at every stage at which a private interest was threatened with adverse action. In connection with administrative acts of specific application, such as the granting or revocation of licenses or the entering of orders to desist from illegal practices, the impropriety of arriving at decisions without adequate hearings, unless urgent necessity demands, is manifest. The prescribing of the terms and conditions of numerous transactions engaged in by limited groups of parties, such as the fixing of railroad rates or the establishment of minimum wages in specific occupations in particular localities, usually is subjected to similar procedure. Quite commonly even

\[\text{See Laidler, Socializing Our Democracy (1935) 27–33, for a brief review of the movement, preceding the New Deal, toward comprehensive national planning. See also Francis X. Welch, in (1932) 9 Pub. Util. Fortnightly 37–42.}\]

\[\text{North American Cold Storage Co. v. Chicago, 211 U. S. 306 (1908).}\]

the laying down of general rules of a definitely legislative character by action of administrative authorities is preceded by hearings in which interested parties may appear as a matter of right.\(^3\)

Hearings, of course, vary from perfunctory audiences with officials\(^4\) to proceedings which have all the aspects of judicial trials.\(^5\) Except in the fields of taxation, abatement of conditions dangerous to health or safety, and regulation of such "privileges" as immigration, however, it is fairly clear that availability of compulsory process to procure testimony, access to opposing evidence, and observance of reasonable limitations in regard to the pertinence of evidence relied upon by the administrative authorities are minimum essentials to a fair hearing.\(^6\) To accord these procedural safeguards requires time—time for notices, time for the

---

\(^3\) Thus, except where the treaty-making power is exercised under 48 Stat. 943 (1934), 19 U. S. C. A. § 1351 (Supp. 1934), changes in tariff schedules may be made by the President only after hearings conducted by the Tariff Commission. 46 Stat. 701 (1930), 19 U. S. C. A. § 1336 (Supp. 1934), discussed in the Norwegian Nitrogen Products Corp. v. United States, 288 U. S. 294 (1933); Agricultural Adjustment Act, tit. I, § 22, added Aug. 24, 1935, c. 541, §§ 1, 7 U. S. C. A. § 624 (Supp. 1935). Under the National Industrial Recovery Act the promulgation of codes was not to take place without a hearing to parties who had not been represented in their formulation, 15 U. S. C. A. §§ 3 (a), 3 (d) (Supp. 1933), although the requirement of licenses in particular lines of interstate commerce might be imposed without advance hearing. \(\text{Id.} \) § 4 (b). Recently the Supreme Court has laid it down that the constitutional requirement of due process of law includes provision for executive "findings" upon which general regulations shall be based. Panama Refining Co. v. Ryan, 293 U. S. 38 (1934); United States v. A. L. A. Schechter Poultry Corp., 295 U. S. 495 (1935). Query whether such findings must, at least in some instances, be grounded upon evidence adduced at hearings.

\(^4\) Such as those commonly accorded by boards of equalization in the assessment of general property taxes. Earl v. Raymond, 188 Ill. 15, 59 N. E. 19 (1900); Londoner v. Denver, 210 U. S. 373 (1908).

\(^5\) The Board of Tax Appeals, for example, which proceeds largely in the manner of a court, is governed by the rules of evidence prevailing in equity cases in the District of Columbia. 45 Stat. 872, § 601 (1928), 26 U. S. C. A. § 611 (Supp. 1928). The Interstate Commerce Commission is carefully limited to evidence which has been duly incorporated into the record, upon which to base its findings. United States v. Abilene & So. Ry. Co., 265 U. S. 274 (1924).

taking of oral testimony, time for the preparation of transcripts, time for arriving at findings, time for judicial review to see to it that the formalities have been duly observed. It is at best questionable whether a thoroughgoing system of regulation of private business, requiring such careful procedure at thousands and tens of thousands of points, would not break down on account of sheer inability to keep pace with the demands upon it.37

Past experience does not furnish a basis for judgment in regard to the procedural workability of the suggested system of regulation. In the United States such detailed control has been attempted only in the case of public utilities. Results in the field of utility regulation have brought despair to some critics,8 but it should be remembered that the principal obstacle to success has been the

37 There is less cause for concern over the possibility of financing such bureaucratic control or of obtaining the personnel to man it. There is no reason to suppose that if the country put its mind to it, its vast reserves of man power would not yield the necessary personnel within a reasonable time, especially if able individuals at present engaged in the wasteful occupations of competitive selling and advertising could be diverted to more useful activity. As regards the cost, it is worthy of note that the bogging down of the economic system during the depression reduced the national income approximately $34,000,000,000 a year in terms of 1929 dollars. Moulton, Income and Economic Progress (1935) 28. If by a reverse process of seeing to it that the national income was properly distributed the total could be increased above the 1929 level of $80,000,000,000 to $100,000,000,000 or more, the bureaucracy would easily pay for itself many times over.

