1934

Capitalism, The United States Constitution and the Supreme Court, Part 2

Hugh Evander Willis
Indiana University School of Law - Bloomington

Follow this and additional works at: https://www.repository.law.indiana.edu/facpub

Part of the Supreme Court of the United States Commons, and the Taxation-Federal Commons

Recommended Citation
Willis, Hugh Evander, "Capitalism, The United States Constitution and the Supreme Court, Part 2" (1934). Articles by Maurer Faculty. 2813.
https://www.repository.law.indiana.edu/facpub/2813

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.
CAPITALISM, THE UNITED STATES CONSTITUTION AND THE SUPREME COURT*

By Hugh Evander Willis**

INCOME TAXES

The extent to which the Supreme Court has allowed the capitalistic system to be affected by income taxes is interesting. In the case of Springer v. United States, it upheld, by a unanimous decision, the Civil War income tax law on the theory that the income tax was not a direct tax but an excise tax. But in the case of Pollock v. The Farmers L. and T. Co., decided in that period when Justice Field was having his greatest influence, the Supreme Court, by a five to four majority, in an opinion written by Chief Justice Fuller, whose great ambition seemed to be to outshine Field, held that an income tax was a direct tax and, therefore, unconstitutional unless apportioned according to the impracticable plan of the Constitution. As a result of this decision, the 16th Amendment was incorporated into the Constitution, and in the case of Brushaber v. Union Pacific Ry. Co., the Supreme Court held that a federal income tax was thereby made an excise tax. Yet, in Eisner v. Macomber, by another five to four decision, the Supreme Court held that an income tax on stock dividends was a direct tax. The case of Eisner v. Macomber adopted as the test for income the cash basis. Since that time the Supreme Court has gradually adopted the accrual basis in place of the cash basis. The subjection of property to income taxes is another important limitation upon the capitalistic system.

*Continued from the March, 1934, issue of the Kentucky Law Journal.


125 (1880), 102 U. S. 586.
126 (1895), 157 U. S. 429.
127 (1916), 240 U. S. 1.
128 (1920), 252 U. S. 189.
ANTI-TRUST LAWS.

In the case of United States v. Trans-Missouri Freight Assn., and United States v. Joint Traffic Assn. (some more decisions of the nineties), the Supreme Court held, by a five to four and five to three decision respectively, that the prohibitions of the Sherman Anti-Trust Act of July 2, 1890, "apply to all contracts in restraint of interstate or foreign trade or commerce without exception or limitation, and are not confined to those in which the restraint is unreasonable." But in 1911, when Chief Justice White, a dissenter, and Justice Harlan, a majority justice of 1896, were the only two members still left on the bench, the Supreme Court, in opinions written by Chief Justice White, held that the Anti-Trust Act should be construed in the light of reason, and when so construed it prohibits only contracts and combinations "which amount to an unreasonable or undue restraint of trade in interstate commerce." Only nine years later, in 1920, the Supreme Court, in the case of United States v. United States Steel Corporation, held that the Anti-Trust Act should be construed in the light of "the risk of injury to the public interest" and "detriment to the foreign trade." With these decisions, the United States Supreme Court freed business from most of the restrictions contemplated by the Anti-Trust Act.

PRICE FIXING.

With the case of Wilson v. New, the United States Supreme Court almost opened the door to price fixing of wages in public callings, but this door was quickly closed by the case of Charles Wolff Packing Co. v. Court of Industrial Relations, Kansas. And in the case of Williams v. The Standard Oil Company, the Supreme Court held emphatically that a legislature is without power to fix prices unless the business or prop-

130 (1897), 166 U. S. 290.
131 (1898), 171 U. S. 505.
132 Standard Oil Co. of New Jersey v. United States (1911), 221 U. S. 1; United States v. American Tobacco Co. (1911), 221 U. S. 106.
133 (1920), 251 U. S. 417. See also, United States v. Trenton Potteries Co. (1927), 278 U. S. 392.
134 (1917), 243 U. S. 332.
135 (1923) 262 U. S. 522.
property involved is affected with a public interest, and even this exception did not include the fixing of wages of employees working for public callings. But only two years later, in *O'Gorman and Young v. Hartford Fire Ins. Co.*\(^{137}\) it held it constitutional to regulate the compensation of insurance agents, and only one year later in the case of *Stevenson v. Binford*,\(^{138}\) it held that it was constitutional to fix prices of private contract carriers outside of public callings. These decisions seem to have broken the taboo against price fixing. If so, we may be about to enter upon a new era of social control of business in a greater way than it has ever been exercised before.

**Liberty Protected.**

Without giving in detail any further illustrations of the control of business exercised by the courts under the due process clause, a few general references will be made to cases of where the courts have favored capitalism and some general illustrations of where they have favored social control. First, some illustrations of where they have favored capitalism will be given. The courts have favored capitalism by holding that a law is unconstitutional which requires all children between eight and sixteen to attend the public schools;\(^{139}\) by holding that an ordinance is unconstitutional which forbids the covering of fruit with colored netting;\(^{140}\) by holding that it is unconstitutional to segregate the races geographically;\(^{141}\) by holding that it is unconstitutional to forbid the sale of provisions and liquor where dry goods are also sold;\(^{142}\) by holding that neither theaters,\(^{143}\) nor employment agencies,\(^{144}\) nor sellers of gasoline,\(^{145}\) nor manufacturers of ice\(^{146}\) can be regulated as public callings; and by holding that employers cannot have the remedy of injunction taken

---

177 (1931) 282 U. S. 251.
138 (1932), 63 S. Ct. 181. The New York milk case decided after this article was first written is an even more striking case of price fixing. *Nebbia v. People of N. Y.* (1934), 54 S. Ct. 505.
140 *Frost v. Chicago* (1899), 178 Ill. 250.
141 *Buchanan v. Warley* (1917), 245 U. S. 60.
142 *City of Chicago v. Netcher* (1899), 183 Ill. 104.
away from them, and by upholding freedom of speech and the press against censorship (even by injunction). Capitalism has also been protected by the supernal postulate of the United States Supreme Court that taxation, in order to be legal, must be for a public purpose; by its gradual prevention of multicontrol; and by its prohibition of retroactive gift taxes.

