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TOWARD THE "TECHNO-CORPORATE" STATE? — AN ESSAY IN AMERICAN CONSTITUTIONALISM

ARTHUR SELWYN MILLER

Preface

The purpose of this Article is to raise questions, not to essay answers. It is to be considered an adumbration; much of what is said is stated dogmatically. Reasons of space necessitated this course; the reader should not think that the writer sees the matters discussed as simple situations. Au contraire, they are of the highest degree of complexity. As is suggested toward the end of the Article, scientific and technological problems are far more simple than are the constitutional (the political-legal-economic) problems facing modern America.

The Article is based on the premise that science and technology are here and here to stay, as large and perhaps increasing elements in American society. The genie is indeed out of the bottle — and will not be returned, simply because it cannot. There is no turning back from the path that man has taken. The important question is how should science and technology be used, not whether they should be. The further assumption is made that science and technology have had, are having, and will continue to have a significant impact on the nature of American politico-legal (i.e., constitutional) institutions.

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Certain direct quotations which because of their length would normally be printed indented in smaller type, are, at the author's request, printed within the regular text in order to maintain continuity.
I. INTRODUCTION

ABOUT MIDWAY in Professor H. L. Nieburg's recent *In the Name of Science*, described on its dust-jacket as a “chilling account of [the] growth of the scientific-military-industrial complex in America,” this statement appears: “Instead of fighting 'creeping socialism,' [American] private industry on an enormous scale has become the agent of a fundamentally new economic system which at once resembles traditional private enterprise and the corporate state of fascism.” This Nieburg calls “the contract state” — a politico-economic system in which the legal instrument of contract is used to weld some of the nation's largest corporations to the federal government. One need not subscribe to the hyperbole of book publishers to believe that Nieburg has, however incompletely, called attention to an important emergent problem in American constitutionalism. My thesis herein is that this problem — in shorthand terms, the creation of the “techno-corporate” state — will perforce have to be in the forefront of scrutiny by constitutional scholars in the future.

These scholars may be lawyers⁴ (although few have to date recognized that a problem exists) or political scientists⁵ or economists or sociologists⁶ (more exponents of these disciplines are working on aspects of the problem, although none has yet produced a systematic analysis). A unilinear approach will not be sufficient to the need; what is necessary is an inquiry that will mesh the insights of each of those disciplines, put them into a common crucible, and produce a synthesis that will at once be empirically valid and productive of a new conceptual framework. Required is a new way of thinking about the corporation and about government — and their interlocking relationships. That is necessary not only for purposes of accurate description of the American political economy (and thus of understanding), but also because these two dominant institutions of the era, existing at a time of cataclysmic change, present critical problems of the management of social change. This Article, then, is a preliminary attempt to outline some of the questions that must be answered before an adequate analysis of one of the more pressing issues of modern constitutionalism can be made.

The question of the relationship of corporate business to govern-
ment is ancient; as Felix Frankfurter said just before he became a
Supreme Court Justice, "The history of American constitutional law
in no small measure is the history of the impact of the modern corpo-
ration upon the American scene." That history (substantially less than
two centuries) has produced two convergent movements — toward
large economic organization and toward big government — which
today make the problem more urgent than it ever has been in the past.
Also suggested in this Article is the absence of data required to answer
many of the critical questions of the government-business symbiosis
(particularly in international economic affairs); and that, accordingly,
a problem of scholarship is to develop such factual material.

By "techno-corporate" state is meant:

(a) That the scientific-technological revolution, of which the
industrial revolution was merely an early stage, has produced a mar-
riage of entrepreneurship to organization and thus made possible the
rise of huge corporate "private" collectivities. These are called "super-
corporations" by Robert Heilbroner in his recent The Limits of Ameri-
can Capitalism; he suggests that about 150 corporations fit the label.
Others, however, think in terms of about 500. However labelled and
however defined, they dominate the economy and set its tone; in so
doing they have created a new society, something far different from
that existing in 1787 or as recently as 1900 or even 1920. (Whether
gigantism in business was a necessary result of the growth of science
and technology is another question.)