Another difficulty that may be put to one side concerns the obtaining of necessary information by the regulating authorities. Obstacles hereafter encountered grow out of the application to the impersonal affairs of business enterprises of constitutional guaranties which are intended to protect the personal privacy and security of individuals. See the summaries of legislative provisions and judicial decisions in Handler, The Constitutional Limitations of Investigations by the Federal Trade Commission (1928) 28 Col. L. Rev. 905; Note (1935) 44 Yale L. J. 819. Under the assumption, common to this entire discussion, that constitutional provisions may be changed to any extent found to be desirable, the immunities now accorded to business could be withdrawn.

38 Mosher, Electrical Utilities: The Crisis in Control (1929) especially cc. 1 and 6. If there has been a conspicuously successful regulatory agency in the United States, it has been the Interstate Commerce Commission. Sharfman, The Interstate Commerce Commission, Part I (1931) cc. 7. Yet its operation for many years has not produced an efficient, coordinated railway system, prevented the financial abuses which a new flood of railroad bankruptcies is revealing, or induced reductions in rates in a time of depression. As to the difficulties involved, see Note (1935) 48 Harv. L. Rev. 1382.
judicial review which has been held to be constitutionally necessary, whose exercise by the courts has virtually paralyzed important aspects of regulation.\(^5\) It probably is not true that the reasonable protection which is the due of private property requires such extensive judicial review, and its restriction in aid of an adequate system of regulation may be assumed for the purposes of this discussion. In England, where constitutional restrictions do not hamper, the attempt to regulate public utilities has not, however, been conspicuously more successful than in the United States.\(^6\)

Further grounds for skepticism concerning the success of thorough regulation of private business follow, however, from consideration of the nature of profit-seeking enterprise. To retain this type of enterprise, at least in its corporate form, and simultaneously to impose restrictions whose purpose is to limit profits and distribute more of the benefits to consumers and workers is to create friction and violate the principles of legal mechanics by imposing conflicting duties upon the same individuals at one time. Individual enterprisers, no doubt, are free to be altruistic in the conduct of their businesses if they wish, and the fastening upon them of duties toward others merely runs counter to their probable inclinations. The directors and managers of corporations, however, are not similarly free. Upon them rests a duty to serve the interests of the stockholders who are their principals.\(^7\) That duty, of course, may be superseded or modified by duties toward the state or toward other individuals. So long, however, as the selection and tenure


\(^6\) Dimock, British and American Utilities: A Comparison (1934) 1 U. Chi. L. Rev. 265.

\(^7\) In terms of legally-enforceable doctrine, it is more accurate to say that the duties of management are to the corporation as an entity. Berle and Means, op. cit. supra note 2, Part II, cc. 5–8. The actual beneficiaries may not be the stockholders as a whole. Note 42, infra. The prevailing view, which doubtless motivates legislatures in maintaining corporation laws, however, continues to regard the stockholders as the prime beneficiaries of corporate activity.
of directors and managers is dependent upon the stockholders, the inclination to place the stockholders' interests ahead of public duties will remain so strong as to be extremely difficult to overcome.

The objectives which are likely to prevail within governmental regulation, no less than hostility on the part of the governed, with which it must cope, give ground for reluctance to entrust vast control powers to an official hierarchy. The directing heads must of necessity be politicians (in no invidious sense of the word), and whatever they attempt to accomplish must be compatible with remaining in office. Especially in a democracy, pressure groups having special interests to serve are able to favor a friendly government and to endanger an unfriendly one out of all proportion to their numbers, because of the immediacy and conscious character of their interest as compared with that of the body politic. In the absence of a continued public awareness of the

42 The investing stockholders, of course, are to some extent being superseded in practice by promoters and cliques of managers as the principal controlling group in the conduct of modern corporations. Berle and Means, op. cit. supra note 2, at 119-125. Where this situation prevails, the problem here discussed is not, however, substantially altered. The managers whose acts regulatory legislation seeks to control remain primarily responsible to profit-seeking principles, among whom they themselves may or may not be included.

43 Regarding the Federal Securities Act it has been said that the "high priests" of the legal profession "may be on the threshold of making a new discovery—that they can train scriveners and the best products of our law schools to become artists in making registration statements, artists who can tell the truth, the whole truth, and nothing but the truth and still chisel the heart out of the Securities Act. Once the drafting of registration statements becomes a game, blurred disclosure may become substituted for fundamental alteration and modification of ethical standards and financial practices." Douglas, The Lawyer and the Federal Securities Act (1935) 3 Duke Bar Ass'n Bull. 66. Despite governmental experience in tax collection, avoidance by taxpayers, not to speak of evasion, continues to be a fairly successful game. Altman, Recent Developments in Income Tax Avoidance (1934) 29 Ill. L. Rev. 154. Nullification of utility regulation by company officials has also been described in colorful language. Dimock, supra note 40, at 268-269.