**SOCIAL CONTROL UPHELD**

Those who have had the opinion that the United States Supreme Court has been dominated by our economic order instead of dominating our economic order and that it has protected property, corporations, and financiers, rather than the general social interests have a surprise coming to them when they learn what has been the real work of the United States Supreme Court in connection with the due process clause. The control which the Supreme Court has exercised over the economic order has been through its legalization of the police power and the power of taxation and the power of eminent domain. In these respective fields, it has permitted so much social control that it has both made a good part of our social control, especially through its recognition of social interests, and has placed remarkable limitations upon the personal liberty and individualism of our capitalistic system.

In developing the police power, it has perhaps established and put into operation more social control than in connection with any other power. Thus, it has upheld liquor laws for the protection of the social interests in health, safety and morals. It has upheld compulsory vaccination laws for the protection of the social interest in social health. A state court has upheld, and the United States Supreme Court would undoubtedly concur in upholding a statute requiring owners to raise the

---

147 Truax v. Corrigan (1921), 257 U. S. 312.
149 Loan Assn. v. Topeka (1875), 20 Wall. 655; Green v. Frazier (1920), 253 U. S. 233.
151 Coolidge v. Long (1931), 282 U. S. 552.
152 License Cases (1847), 5 How. 504; Mugler v. Kansas (1887), 123 U. S. 623.
grade of their land for the preservation of the public health.\textsuperscript{154} It has upheld an ordinance providing for segregation of lewd characters in order to protect the social interest in morals.\textsuperscript{155} It has forbidden the sale of stock on margin for the protection of the social interest in morals and in general progress.\textsuperscript{156} It has upheld statutes prohibiting the use of coupons by business men in order to protect the social interest in morals.\textsuperscript{157} It has upheld a requirement for the stoppage of interstate trains in cities of fairly large population for the protection of the social interest in safety.\textsuperscript{158} It has upheld zoning laws for the protection of the social interest in the aesthetic (although for other pretended social interests).\textsuperscript{159} It has upheld statutes forbidding the assignment of future wages to protect the social interest in public health and the social institution of the home.\textsuperscript{160} State courts have upheld the commission of children to institutions for delinquent children;\textsuperscript{161} and the interdiction of marriages between imbeciles, the feeble-minded, and epileptics;\textsuperscript{162} and the United States Supreme Court has upheld sterilization laws,\textsuperscript{163} all for the protection of the social interest in our human social resources. State courts have upheld the killing of deceased animals for the protection of the social interest in property resources and in health.\textsuperscript{164} The Supreme Court has upheld statutes controlling the escape of gas and oil from wells for the protection of economic social resources.\textsuperscript{165} State courts have upheld statutes requiring incorporation as a condition to the privilege of doing banking for the protection of the social interest in general security.\textsuperscript{166} The Supreme Court has upheld statutes making cities absolutely liable for damage done by mobs to protect the same social interest in general security.\textsuperscript{167}

\textsuperscript{154} \textit{Nickerson v. Boston} (1881), 131 Mass. 306.
\textsuperscript{155} \textit{L'Hote v. New Orleans} (1900), 177 U. S. 587.
\textsuperscript{156} \textit{Otis v. Parker} (1903), 187 U. S. 606.
\textsuperscript{157} \textit{Rast v. Van Deman} (1916), 240 U. S. 342.
\textsuperscript{159} \textit{Village ofEuclid v. Ambler Realty Co.} (1926), 272 U. S. 365.
\textsuperscript{160} \textit{Mutual Loan Co. v. Martell} (1911), 222 U. S. 225.
\textsuperscript{161} \textit{Ex parte Sharp} (1908), 15 Idaho 120.
\textsuperscript{162} \textit{Gould v. Gould} (1905), 78 Conn. 242.
\textsuperscript{163} \textit{Buck v. Bell} (1927), 274 U. S. 200.
\textsuperscript{164} \textit{Miller v. Horton} (1891), 152 Mass. 540.
\textsuperscript{165} \textit{Ohio Oil Co. v. Indiana} (1900), 177 U. S. 190; \textit{Walls v. Midland Carbon Co., et al.} (1920), 254 U. S. 300.
\textsuperscript{166} \textit{Weed v. Bergh} (1910), 141 Wis. 569.
\textsuperscript{167} \textit{City of Chicago v. Sturges} (1911), 222 U. S. 313.
It has upheld an assessment on banks for a depositors’ guaranty fund168 and the liability of the directors of a bank for taking deposits after the bank’s insolvency169 in order to protect the social interest in general security. It has upheld statutes forbidding unfair competition by combinations for the purpose of injuring other competitors for the protection of the social interest in general economic progress.170 State courts have upheld limitations on ownership of property to prohibit spite fences for the protection of the social interest in peace.171 State courts have upheld statutes forbidding the creation of monopolies,172 and both state courts and the United States Supreme Court have upheld workmen’s compensation laws173 for the protection of the social interest in general progress. The Supreme Court has upheld the forfeiture of property used to violate the law in order to protect the social interest in our political institutions.174

Enough has been given to show both the extent of constitutional control of business and the judicial creation of social control. It is apparent from the few illustrations which have been given how extensive is the work of the Supreme Court in the creation of law. If the purpose of law is the creation of a better social order by the protection of necessary social interests, it is apparent at once how important is the work of the Supreme Court when it determines the social interest which shall be protected by law.

Only a few typical illustrations of the social control which the United States Supreme Court has permitted through the taxing power will be given. In Green v. Frazier,175 the Supreme Court held that there was a sufficient public purpose for taxation in the government ownership program of the state of North Dakota. In the case of State Board of Indiana v. Jackson,176 it held that a state could constitutionally provide for graduated

174 J. W. Goldsmith, Jr.-Grant Co v. United States (1921), 254 U. S. 505.
175 (1930), 253 U. S. 233.
176 (1931), 235 U. S. 527.
excise taxes on chain stores without violating the equality clause. In Board of Trustees of University of Illinois v. United States, it held that the United States government could levy a tax upon goods imported by a state university from a foreign country, though the state university was an agency of the state, without violating our dual form of government, because the doctrine of a dual form of government does not apply so far as concerns foreign affairs. These decisions are enough to show how much liberty the United States Supreme Court will permit the states or the federal government in the matter of taxation of business enterprises and property.