(b) That the nature of government has changed from the
"negative, nightwatchman state" to the "positive state" — that is, to a
government with affirmative obligations to enhance the well-being of
the American people. Epitomized in the Employment Act of 1946, which
established the Council of Economic Advisers and which by the
1960's had resulted in programs that led the London Economist to
herald an "unrecognized economic revolution" toward the active
management of the economy — this is perhaps the most significant con-
stitutional change in American history. That it came without amend-
ment, but by legislative and executive programs either approved or
ignored by the Supreme Court, makes it all the more remarkable. It

5. F. FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND
WAITE 63 (1937).
7. Id. at 11.
8. E.g., A. BERLE, supra note 2.
its significance see E. ROSTOW, PLANNING FOR FREEDOM (1959).
is a classic illustration of how the Constitution can grow — Woodrow Wilson likened it to a "living organism," saying that constitutions must follow the laws of life and not of mechanics and that they must be Darwinian and not Newtonian\(^\text{11}\) — without change in the language of the original document of 1787. (The extent to which governmental duties or obligations may be becoming a constitutional doctrine, rather than a political program, will be discussed below.)

(c) That the net result of the coming of big business and big government is an interlocking partnership between the two. They exist in a symbiotic relationship; little by little, they seem to be growing closer together every year. This takes place by slow accretion, rather than by fiat, through the myriad formal and informal transactions between the two characteristic institutions of the day. (It is not at all clear which is the dominant or senior partner.) The relationship cuts across the entire field of corporate enterprise; thus it far transcends the situation described by Professor Nieburg. The development has so warped constitutional theory that the underpinnings of the 1787 document and its amendments have been seriously eroded. The nature and theory of American constitutionalism, accordingly, require re-examination and restatement in the light of the social realities of the day and the probabilities of the future. ("Future-orientation" is an increasing necessity.) The 55 men who wrote the Constitution foresaw neither the rise of the supercorporation nor the Positive State. Corporations were few and small and of little consequence in the late 18th century. The Constitution did not provide for them (or for any other decentralized social group.) In addition, the fundamental law made no provision for the affirmative responsibilities of government.

The techno-corporate state is being built without amendment. But that does not mean that the Constitution is not being changed; it is, but by a different method. The "living" or "practical" Constitution, in other words, may and does differ from the formal document. That document, although written, must change by means other than amendment, else it would long ago have been discarded. The eminent historian, Frederick Jackson Turner, once said: "Behind institutions, behind constitutional forms and modifications, lie the vital forces that call these organs into life and shape them to meet changing conditions."\(^\text{12}\) One conclusion of this Article is that those "vital forces" can alter the Constitution by a number of methods other than amendment: by judicial exegesis of the basic text, by political practice (as

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\(^{11}\) W. Wilson, Constitutional Government in the United States 56-57 (1908).

in the rise of political parties), and by deep-rooted alterations in the structure of government, exemplified by certain fundamental statutes and executive actions. What this means is that the techno-corporate state can be and is being brought into existence without the need for formal amendment.

II. THE RISE OF THE SUPERCORPORATIONS

As long ago as 1905, it was asserted that "the growth of corporations in western Europe and the United States signifies nothing less than a social revolution." By the mid-1960's that "social revolution" had become so solidified that corporations seem part of the "natural" order of things, so much so that no serious intellectual opposition to them is evident. They have become accepted and the question (which is seldom raised) is how to deal with them rather than the more basic question of whether they should exist at all. It was not always so. Historically, not only "big business" (the "trusts") was feared and even hated, but the very idea of incorporation was long fought. Something that is taken for granted today — that the corporation is a "person" and thus entitled to the protections of the Constitution — did not achieve judicial acquiescence until 1886. Prior to that, of course, the Supreme Court through astute and imaginative use of the commerce and obligation-of-contracts clauses did create a protective legal umbrella under which corporate enterprise could (and did) flourish. The Dartmouth College case and Gibbons v. Ogden are leading examples of how the judiciary operated. The trend that began in the early 19th century, when corporations were small, had by the mid-20th century produced the corporate giant, the supercorporation, something new under the economic and legal sun.

The development is noteworthy for other reasons, two of which are worthy of brief mention: the factor of change and the way in which the supercorporations developed (as ad hoc responses to situations rather than in accordance with a prescribed theory or ideology).