44 Nor does it matter particularly whether control be relatively more in the executive than in the legislature or vice versa. The latter situation doubtless is to be preferred in such a matter as removal of quasi-judicial officials, Humphrey's Executor v. United States, 295 U. S. 602 (1935), because the legislature is more slow-moving than the executive and is certain to include representatives of the broadly public point of view as against attempted political aggrandizement. Subversion of impartial, scientific administration can be accomplished through either channel, however.
central objectives of government, coupled with a determination to support the attainment of these objectives so far as practicable, the officials in power must resist pressure groups at their peril. Thus government control is at times in danger of being perverted to the service of vested interests, propertied, occupational, or geographic. If thoroughgoing control should fail on that account, the results might be disastrous to the entire social fabric.

Considerations such as these have led to the advocacy of economic control by functional groups, usually with the backing of the government in maintaining a proper balance of interests, in enforcement of group mandates, or in both. Such control, it is said, would be less remote, better-informed regarding the problems to be dealt with, and therefore more palatable. It would, moreover, be non-political. Analysis indicates that, as applied to functional groups now existing, there is little substance to these claims.

In an effort to cut through the procedural slowness of bureaucratic regulation, to minimize public expense, and to render widespread control acceptable, the National Industrial Recovery Act called for the formulation of codes of fair competition by industrial and trade groups. In the administration of the Act reliance was placed upon code authorities in trades and industries, whose function it was to deal with code violations coming within their competence. The actual authority and responsibility in the promulgation of codes were, however, placed in the President, and the findings of the code authorities could under the Act be given no weight in judicial or Federal Trade Commission proceedings, which were the sole coercive means of enforcement. Consumers and in most instances employees were not represented in the drafting of the codes or on the code authorities. The resulting

---


47 See Fuchs, Constitutionality of the Recovery Program (1933) 19 St. Louis L. Rev. 1, 6-7, for a brief account of the mechanics of the Act.

48 See Fuchs, Collective Labor Agreements under Administrative Regulation of Employment (1935) 35 Col. L. Rev. 493, for an account of labor's participation in control under the N. I. R. A.

49 Code authorities on which labor was not represented were not permitted to handle violations of code labor provisions.
IOWA LAW REVIEW

administrative brew was far from being as palatable as had been hoped.50

Plans of functional control by existing industrial and commercial groups could succeed in correcting few of the elements of weakness obtaining in outright governmental regulation. On the contrary, they probably would introduce weaknesses of their own. Unless a bait were offered to the interests to be regulated, in the form of collective rigging of the market in which they operated,51 the control which was set up would be likely to be as opposed to their immediate profit as the prescriptions of public officials.52 Enforcement, therefore, would be equally difficult, and it would be unaided by the methods and personnel standards which government has worked out for itself over a long period of time. Enforcement personnel might indeed turn out to be superior to that which the government affords, but there is no assurance that such would be the case. Even conceding effective administration, furtherance of the public purpose of a better distribution of income from the regulated trade or industry can result only if the controlling group is properly composed. Whether power actually can be placed by such means in the hands of those whose interests coincide with the public interest presents a crucial question.

It is consumers and workers who, in addition to the owners and managers of businesses, require representation in any functional


51 Greater freedom for trade associations has not been seriously advocated except as a means of permitting intelligent competition in the light of the information and suggestions made available through these associations. Hoover, The Attitude of the Department of Commerce towards Trade Associations (1922) 23 Econ. World (n. s.) 544; Fay, The Trade Association and Its Place in the Business Fabric (1923) 2 Harv. Bus. Rev. 84. The price fixing which at times has been accomplished through them, since it operates without checks at the hands of the government or of opposing interests, is manifestly a perversion from the standpoint of the general welfare. United States v. Trenton Potteries Co., 273 U. S. 392 (1927).