In the matter of eminent domain, the state courts and the United States Supreme Court, in applying the constitutional limitation against the taking of private property for a public use without just compensation, have often held that there is a public use when the property taken would be useful to the public, although state courts and the United States Supreme Court have sometimes required a use by the public. So far as concerns taking, there has been a division in the cases. Some have taken the position that there must be a taking of a physical thing or a deposit of a physical substance on something owned before there can be a taking. But other cases have taken the position that there has been a taking whenever any rights of ownership are taken from an owner. And some have gone so far as to hold there is a taking of property when property has been damaged. Such decisions as this, of course, would protect property rather than social control, and all of the more liberal eminent domain cases would seem to have this effect were it not for the fact that the courts have been very liberal in drawing the line between the police power and eminent domain so as

177 (1933), 53 S. Ct. 509.
182 Rigney v. Chicago (1882), 102 Ill. 64.
to permit a great many forms of social control as proper exercises of the police power.\textsuperscript{183}

However, there is some constitutional law which seems to protect neither property nor social control, and this embraces most of what we call criminal law. A great many of the constitutional guaranties were originally put into the Constitution for the purpose of protecting innocent people against arbitrary social control. Under our technical system of legal procedure, most of these provisions (which were originally developed in English law to protect the guilty) have been perverted to the protection of criminals, so that they are enabled to prey both upon our economic order and upon our political order. Orderly human progress, so far as it depends upon private ownership of property, requires, on the one hand, the establishment of man’s creative and constructive ability over nature’s resources and, on the other hand, a system of institutional control to prevent the activities of those who would interfere with such ability and to secure the wealth resulting from individual work from being snatched away by social parasites. Under our political system, the first condition of human material progress has been realized through the inventive genius and technological development of industry, but the second condition has not been met. Government has allowed racketeering, unfair competition, lobbying, and many other unfair social practices to interfere with the abilities of those who would create new wealth; and it has allowed larceny, robbery, burglary, embezzlement, stock gambling, lotteries, high finance and many other schemes to get wealth without producing it to enable individuals to interfere with the security of acquisitions.

\textbf{Government Ownership}

The story of constitutional social control has been only half told. Not only has the United States Supreme Court set up a scheme of social control to regulate the conduct of capitalism where it has been given freedom to own property and to conduct enterprises, but it has set up a scheme of social control which places important limitations upon ownership and operation.

themselves. There are important vocations or fields of business in the United States, into which at the present time private capital is not permitted to enter. The industries of communication and transportation are in the process of passing out of the realm of private ownership. The conveyance of letters and parcels, and the construction and maintenance of highways are matters of public enterprise. The transmission of telegrams and telephonic communications and railroad transportation are still in the hands of private individuals, although there are some evidences that these may be in the process of passing from private hands to public hands. But services which minister to the public health, like water supply, drainage of cities, street cleaning, and medical services are coming increasingly under public ownership and control. Various employment enterprises, like the drainage of marshes, dredging of rivers, construction of sewers, dikes, and irrigation systems, are matters exclusively for government. Nearly the whole industry of education has passed out of the realm of private ownership. The industry of recreation, which brings within its scope public parks, zoological gardens, public libraries, public concerts, etc., are governmental in nature. Fire departments are also owned and operated by governments. Some of the largest producers of books and printed matter are governmental agencies. The United States government has embarked upon postal savings bank business, and there is a possibility of the Federal Reserve system becoming entirely governmental. Private ownership is denied more and more in the industry of making and distributing light, heat and power, whether by gas, electricity or water under hydraulic pressure. Public ownership is beginning to make significant inroads, in the business of housing, forestry, agriculture, mining and even manufacture and distribution. Taken all together, these make a formidable list of businesses denied to our capitalistic system. In other words, social control in all of these respects has been applied to the personal liberty of our capitalistic system.

Such has been the relation up to date between capitalism

---

and the social control provided by the Supreme Court and the Constitution created by it. Yet the Supreme Court has as yet neither given enough protection to capitalism to save it from the danger of self-destruction nor enough momentum to the social control of capitalism to realize the goal of law, whether that goal be regarded as social happiness or racial perfection.

PRESENT CHARACTERISTICS OF CAPITALISM

Capitalism has as its philosophy emphasized individual liberty, the economic laws of competition, supply and demand, laissez faire, and private ownership of property. It has always been opposed to social control or economic planning by government. Adam Smith gave six characteristics of capitalism: private property, private enterprise, individual initiative, profit motive, wealth, and competition. Business men, lawyers generally, and many economists continue to think of capitalism in these terms. They think what once was still continues to be. Yet it can be quickly shown that most of these characteristics have ceased to exist, not because of the work of government, but of capitalism itself.136

PRIVATE PROPERTY

Private property, for the most part, is no longer what it was in the day of Adam Smith. The division of property into active and passive ownership was unknown by him. Formerly, control was a universal function of ownership. Now, in industry, it has become a separate factor apart both from ownership and management though it is moving in the direction of management control. In the beginning, ownership consisted of the unity of interest in the enterprise, of power over it, and of acting with respect to it. By the nineteenth century, in industry, the first two only belonged to the owners who hired managers to perform the third. Now, all three have been separated. At the present time, people called owners own only an interest in the enterprise. Their situation is practically that of creditors who have loaned money, only for dividends instead of

135 Wealth of Nations.
136 Berle and Means, The Modern Corporation and Private Property; Laski, Democracy in Crisis.
Corporation control takes five different forms: first, complete ownership; second, majority control, as in the Ford Automobile Company through the ownership of a majority of the stock; third, control by a legal device, as in the field of public utilities through holding companies or voting trusts, etc.; fourth, minority control, as in the case of John D. Rockefeller and the Standard Oil Company of Indiana through proxy schemes, etc.; and fifth, management control, as in the case of the American Telephone and Telegraph Company and the railroads through a proxy committee. Corporations in which there is complete ownership are six percent by number and two percent by wealth. Corporations in which there is majority control are five percent by number and four percent by wealth. Corporations in which there is control by a legal device are twenty-one percent by number and twenty-two percent by wealth. Corporations in which there is minority control are twenty-three percent by number and fourteen percent by wealth. Corporations in which there is management control are forty-four percent by number and fifty-eight percent by wealth. Ownership, therefore, is becoming more dispersed like a centrifugal force, and control is becoming more concentrated like a centripetal force. As control becomes concentrated, power becomes widened. At the present time, industry is dominated by the economic autocrats who have acquired control of corporations. Yet they are not the owners of the corporations.