52 Even if the control group is made representative, it will not necessarily be more so than a well-vised government or more acceptable on that account. It will, of course, be more representative of the economic group than a geographically-chosen legislature, but public administrative agencies can reflect and comprehend the interests to be regulated. Under the N.R.A. objection was frequently made by the regulated businesses themselves to control by competitors on code authorities or by their agents. Lyon, op. cit. supra note 50, at 250-255.
group to which controlling powers are given, if the objectives of lowering prices and raising wages are to be attained by regulation rather than competition. There exist no precedents for the inclusion of consumers in such control agencies. Except where capital goods or raw materials are absorbed by industries, the consumers of particular products and services are not a sufficiently definite group to be incorporated—although the development of a representative consumers' cooperative movement in the United States would alter the picture in this respect. The workers in industries and trades, of course, are definitely recognizable groups. Their organization into unions affords a means of obtaining representation of their interests by delegates whose responsibility can be enforced. Through collective agreements it is possible to bring workers and employers together, both for the purpose of laying down standards in quasi-legislative fashion and for the purpose of maintaining continuous administration of the prescribed provisions. Consumers who are organized can be brought into such schemes by similar methods. Organized farmers can be included in the same fashion.\(^5\)

Seductive as such plans may be, it should be noted that they are contractual in nature and must be arrived at by a process of bargaining. Owners remain owners and deal at arm's length with the other interests represented. Such a process may work well enough in relation to a single matter such as wages and working conditions and yet be unsuited to controlling the more numerous factors that would be involved in the furtherance of a national policy of redistribution of income. Complete disclosure of the facts relating to the businesses, labor unions, and other organizations involved would, for example, be essential. That it would be voluntarily forthcoming seems unlikely. To compel it by govern-

---

\(^5\) Cooperative agricultural marketing agencies commonly are corporations engaged simply in the sale of commodities. Hanna, The Law of Cooperative Marketing Associations (1913) § 119. Their agreements, however, could easily be made to embrace other matters. In the St. Louis milk shed at the present time an agreement between the producers' cooperative and the milk distributors in the city, results in the payment of stipulated sums by both farmers and distributors for the payment of sanitary inspectors supplementary to those regularly employed by the city. These inspectors are employed and the funds are handled by a "Dairy Commission" established for the purpose. The city, which is a nominal party to the agreement, appoints the inspectors to its staff for the purpose of investing them with the necessary powers.
mental action and at the same time to engage in the task, which probably would be equally necessary, of preventing unfair practices on the part of one bargaining interest as against the others, would be to rely upon the cumbersome procedure and to invite all of the resistance and generate the friction that threaten the success of first-hand governmental regulation itself. Experimentation along these lines is all to the good. Statesmen, however, would do well to cast about for other means of furthering social objectives.

Rather preferable, apparently, is the practice of consultation with interest groups on the part of governmental regulatory agencies. Public power remains lodged definitely in the hands of responsible officials whose primary duty is to the interest of the public. At the same time their action is informed by contact with those whose affairs are to be regulated. No reason appears why they cannot balance the scales justly between conflicting interests and win as well as compel acceptance of their measures. The process of consultation is different from that of conducting hearings. The latter usually is formal and more or less advisory in character. The former involves free exchange of views and information in informal discussion. It is particularly valuable in advance of the promulgation of general regulations. Thus far it has been resorted to voluntarily by officials more often than it has been employed because of legal prescription. It might easily be required with

---


55 Attention will not be given here to control of private enterprise by competition at the hands of public enterprise. Experiments in this direction may accomplish much good. Inherent objections, however, seem to negative the wisdom of extensive reliance upon such a device. Wasteful duplication of facilities may be a proper price to pay for escape from evil conditions, but it seems a confession of ineptitude in the use of more economical means of control. And the "yardstick" can hardly be accurate in any event. In reading it so much depends upon accounting methods, and the conditions prevailing in the enterprises sought to be compared are likely to vary so widely, that unfairness to one side or the other in the controversies which are certain to ensue seems inevitable.

56 The exercise of delegated legislative powers affecting private interests seems in England to be commonly accompanied by consultation with those interests. Wade, Departmental Legislation (1933) 5 Camb. L. J. 77. The practice in this country has not developed to a similar degree. The outstanding instance of consultation on a definitely-announced basis, the Federal Trade Commission's trade practice conference procedure, looks toward voluntary
considerable uniformity in many fields of governmental control.57
Administrative control by public officers, acting according to established methods and in the light of regular conferences with interested groups, seems more promising than any of the other methods previously reviewed as a means of attaining necessary social objectives through private business. There remain for consideration the less orthodox alternatives originally suggested.

IV

Amazingly little constructive thought has as yet been devoted to ways and means of organizing economic activity for the attainment of social objectives under modern conditions.59 Reversion to small-scale business, with competition to regulate it, and control through old-fashioned commands of the state, formulated in various ways but in the end supported by penal sanctions,59 furnish the chief reliances of such “liberal” proposals as have serious chances of standards of competitive practice and not toward enforceable regulations. Watkins, The Federal Trade Commission (1926) 40 Quar. J. Econ. 578. Participation by interest groups in the selection of public officials is, however, not uncommon. Chamberlain, Democratic Control of Administration (1927) 13 A. B. A. J. 186. This, in turn, shades into occasional delegation of actual regulatory power to professional groups. Bradley v. Board of Zoning Adjustment, 255 Mass. 160, 150 N. E. 892 (1926); Note (1932) 32 Col. L. Rev. 80.

57 Laski, A Grammar of Politics (1925) 244 et seq. sets forth an ideal scheme of control of their internal affairs by functional groups and of consultation with such groups by government officials in the regulation of matters in which the public interest is primary.

59 “We, like all other peoples in history, have allowed our social thought to lag. The industrial system, which on the technical side is collectivism, exists in the twentieth century; the system of thought we bring to it comes from the eighteenth century. We are meeting the industrial system head-on with a system of thought quite out of date. This holds alike for conservatives and for liberals, for stand-patters and for reformers. If history teaches anything, it teaches that the reformer always arrives on the spot one generation too late.” Hamilton, The Anti-Trust Law and the Social Control of Business, in Handler, a Symposium on the Federal Anti-Trust Laws (1931) 10.

59 Regulation of business by administrative agencies, which is discussed earlier in the text, obviously depends for its ultimate sanction upon penal provisions. These do not require frequent invocation where the disposition to use them is clear; but an evident reluctance to apply them, as in the case of the N. R. A., or an inability to make them effective, as in the case of prohibition enforcement, quickly lead to a breakdown of the system of control. As to the statutory techniques involved in penal regulation, as well as in the less applicable “civil” regulation, see Freund, Legislative Regulation (1932).
winning present public support in the United States. Private
labor-capital cooperation has seldom altered the power of control
or the distribution of income. When occasional excursions into
public ownership are made in the United States, either ad hoc
devices are employed or existing bureaucratic or corporate patterns
of control are copied in varying combinations. In no instance of
public enterprise does there appear to have been an attempt to
create a form of organization which should so distribute control
that, by reason of participation by workers or consumers, the
economic objective of better distributing income would be furthered.
Reliance is always placed upon legislative prescription, supple-
mented by official discretion, to bring about proper service to the
“public”. The interests of employees are almost never promoted.

60 The purchase of compliance with legal requirements from affected private
persons by means of money payments, as under the A.A.A., or the direct
distribution of wealth by means of bonuses, subsidies, or relief are alternative
measures which receive much current acceptance. Leaving out of account
the moral factors involved, such measures must be as limited as the ability
of the government to extract taxes or as ephemeral as the duration of a money
or credit inflation.

61 A number of “New Deal” enterprises, including the Public Works Emer-
gency Housing Corporation, have taken the form of Delaware corporations,
indistinguishable, except for Federal ownership of their stock, from private

62 Even the T.V.A., widely heralded as an experiment which, unlike other
New Deal agencies, is genuinely “socialistic” in character, contains no radical
departure from established models of government enterprise. Endowed with
corporate status in order to facilitate business transactions, legal processes,
and relatively independent accounting, the control of the Authority is vested
in a Board of three members which is essentially similar to a governmental
commission — engaged in this instance in managerial rather than regulatory
functions, but responsible to the Government alone. 48 Stat. 58, 16 U.S.C.A.
§§ 831–831dd (1933). The freedom of the Authority from the ordinary laws
relating to government personnel enables it, however, to experiment, if it
wishes, in new forms of employment relations.

63 The proclamation of the president, assuming control of the transportation
systems of the country for the duration of the World War, Dec. 26, 1917,
40 Stat. 1733, however, continued all applicable existing statutes, including
§§ 101–104 (1913), in effect. The same provision appears in the later Act
Providing for the Operation of the Transportation System, Mar. 21, 1918,
§ 10, 40 Stat. 456. The Canadian National Railways operate under collective
bargaining with unions as do the privately-owned carriers in the United States
and Canada.
except for the security of tenure contained in occasional civil service laws.  

The control of private productive enterprises by managements in which competing claimants to the benefit of their operation participate has long been a dream of non-socialist democratic thinkers who recognize that machine production has made individual bargaining by labor into an instrument of autocratic control instead of a means of arriving at consensual arrangements. Consideration has already been given to collective bargaining as a means of group control of employment relations under private ownership. Extension of labor participation into other phases of management by voluntary concession on the part of owners or by arrangements effected through collective bargaining has been more than a casual phenomenon since the World War. As has been pointed out, however, such schemes, even where they have been genuine and have dealt with more than petty details, have largely depended for such success as they have had upon the competitive advantages which increased efficiency has afforded. If these were eliminated by the general adoption of similar plans, it is doubtful at best whether the participants would be able to resolve their conflict concerning the distribution of benefits in continued cooperation. Consumers, of course, have not been represented in such schemes; but clearly they might be.