**Private Enterprise**

In the same way, corporate enterprise has supplanted private enterprise. The only room for initiative in the United States today in corporations is the room enjoyed by a dozen or so men in control of the organization. For the owners and workers, individual initiative has disappeared. Under the factory system, there was a single management. The wage earner surrendered the direction of his labor for wages. Under the modern quasi public corporation where the wealth of the many has been placed under the control of a few, the property owner has surrendered the direction of his wealth for the wages of capitalism. The owners have no responsibility.
INDIVIDUAL INITIATIVE

In the United States, individual initiative is being destroyed. At least all the good in it is being destroyed, and only the bad is being retained. Yet here, also, this is not due to the judges but to the financiers. The government is to blame only in a negative way. The corporations are to blame in an affirmative way. At first, in the United States, individualism expressed the agricultural economy. Then the traders, craftsmen and capitalists generally, crying "Laissez faire," set themselves free from old restrictions. Laissez faire, starting as a liberation of individualism has, however, developed one of the worst forms of tyranny, although it is still justified and defended in the name of freedom. The responsible individual entrepreneur has been replaced by the non-responsible corporation. The corporation has succeeded to the position formerly occupied by the feudal lord. Corporations have thrived upon the investment of the thrifty accumulations of the many, and the evasion of personal, social, and political responsibility. More recently, because the credit structure is the core of modern finance, the banker and his scheme of values have been set up as the head of the corporations; and money, consequently, has become king. This consummation has been accomplished behind a screen; yet it is none the less an accomplishment. Financiers and industrialists have abused and manipulated our political democracy for their own purposes. Their power has become so great that it has been customary to speak of "the interests" as an invisible government. Thus, within the superficial framework of a political structure postulated on free and individual farmers, there has been built up an economic hierarchy which has reduced the individuals concentrated very largely in the cities to dependent wage workers. Men have ceased to be personalities—planning, choosing, and judging—and have become more and more interchangeable machine parts handled like inanimate objects, only with the difference that things without life are guarded and cared for as things with life are not. Individuals have ceased more and more to be personalities with rights and powers and have become more and more links in a chain of causation. The corporation has operated like an army on rugged individualism.
PROFIT MOTIVE

The profit motive which the classical economists have so much emphasized is no longer operating as they prophesied that it would operate. The modern owners under our corporate system get the profit, but this does not motivate them to a more efficient use of their property for they have no control. Any spiritual values which used to attach to their ownership are gone. The wealth of stockholders is determined by others. It fluctuates, is liquid, and cannot be employed by them. They own only a symbol of ownership. When the owners were in control, there was at least an assumption that they would operate the business in their own interests, but there is no longer any guaranty that it will be operated even in this way. Those in control may not be interested either in profits for the stockholders or the distribution of profits or the marketability of securities. Those in control of our quasi public corporations, of course, are not entitled to the bulk of the profits; hence, they certainly cannot be motivated by the profit motive. Under such circumstances, it is difficult to determine for what end a corporation may be run. When it is remembered that the power over our huge corporations is not in the shareholders, or the bondholders, or the employees, or public consumers, but in the hands of a relatively few called management, the implications of the situation begin to appear. Those in control may desire profits, especially for themselves, but they are not the stockholders and therefore the so-called owners. Hence, if they would gain profits, they must sell to their corporations things which they own, or wreck their corporations, or shift profits to subsidiary corporations which they own, or speculate on the stock market in the buying and selling of stock. The motives in capitalism today are not so much probably profits either for the owners or for the controllers as the motives which actuated Alexander the Great.

COMPETITION

Competition, also, in modern times has ceased to operate in the way planned for it by the classicists. It has now developed either into monopoly or into cut throat competition.

Thus, it is seen that none of the characteristics of capitalism which Adam Smith emphasized any longer exist. Yet, in spite
of all this, the believers in and the minions of capitalism still adhere to the old doctrines of Adam Smith. The terms and concepts remain, although the economic conditions have changed so that new terms and new concepts are imperatively necessary. Capitalism itself has been undergoing such internal changes that it itself has largely destroyed many of the doctrines to which its believers still adhere. The corporate form of business organization and ownership has largely been responsible for these changes. More and more, private ownership has been overthrown and individual liberty subjected to the control of corporations. Adam Smith combated corporations as unfit to accomplish the results which he advocated. Yet today corporations dominate our economic life and have dethroned all of Adam Smith's generalizations. In spite of this, however, the disciples of Adam Smith, still both claim to believe in his doctrines and also in the institution of the corporation.

The result of all this is not merely a change in the nature of capitalism, but the creation of an economic order which has proven unworkable. Left to itself, capitalism has shown that it is vicious and impossible. It has turned out to be a house built on the sand. The profit motive largely exempted from social control has, with the other factors of capitalism, resulted in such concentration of wealth as to reduce our purchasing power so far below our producing power as to stop the operation of the wonderful economic machine for mass production which it has created. It would be economic suicide to continue to produce products which cannot be sold. This was the cause of our last depression, and our last depression was so serious that it came closer to wrecking our capitalistic system than most of those inside the system realized. Individualism, competition, greed, industrial warfare and the concentration of wealth caused unemployment, bankruptcy, poverty, crime, racketeering, lawlessness, disease, illiteracy, degeneracy, immorality and economic chaos. Capitalism has demonstrated that it cannot make itself work and that if nothing is done about the situation, it will simply perish from off the earth. Individualism, no matter how rugged, is doomed. The only question left is whether or not social control should be applied to capitalism so as to save it, and this involves two questions: first, whether or not capital-
ism is worth saving; and second, whether or not it can be saved by social planning even if it is worth saving.