64 The outstanding example of protection to employees in what is essentially a public economic undertaking is, of course, the prohibition of removals, except for cause, in the classified postal service. 37 Stat. 555 (1912), 5 U. S. C. A. 652. The right of the employees in this service to belong to organizations for the betterment of their status, so long as strikes are not contemplated, is protected in the same section of the statutes against coercive use of the removal power.

65 Bruère, The Main Business of Industry (1923) 50 Survey 133.

66 See page 343, supra.. See also the writer's Collective Labor Agreements in German Law (1929) 15 St. Louis L. Rev. 1; The French Law of Collective Labor Agreements (1932) 41 Yale L. J. 1005; Collective Labor Agreements Under Administrative Regulation of Employment (1935) 35 Col. L. Rev. 493.

67 See the excellent review by J. B. S. Hardman, Labor-Capital Cooperation, 8 Encyc. Soc. Sciences 624.

68 Ibid.

69 Producers' cooperation has, for the most part, developed internal conflicts of interest which have prevented its success. Saposs, Producers' Cooperation, 13 Encyc. Soc. Sciences 458. Industrial Relations Councils within capitalist industry have not displayed vitality. Guillebaud, Industrial Relations Commissions, 7 Encyc. Soc. Sciences 717.
The development of consumers' cooperative enterprises, with full employee participation in management and in the benefits of increased efficiency, offers intriguing possibilities which go beyond those suggested by labor-capital cooperation. There is more identity of interest between consumers, who are also workers, and the workers in a consumer-owned establishment, who are conscious of their status as consumers, than there is between workers and the owners of capital. The problem of developing an efficient, trustworthy management seems not to have presented undue difficulty in the large-scale consumer cooperation of Europe. Obviously under a completely cooperative system, with no opportunities for profit from the investment of capital, the temptation to graft on the part of officials would be slight in any event, for the limits to its attractiveness would be set by the capacity of the individual and his family to consume the ill-gotten gain. The restrictive feature in such a system would seem to be the limited ability of the individual consumer-worker actually to participate in the affairs of the numerous enterprises to which he would be a party. Popular control, however, could be as remote and sporadic as in the modern democratic state without serious danger, so long as expert direction was obtainable and predatory interests did not present a menace from without.

On the whole, however, the political state affords, at least for the time being, a more available, if not an inherently better agency


71 "Asked to elect masses of committees to perform all manner of representative functions on their behalf, and to keep their delegates constantly up to the scratch by persistent attention to their doings, the mass of factory workers would speedily settle the question for themselves by not bothering to vote, and the committees would die of inanition." G. D. H. Cole, The Next Ten Years in British Social and Economic Policy (1929) 161. Syndicalist and Guild Socialist theories would almost certainly break down in application, because of the fact thus pointed out.

72 "Subject to a broad control of economic policy and a continuous public scrutiny of the results achieved, the consumer will find his best interest in getting industrial administration into the hands of those most competent to conduct it. He has, indeed, to secure that the work of production shall not be interrupted unnecessarily by internal friction, and the assurance of the right conditions to the producers therefore concerns him as consumer as well as citizen. But, given this, he does not need to run industry, or to insist on its administration by representative bodies elected by all the citizens. His best course is to devolve industrial administration, as distinct from policy control, upon the expert..." Id. at 154.
for introducing social considerations into the conduct of economic enterprises than do workers' or consumers' cooperative organizations. The state can command the necessary capital more readily, and it has developed administrative methods and personnel standards which can be availed of. It is not necessary that the state assume complete ownership or management in order to introduce its influence into economic undertakings. Partial stock ownership, carrying with it participation in management, is a distinct possibility. Ownership of a natural resource essential to the conduct of an industry or control over a franchise without which the industry cannot function may be made the basis of government participation in management. Government enterprise in the key portion of an economic process may become the means of controlling private enterprise in the remainder.

Complete government ownership itself may be almost infinite in its varieties. Coming increasingly into favor is the government-owned corporation, of which there are numerous examples in the United States, in England, and on the Continent of Europe. Its principal recognized advantages over bureaucratic operation of public services lie in its greater adaptability, the possible

---

73 Webbink, Government Owned Corporations, 7 Encyc. Soc. Sciences 106, citing the First and Second Banks of the United States and modern European "mixed" corporations for the supply of public services.

74 In the United States, franchise contracts have been made the basis of attempted control over public utilities whose managements remained wholly private, instead of a basis for public participation in management. Without substantial administrative means of enforcement, such control has been largely ineffective.