SOCIAL PLANNING AND CONTROL

It cannot be emphasized too strongly that the pass into which capitalism has come is not the result of social control, but the result of allowing capitalism to operate without social control. It is true that under our Constitution capitalism has had a great amount of social control. Some of this social control has taken the form of the protection of capitalism against other social forces. Some of this social control has taken the form of subjecting capitalism to control for the protection of other social interests. We have already made a study of these matters, but perhaps at this point a brief summary will help to appreciate the situation.

Among the illustrations of the protection of capitalism afforded by our capitalistic system may be named: the provisions with reference to the payment of debts; the property in slaves, the prohibition on the states' making anything but gold and silver coin tender; the prohibition of taxation of imports and exports by the states and of exports by the federal government; the guaranties of the privileges and immunities clauses, both relating to state citizens and to federal citizens; our dual form of government and separation of powers; the provision against impairing the obligation of contracts which the Supreme Court extended to the protection of conveyances and of private corporations; the protection of freedom of contract finally established under the due process clause after protection was narrowly avoided under the contracts clause and the privileges and immunities clause, the protection of interstate commerce and, incidentally, some intrastate commerce against state social control; the protection against class legislation of the equality clause; and the protection of the due process clause. Of course, the greatest protection of capitalism has been afforded by the due process clause as a matter of substance, and here capitalism has been protected against the police power in the matter of regulation of wages, the fixing of prices outside of public utilities, discrimination against private schools, the requirement of the covering of fruit, segregation of races geographically, mak-
ing private businesses public callings, the abolition of the in-
junction, and the control of child labor by the United States.
Capitalism has been protected against taxation by the require-
ment of public purpose, the protection against multi-taxation,
and against retroactive taxation. It has been protected against
eminent domain by the requirements of public use and a taking
in the eminent domain sense and compensation.

Among the illustrations of the delimitation of the personal
liberty of capitalism rather than its protection may be named,
first, the social control permitted in the exercise by the states of
the police power, taxation and eminent domain, in spite of the
obligation of contracts clause by a reinterpretation of the protec-
tion afforded by this clause. Another method whereby capitalistic
freedom has been delimited has been through the exercise of a
general police power by the United States Government under the
commerce clause. But the greatest social control of capitalism
has occurred in connection with the due process clause as a
matter of substance where the Supreme Court, after first extend-
ing the protection of the due process clause as a matter of sub-
stance to capitalism, then permitted both the states and the
federal government to exercise social control over capitalism,
wherever the Supreme Court thought there was a proper exercise
of the police power or the power of taxation or the power of
eminent domain. Here, practically the whole law relating to
public utilities has been lifted out of the realm of contracts and
placed under legal obligations imposed by law, although it
should be noted that much of the social control first established
in this field has in the course of time been frittered away by
decisions of the United States Supreme Court. The hours of
labor permitted by employers have been controlled. Anti-trust
laws have been passed and upheld. Laws have been passed and
upheld controlling the liquor traffic, vaccination, the speed of
trains, protecting the social interest in the aesthetic, human re-
sources, natural resources, banking system, fair competition, em-
ployees' liability, and government ownership. Income taxes
have been allowed to increase revenue, and government owner-
ship has been held constitutional. Chain store taxation has
been justified, and taxation of state imports by the federal gov-
ernment has been permitted.
While we see from this enumeration that there has been both great protection and great subjection of capitalism by social control, yet, on the whole, capitalism has received more protection than it has social control. This was especially true in those constitutional periods dominated by Chief Justice Marshall and by Justice Field. The greatest subjection of capitalism to social control has been occurring in the recent Anglo-American period of socialization. But neither in this period nor in any other period has the matter of a corporate organization been subjected to social control in any attempt to prevent the developments in our industrial order which have occurred since the days of Adam Smith. Hence, neither our Supreme Court nor our Constitution can be blamed for the present economic situation in which the American people find themselves. The blame, so far as any blame attaches to anyone, must be borne by the capitalistic system itself. As we have already seen, the capitalistic system has, because of the modern corporation, not only failed to obtain the great ends which Adam Smith and the other classical economists claimed that it would attain, but has also destroyed any of its characteristics which already existed in our economic order, and the corporation, like a Frankenstein monster, is now turning upon its capitalistic creator in an effort to destroy it. Finance capitalism has succeeded all other forms of capitalism and has affected many of the earlier rules, but it has not been able to evolve a technique to control the giant corporation. The courts, on the whole, have waited in vain for a crystallization of capitalistic attitudes. A decisive minority has worked interstitially, especially in connection with the police power, to gain control and give direction to the capitalistic system. But it has not gained enough control to affect the current of economic development.

It is evident, therefore, that we have had too much economic freedom and not enough social planning. We have too much allowed our highly specialized social body to function without any social brain or spinal cord to coordinate the activities of the different specialized parts. The great objection to social planning has always been that it would destroy private enterprise, individual initiative, freedom of contract and competition.
Even if it were admitted that these were desirable ends, the answer to this objection is that all of these so-called characteristics of our capitalistic system have already been destroyed. As we have seen, the corporation has already destroyed rugged individualism, and under corporate management freedom of initiative is a sheer fiction. Under a new economy, there would be no more regimentation than now exists, but it would be determined by social need instead of private greed. What we have in this country will have to be called a capitalistic democracy. There is a profound contradiction between capitalism and democracy. Capitalism as now developed emphasizes the power of the few; democracy, the power of the many. Capitalism is distinguished by a narrow concentration of economic power; democracy, by the wide-spread distribution of political power. Appalling inequalities abound in the economic sphere; formal equality is enjoyed in the political sphere. There is a great gulf, therefore, between the economic ideal and the political ideal. The forces concerned with economic power are anxious to reach out for political power. The forces concerned with political power would like to bring economic power within their sway. In the past, the press, the educational system, military establishment, bureaucracy, though classed as political agencies, and, of course, the general economic agencies, have, on the whole, been instruments for the forces of the economic order. Most other political agencies and some economic agencies have been instrumentalities of the political order. These forces have been making for conflict. This conflict is beginning to threaten the overthrow of one or the other of our systems. Unless there is evolved some way of making the two systems compromise their difficulties, it is inevitable that one or the other must be overthrown. Social planning can prevent this catastrophe.