75 Thus the T.V.A. is required to control the rates to ultimate consumers for electricity sold by the Authority to intermediate suppliers. 48 Stat. 65, 16 U. S. C. A. § 831k (1933). Similarly the British Central Electricity Board, a corporate body, has as its chief function the acquisition or construction and ownership of a unified system of main transmission lines and the purchase of electricity from selected, privately owned generators and its sale to privately owned suppliers, together with the exercise of extensive powers over generators so as to increase the efficiency of the unified system. 16 & 17 Geo. V, c. 51 (1926). Regulation of service to consumers remains in the hands of the Electricity Commission, a regulatory body. It has been suggested that the Commission will prove to be superfluous when the Electricity Board's scheme goes fully into operation. Dimock, British and American Utilities: A Comparison (1934) 1 U. Chi. L. Rev. 265, 275.

76 May, Government Ownership, 7 Encyc. Soc. Sciences 111.

77 Webbink, op. cit. supra note 73.
tiation of its methods from cumbersome official procedures, and the greater possibility of insulating it from political control. In addition, the provision for means of consumer and employee participation in management is more practicable in the case of segregated public enterprises than in the case of bureaus which are subject to all the usual laws relating to official methods and personnel. The matters of adaptability and of differentiation in methods are beyond the scope of this essay and probably are self-evident. Insulation from politics and participation in management by consumers and employees are, however, of the essence of the problem under discussion.

As regards freedom from political control, the provision for boards with long terms of office and overlapping tenure on the part of members is an obvious device. Its effectiveness where it has been tried cannot be measured objectively, and there is not even a general estimate of its success or failure. Americans, including lawyers, will be governed in their attitudes toward it largely by their political and economic philosophy. The “spotted actuality” will furnish different answers to different people. At least one ingenious device for increasing the insulation from politics, however, deserves mention. The Act establishing the London Passenger Transport Board as a corporation for the operation of most of the metropolitan communications of London provides for a board of “Appointing Trustees” to exercise the function of naming the members of the Transport Board. The Appointing Trustees are the following: the chairman of the London County Council; a representative of the Advisory Committee; the chairman of the Committee of London Clearing Bankers; the president of the Law Society; the president of the Institute of Chartered Accountants in England and Wales; and, for the filling of vacancies after the original creation of the Transport Board, a representative of that Board itself. The “Advisory Committee”, which is represented on the board of Appointing Trustees, is a committee, representative of various portions of the metropolitan area and of various affected interests including labor, which functions in connection with the Transport Board. For the exercise of the appointing function an ad hoc group, such as the Appointing Trustees, is probably to be preferred to the system of direct appointments or nominations by professional organizations or other established groups, which fre-

---

78 23 & 24 Geo. V. c. 14, § 1 (1933).
ALTERNATIVES IN GOVERNMENT CONTROL

quently are shot through with politics of their own. Offhand, one would suppose the arrangement in the Act to be far more effective in procuring able, impartial directors for the transport system than the ordinary methods of selecting the directors of private corporations.

Except in the advisory manner provided in the London Passenger Transport organization, the introduction of consumer and employee participation in the control of public corporate enterprises has not been used in actual practice. In the Transport Act, however, significant powers of investigation are conferred upon the Advisory Committee, including the power to compel testimony.\(^7^9\) In addition, the trade unions are recognized in the establishment of wages and working conditions\(^8^0\) and provision is made for the creation of a system of permanent joint councils representative of the Transport Board and of employees.\(^8^1\) Clearly a form of economic enterprise has been established under the Act which, in the absence of counter-balancing weaknesses springing from other causes, is more likely than either the ordinary private or public undertaking to result in a socially desirable distribution of benefits.\(^8^2\)

Several more or less well known proposals for the socialization of particular industries have embodied the idea of direct consumer and employee participation in control. Schemes for the nationalization of the British coal industry, publicly advocated by responsible individuals and bodies, have provided for management by national, district, and local councils, representative in varying proportions of the Government, of consumers, and of manual, technical, and commercial employees.\(^8^3\) In this country the plan of two authors for the establishment of a monopoly in bituminous coal under the ownership of a single corporation managed by a

\(^7^9\) Id. § 60, supplementing 14 & 15 Geo. V, c. 34, § 3.
\(^8^0\) Id. §§ 67, 68, 72.
\(^8^1\) Id. §§ 69, 70.
\(^8^2\) In the report of Joseph B. Eastman, Federal Coordinator of Transportation, with reference to ultimate nationalization of the railroads of the United States, provisions are recommended which are not dissimilar to those in the London Passenger Transport Act. Thus the right of collective bargaining would be guaranteed. An advisory board of twenty-four members, with full access to all records and information in the possession of the railway administration, would be established. N. Y. Times, Jan. 21, 1934, § 1, at 3, 26.
\(^8^3\) Lubin & Everett, The British Coal Dilemma (1927) 320–327.
board of consumers’ and workers’ representatives would perhaps not be classed with schemes for government-owned corporations; for the proposed entity would not be under the continuous control of government at all. Nevertheless, government would be called upon to establish the new control through the use of coercive powers over the present owners of coal properties to compel their transfer; would exercise continuous scrutiny; and “must remain the final judge of the organization”, making such changes as might prove to be necessary. Investors would be paid a fixed return upon the capital required. The celebrated “Plumb Plan” for the railroads of the United States would involve government acquisition of the properties and their operation by a corporation established for the purpose, whose directors would be representative in equal proportion of the “public”, the management, and the employees. It requires no demonstration that such plans, if they were applied to a substantial number of industries and if there were no counterbalancing weaknesses, would go far in the direction of effecting a distribution of income far different from the concentration which is the root cause of present economic difficulties.