If we are to have social planning, what form should this social planning take, and who should do the social planning? The last depression has been teaching us that there can be no fixed form of government. Its patterns, like those of industry, must be mutable; the design must follow the event. But one of two general courses must be pursued. Either some other system must be substituted for our capitalistic system or our old capitalistic system must be reformed. If some other system is to be
substituted, it will be a very difficult matter to determine what system, and it would be more difficult to substitute it. If the old system is to be reformed, many other problems will arise. For example, what social control should be exercised over securities; over the distribution of wealth; over price fixing; over public utilities; over our banking system? Should protection be given to the few or the many, to property or humanity? Should wealth or poverty be taxed? Should producers or consumers have the greater consideration?

If we are to have social planning, who should do this work? The Supreme Court cannot take the initiative. It cannot be a leader. It may determine the final direction of our social control, or perhaps even prevent all plans of social control, but someone else must take the initiative. Shall this initiative be taken by the capitalistic system? It is very doubtful whether capitalism can give the court another clear faith and articulate ideology. Before the depression, business men were prating about less government in business and more business in government, whatever the latter meant. They hitched their fortunes to the stars of individualism, competition and laissez faire. New inventions and mass productions increased their power of production. But a new problem of a necessity to increase purchasing power arose. Business men could not see this. This was no part of their economic theories. As a consequence, business was borne down by one disaster after another until it at last crept to a standstill. Millions of blameless people shuffled in breadlines; banks were closed; farmers revolted; creditors saw their wealth vanish; and business men generally suffered a paralysis of the will. They had no solution for our problem. They at last practically admitted defeat and had the grace to step aside for the time being, although they continued to mumble their old shibboleths. As they stepped aside, those whom they formerly had scorned, the members of the so-called "brain trust," stepped forward to present various schemes of social planning with a view to turn what was about to be a disorderly overthrow of the old capitalistic structure into a peaceful and orderly evolution. Just at this time, a new political administration was voted into power, the Franklin D. Roosevelt administration, and this administration decided to put into operation some of the
plans of this so-called "brain trust." The Franklin D. Roosevelt administration chose to attempt to reform the old capitalistic system rather than to attempt to substitute some new economic system for it.

**Program of the Franklin D. Roosevelt Administration**

The scheme of social planning inaugurated by the Franklin D. Roosevelt administration is on a scale never dreamed of by the founding fathers. The main point in this scheme is to balance in the United States purchasing and producing power by an attempt to break up our concentration of wealth. As yet this scheme of social planning has not attempted to break up our concentration of wealth through radical changes in our system of taxation and the direct limitation of profits, but it has undertaken to increase purchasing power by regulating the weight of the dollar, overriding the gold clauses in contracts, making new government notes legal tender, stopping of gold hoarding, the declaration of a bank holiday, control of the sale of securities, the establishment of a Tennessee Valley authority, the Home Loan Corporation, Farm Loan Corporation, the Reconstruction Finance Corporation, and a general program of economic planning (N. R. A. and A. A. A.) affecting the most important relations of labor, agriculture and industry, especially through regulating minimum wages and the maximum hours of employment.

These economic measures raise constitutional questions of vast importance. Many constitutional doctrines seem to be affected by these measures. Will the Supreme Court hold that the Constitution prohibits what is attempted by the Franklin D. Roosevelt program, or will the Supreme Court stretch the Constitution as it has been stretched on prior occasions to meet this new emergency? On the answer to this question, depends the success, if it otherwise succeeds, of the whole Franklin D. Roosevelt program. If the Supreme Court declares the program unconstitutional, there will be nothing left but capitalistic chaos or a violent revolution or a radical formal amendment of our Constitution. If it upholds the program, it will write new constitutional law as important as any written by Chief Justice Marshall or Justice Field or Justice Holmes.
What will the Supreme Court have to do to uphold the Franklin D. Roosevelt program? The constitutional questions raised by the pieces of legislation inaugurated by the Franklin D. Roosevelt administration relate principally to our dual form of government, our doctrine of separation of powers, and the protection against social control found in the United States Constitution. The question of the violation of our dual form of government is raised by the legislation as to the weight of the dollar, the gold clauses, the legal tender notes, the gold hoarding, the bank holiday, the Securities Act, the Tennessee Valley Authority, the Farm Loan Act, Home Owners’ Act, Reconstruction Finance Corporation, and the economic planning. The question of the violation of our separation of powers is raised also by practically everyone of these pieces of legislation. The question of the violation of constitutional guaranties against social control is raised by the gold clause, the legal tender notes, gold hoarding, Securities Act, Tennessee Valley Authority, Farm Loan Act, Home Owners’ Act, Reconstruction Finance Corporation, and economic planning.

To uphold this program, the Supreme Court will have to find, first, that our dual form of government is not violated because the federal government has either the express or implied power to do all of the things which it has undertaken. So far as the control of the weight of the dollar is concerned, there is little difficulty because Congress has this express power. So far as the gold clauses are concerned, it can easily find that Congress has such an implied power because of its express powers to coin money and to borrow money. The question of the power of Congress to issue legal tender notes has already been thoroughly established by prior decisions and has been derived from the power to borrow money and the power to issue bills of credit. The power to control gold hoarding also can easily be implied from the money power, as can the power to declare a bank holiday. The power of Congress to pass the Securities Act can be derived from its power over interstate commerce, and its postal authority; its power to establish the Tennessee Valley Authority, from its power over navigation and its war power; and its power to pass the Farm Loan Act, the Home Owners’ Act and the Reconstruction Finance Corporation and Emer-
gency Relief Act, from its power to appropriate money for the general welfare.

The power of Congress to pass the National Recovery Act and the Agricultural Administration Act and to establish social control over the economic, business and agricultural life of the nation will have to be related to the power of Congress to regulate interstate commerce. So far as Congress appropriates money, the power may be derived from the general welfare clause, but its general police power over these matters will have to be derived from some other source. Where there is either traffic or transportation between people in one state and people in another, the interstate commerce clause would be sufficient authority for the federal government, but in order to give the federal government power to regulate local state business in all of its aspects before traffic or transportation has begun is going to be more difficult. Perhaps the Supreme Court will find that Congress has this power because of the interblending of local state business and interstate business, so that the local state business can be regulated to prevent it being a burden on interstate commerce business.

In the second place, it will have to find that our separation of powers has not been violated, and to do this, it will have to find that Congress has not delegated legislative powers to the President. But it can do this by holding that Congress has not delegated its power but set up a standard for the President to administer in the case of fixing the weight of the dollar, stopping gold hoarding, establishing the Tennessee Valley Authority, and providing for economic planning. In the other pieces of legislation, Congress has acted directly, so that there will be no difficulty on this point. In some cases, it will be difficult to find that the President is merely administering a standard rather than legislating, but the Supreme Court has already, in connection with interstate commerce,\(^\text{187}\) and the flexible tariff,\(^\text{188}\) gone very far in upholding such legislation as is herein involved.

In the third place, so far as concerns the question of violation of protection against social control, it will have to find


\(^{188}\) *J. W. Hampton, Jr., & Co. v. United States* (1928), 276 U. S. 394.
that the gold hoarding order is not a violation of due process as a matter of procedure in failing to provide a hearing and of due process as a matter of substance because an exercise of the police power, and not eminent domain; and that the other pieces of legislation are proper exercises of the police power. So far as concerns the fixing of the gold content of the dollar and the declaration of a bank holiday, there is no difficulty because there are no limitations of due process which would apply to the federal government. In the matter of gold hoarding, undoubtedly due process would be a limitation, but this limitation is satisfied because of the social interest in a stable currency if the power exercised is rationalized as a police power. Some have contended that the federal government is exercising the power of eminent domain. In such case, problems of a jury trial and just compensation would be encountered. But the better opinion is that the government is not exercising a power of eminent domain, but a police power, because it is not taking private property for a public use, but is regulating the use of money by its people, and because it is doubtful whether or not money is subject to the power of eminent domain. The gold clauses legislation and the legal tender notes legislation should also be rationalized as proper exercises of the police power.188a The legal tender problem has been definitely settled by decisions of the United States Supreme Court. The power of the government to cancel the gold clauses provisions in its own contracts can be derived from its power to define what shall be legal tender and from its immunity against suit without its consent; and its power to override the gold clauses in private contracts can be derived from its power over legal tender and its authority to call in gold coins. It may be held that thereby the performance of contract conditions has been frustrated. Such contracts create debts, not sales of a commodity. The government has the power to say what shall be the legal tender for the payment of debts, and it is due process of law to change the legal tender from two standards to one standard. The Security Act is a proper exercise of the police power because of the social interest in economic progress. The Tennessee Valley Authority can be ration-

188a Hanna, Currency Control and Private Property, 33 Col. L. Rev. 617, 636.
alized as a police power incidental to the war power and the power to improve navigation. The appropriations of money afford no difficulty. If the federal government once constitutionally obtains revenue, there are apparently no limitations on the way it may spend it, except those which Congress may put on itself.¹⁸⁹

That leaves as the great problem the question of whether or not the program of economic planning (that is, the N.R.A. and the A.A.A.) is a proper exercise of the police power, and this involves five minor questions. The first is whether or not it is constitutional to regulate prices outside of public utilities. Before the case of Stephenson v. Binford,¹⁹⁰ anyone would have hesitated to have taken the position that the Supreme Court would uphold such a power, but since this case upheld price regulation of private contract carriers, it would seem that it would be the logical step for the Supreme Court to uphold any general scheme of price regulation. The second is the constitutionality of the limitation of hours of labor. In its first decisions on this point, the Supreme Court refused to uphold hours of labor, but it has since reversed itself and now so completely upholds them¹⁹¹ that there should be no question on this point except for the First Child Labor decision which held that even though it was constitutional for the states to pass child labor laws,¹⁹² the federal government had no such power under the interstate commerce clause. This, therefore, really involves the question of our dual form of government; but before the Franklin D. Roosevelt program can be upheld, this child labor decision will, of course, have to be overruled. The third relates to the minimum wage provision in the economic planning law. The United States Supreme Court has in one decision heretofore declared a minimum wage law, even where the federal government otherwise would have the power, unconstitutional because in violation of the due process clause.¹⁹³ Hence,

¹⁹⁰ (1922), 53 S. Ct. 181. See also Nebbia v. People of N. Y. (1934), 54 S. Ct. 505.
¹⁹³ Adkins v. Children's Hospital of the District of Columbia (1923), 261 U. S. 525.
this case, also, will have to be overruled if the Supreme Court is going to uphold the constitutionality of the program for economic planning.

The fourth is the constitutionality of the collective bargaining feature of the N. R. A. program. Where this and other features of the N. R. A. program are carried out by voluntary agreement, there is no question; but where the provisions of the N. R. A. program are going to be imposed by law upon unwilling members of society, the question is directly presented. Adair v. United States\textsuperscript{194} held that, to make it unlawful for an employer to threaten an employee with loss of employment for membership in a labor union was unconstitutional because of its abridgement of the freedom of contract. Coppage v. The State of Kansas\textsuperscript{195} followed the Adair case and applied its doctrine so as to permit an employer to require the so-called yellow dog contracts not to join or retain membership in labor organizations. If these were the only cases on the subject, they would have to be overruled in spirit at least if the provisions of the N. R. A. in question were to be upheld. However, the more recent case of Texas and N. O. Railway v. The Brotherhood of Railway and S. S. Clerks\textsuperscript{196} upheld the Railway Labor Act of 1926 with its feature of collective bargaining. This case would seem to indicate that the Supreme Court will be able to uphold the constitutionality of the N. R. A. program so far as concerns this point. The fifth involves the question of whether or not in the processing features of the A. A. A. program there is a public purpose in the levying of a tax to reimburse some at the expense of others. On this point, the Supreme Court has already held that the number benefitted is an important although not a decisive consideration.\textsuperscript{197} It has also been very liberal in upholding classification for the levying of taxes.\textsuperscript{198} For these reasons, it would seem that the prior decisions of the United