Bureaucratic management of public services has impressive works to its credit. Outstanding on the North American Continent is the Ontario Hydro-Electric Power Commission. Of realistic appraisal of bureaucracy as an economic manager in terms of efficiency and social distribution of benefits there is as yet, however, relatively little. It can only be suggested that the governmental process is basically designed for the service of the general welfare and that there is no inherent obstacle to making it efficient as well as benevolent, provided suitable incentives can be drawn upon. Its uniformity, however, and the lack of employee participation in policy determination make it a less likely candidate than the public corporation for the role of distributor of economic income.

84 Hamilton & Wright, A Way of Order for Bituminous Coal (1928).
85 Id. at 255.
87 “All factors considered, the Post Office’s management of British telephones, in which the department is assisted by a firm of public relations consultants, probably surpasses that of any other public utility in Great Britain.” Dimock, British and American Public Utilities: A Comparison (1934) 1 U. Chi. L. Rev. 265, 281.
The problem of incentives, where the profit motive is not relied upon as the mainspring, is basic to the entire question of government ownership and management. Again there is much that needs to be done by way of experiment and exploration. Accurate analysis reveals little that is flattering to private corporate enterprise and much that is hopeful in public enterprise. And this question is of the essence of the lawyer's problem—namely, the procedure for getting things done through law. The mists of traditional, cynical views of "human nature" and of idealized theories of the operation of the search for private gain badly need to be blown away.

The foregoing sketchy survey will have served its purpose if it aids in pointing out the principal lines of advance that are possible.

---


It is one of the ironies of the position of the legal profession in the United States at present that its attention in regard to government regulation of economic activity is so largely directed to matters lying outside its special competence, with relatively little emphasis upon considerations peculiarly within the legal field. Thus large issues of policy, couched in terms of constitutional doctrine, are debated among lawyers ranged on the two sides of the fence that separates the advocates of the New Deal from its opponents. Now the question of how far business men may rightly be subjected to statutory controls presents issues of liberty as against public authority which concern all individuals as people, as well as issues of economic wisdom upon which only those with economic experience or training are especially qualified to throw light. There are involved, also, questions of procedure and of administrative efficiency upon which lawyers as lawyers are entitled to particular deference. Yet members of the legal profession often lay claim to superior authority in regard to all constitutional questions and persist in couching even such obviously administrative issues as the desirable size of governmental units, upon which lawyers might be expected to offer genuine wisdom, in terms of high-sounding issues of liberty and the "right" of "local" self-government as against central authority. As the American government is organized, of course, the profession cannot escape the necessity of presenting all pertinent constitutional questions to the courts and of having such of its members as are elevated to the bench decide these questions with finality. The emphasis in professional literature ought to be placed, however, upon the realistic and fair presentation of these issues rather than upon the direction in which the decision should go, except in so far as administrative and procedural points are involved. See Bikle, Judicial Determinations of Questions of Fact Affecting the Constitutional Validity of Legislative Action.
in solving the economic difficulties of the twentieth century by means of law. In its public capacity the legal profession has no more important duty than the impartial appraisal of these alternatives, without regard to fears or slogans which, for the most part, have little bearing upon procedural realities.

(1924) 38 Harv. L. Rev. 6; Denman, Comment on Trials of Fact in Constitutional Cases (1935) 21 A. B. A. J. 805. A somewhat greater skepticism regarding the wisdom of having lawyers solely entrusted with the decision of fundamental questions of statecraft would betoken a profession better equipped to handle the matters more especially requiring its attention, such as ways and means of fairly and efficiently knitting together organized control by economic groups under the supervision of government—the task which was so disastrously botched by the National Recovery Administration. The American Bar Association's Special Committee on Administrative Law, whatever may be thought of the validity of its approach and its conclusions, properly concerns itself with those procedural realities in the control of business which lie peculiarly with the province of lawyers. (1933) 58 A. B. A. Rep. 407; (1934) 59 id. at 539.