\textsuperscript{194} (1908), 208 U. S. 161.
\textsuperscript{195} (1915), 236 U. S. 1.
\textsuperscript{196} (1930), 281 U. S. 548.
\textsuperscript{197} Loan Association v. Topeka (1874), 20 Wall. 655; Milheim v. Moffat Tunnel Improvement Dist., et al. (1923), 262 U. S. 710; 80 Univ. of Pa. Law Rev. 1023; 42 Yale Law Journ. 762; 31 Mich. Law Rev. 120.
\textsuperscript{198} State Board of Tax Commrs. of Indiana v. Jackson (1931), 283 U. S. 527; 7 Ind. Law Journ. 179.
States Supreme Court will not stand in the way of its upholding this feature of the A. A. A. program.

Will the Supreme Court uphold the Franklin D. Roosevelt program? The writer is not so much worried over what the Supreme Court will do as he is over what the Roosevelt program will do. He is afraid that not enough has as yet been attempted by the Roosevelt program to restore the balance between purchasing power and producing power. There has been lack of co-operation, if not actual sabotage, on the part of the former beneficiaries of the capitalistic system. As a consequence, there is danger that any increase in purchasing power will be more than matched by an increase in producing power. For this reason, he is of the opinion that, if the Roosevelt program is to accomplish its desired result, it will have to move on to another stage, in which it will undertake, in the first place, to reform our tax system so as to make the rich, not the poor, carry the tax burden in the future and thereby gradually to break up the swollen fortunes in the United States and to transfer wealth from those who will not buy but will produce or invest, to those who will buy; and, in the second place, to limit profits by governmental reduction of high salaries and bonuses and the rates of return allowed public utilities, so as to prevent producers, through holding companies, speculation and other schemes of high finance, from getting too much from consumers, and thereby to keep in the consuming class a sufficient purchasing power to maintain the proper balance between producing and consuming power. Prices and profits can be controlled. This is proven by the history of the trusts and of the war-time Lever Act. If the Roosevelt program should move on to this stage, the decisions of the United States Supreme Court would offer little constitutional difficulty on the score of taxation, but for the control of profits the Baltimore Street Railway case\(^{190}\) and some other public utility cases would have to be overruled. Yet, the recent cases upholding wage and price fixing seem to point the way for the Supreme Court.

Would even the reform of taxation and the control of profits be enough to solve the problem called to our attention by the recent depression? The capitalistic system was a com-

\(^{190}\) United Railways, Etc., Co. v. West (1930), 280 U. S. 234.
petitive system on the basis of private profits. There has been no motive in the competitive system except the profit motive. Such a tax program and control of profits as suggested would largely destroy the profit motive. Would it be possible to maintain competition except on a *laissez faire* basis? It will have to be admitted that here is a very real danger that such social planning would destroy the last vestige of the capitalistic system. It might not be possible to curtail competition and also to keep it. In that event, the only alternative left for the Roosevelt program would be for it to move on to a third stage wherein the government would take over business and operate it for the public welfare. That is, it would have to displace the competitive system by a system of social operation of economic processes for the general welfare of society. If the Roosevelt program should move on to this stage, the constitutional difficulties would be staggering. Probably if governmental operation were to be undertaken by the states and local subdivisions of the states, the decisions of *Jones v. Portland*\(^{200}\) and *Green v. Frazier*\(^{201}\) would be sufficient authority, at least so long as the governmental operation was confined to the field now occupied by the public utilities, which would seem to be a big enough field even for governmental operation. But if this governmental operation were to be undertaken by the federal government, it would have to be in connection with such powers of the federal government as the commerce power, the postal power, patent and copyright power, and the war power, which would mean that its field would have to be much narrower than that which the states might occupy. However, even this would be no inconsiderable field, and perhaps the federal government, either through its power to appropriate money for the general welfare or through the power of example, might persuade the states to cooperate with its program.

Again, we ask the question: Will the Supreme Court uphold the Roosevelt program in one or all three of these stages? It is the opinion of the writer that it will do so. He believes that the present emergency is such and the capacity of the United States Supreme Court finally to think through for itself our great social problems is such that the Supreme Court without change

---

\(^{200}\) (1917), 245 U. S. 217.
\(^{201}\) (1920), 253 U. S. 233.
in personnel will overrule the decisions to which reference has been made—which were five to four decisions in the first place and which were decisions whose validity has been questioned from many different sources—so as to add a new chapter to the powers of the federal government, to further delimit personal liberty in the exercise of the police power, and to protect the social interest in economic human progress as it has never been protected before. When the Supreme Court realizes that our distress does not arise from any lack of goods or from the economic realities of our situation, but from our artificial capitalistic system of producing and distributing goods for private profit, the Supreme Court is going to find a way to end our distress. He believes that it will not permit the old scheme of financial power or any new scheme of dictatorial political power to destroy individualism, nor allow unbridled individualism to destroy political power and repeat the rebarbarization of the world; but will discover a scheme to preserve the freedom and adaptability of individualism and to socially plan it so as to coordinate its good activities and curb its evil tendencies. In this way, it will make the people the masters rather than the victims of destiny and give democracy both an ambition for an ordered society and an opportunity to acquire the discipline to establish and maintain it. The Supreme Court will invent some means to stifle the conflicts which have been destroying civilization and to save our institutions from the poison of unlimited greed, so as to turn the results of common effort toward general benefits. The Roosevelt program grows logically and articulately out of former precedents of the United States Supreme Court. There will be no breach of continuity in upholding this program if the precedents are permitted to unfold and develop. In the future economic affairs will no longer be left to automatic controls or private controls, but will be subjected to social control.