13. 2 J. DAVIS, CORPORATIONS 261 (1905).
15. Then it was accepted unanimously and without argument by counsel. See Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1886). Justices Black and Douglas of the present Supreme Court have maintained that the Santa Clara case should be overruled on that point. See Wheeling Steel Corp. v. Glander, 337 U.S. 552, 577 (1949) (dissenting opinion); Connecticut General Life Ins. Co. v. Johnson, 303 U.S. 77, 83 (1938) (dissenting opinion). But the idea has not been accepted.
17. 22 U.S. (9 Wheat.) 1 (1824).
Change is a social constant. In less than two centuries, the nation has been vastly altered, particularly in the creation of a unified, if not uniform, society. In this process, the entrepreneur has combined with the scientist and technologist to make stability a myth. Sociologist W. Lloyd Warner put the point in apt words: "The whole American society is rapidly growing into one primary community, in which corporations along with other complex hierarchical structures play their significant and necessary roles. Change is built into the very nature of this social system . . . ." The concept of change, although a truism, has not been fully assimilated by exponents of any one discipline. Law, for example, proceeds by denying change. The very notion of law runs counter to that of continuing change, for law is the social instrument of conservation. Economics, too, has not accepted the concept; economists still think in terms of equilibrium (i.e., a steady state) when the very nature of human affairs negates it. Furthermore, economists still tend to think of the corporation as a "disembodied economic man" and to equate General Motors with John Doe when talking about economic policy; as Andreas G. Papandreou put it, "[T]he economist . . . retains his schema of an acting individual agent, even in the case of the firm, which may legitimately be regarded as a 'collective' of some sort. . . . [T]he economist has not evolved a theory of conscious cooperation." Change, furthermore, is now increasingly being seen as something to be managed; men seek to control or to "invent" the future. Scientists, with the hubris that tends to infect that fraternity, now believe that through choice among scientific and technological developments the future can be guided and even controlled. As Daniel Bell has said, "Perhaps the most important social change of our time is the emergence of a process of direct and deliberate contrivance of change itself. Men now seek to anticipate change, measure the course of its direction and its impact, control it, and even shape it for predetermined ends." The possible success of such efforts is not our point (although success or failure is far from irrelevant); rather, it is in continuing change and the acceptance of the challenge to manage change. This will have some

importance in the discussion below; to anticipate a bit, if the techno-corporate state poses critical problems to the nature of American constitutionalism, then how can social invention take place to make sure that the fundamental values of constitutionalism are retained? One further aspect of the concept of change is worthy of mention: what Donald A. Schon has called "the problem of the development of an ethic of change." His views merit quotation at some length:

The concept of an ethic of change very nearly appears as a contradiction in terms. Our norms are precisely norms for stability. We hold on to our norms and objectives, stand fast by them, keep them, and because we do, maintain a steady course which enables us to dispense with an ethic of change. Our moral heroes . . . are generally those who stand firm in the face of challenge. . . . We are apt to see change of objectives and norms, when it occurs, as inconstancy.

And yet the problem of the development of an ethic of change now confronts individuals, organizations (companies and others) and our society as a whole. The individual asks, How shall I act when the foundations of my self (and the roots of my action) are disappearing? The company asks, How can we find our way into the future and maintain our integrity when it is no longer clear what business we are in . . . ? Our society asks, How are we to guide our course now that the instrument of technology has eroded our objectives and we are deprived of the illusion of a stable state toward which we are heading?25

Resistance to change, it may be noted, comes as much or more from the intellectuals as from any other class. Those with a vested interest in learning or in the mysteries of a given profession are likely to be the very ones who most want to hold on to that interest.26 Ready examples are those economists who still think in terms of atomistic individuals acting in the economy and the practicing bar which stoutly resists any proposed change in procedure.

The second preliminary point about the rise of the supercorporations — that they grew in response to felt circumstances and opportunities — has been aptly stated by William Letwin: "[E]conomic doctrines have never as much influenced the making of American economic policy as have political and constitutional considerations. The reason why the whole of American economic policy looks so incoherent — with mercantilist, socialist, liberal, or autarkic elements all

25. D. SCHON, supra note 21, at 204.
26. As Arthur Koestler has cogently observed: "The inertia of the human mind and its resistance to innovation are most clearly demonstrated not, as one might expect, by the ignorant mass — which is easily swayed once its imagination is caught — but by professions with a vested interest in tradition and in the monopoly of learning." A. KOESTLER, THE SLEEPWALKERS 427 (1959). See also D. SCHON, supra note 21; M. SHANKS, THE INNOVATORS (1967).
living happily side by side is that political balance rather than economic consistency has been the more powerful drive."27 Even so, it is fair to say that legal doctrines, constitutional and otherwise, helped to create a favorable milieu in which corporations could wax large and strong. In addition, laissez faire was never a doctrine that prevented government aid to business enterprise; throughout American history, public resources have been employed to that end.28 (It was only when government undertook to help other groups in society [e.g., labor unions] that the Supreme Court found that due process of law protected liberty of contract and thus made such attempts invalid.) What this means has relevance to the general theme of this Article: the power of the state was used to encourage corporate enterprise. Furthermore, while enterprises may have grown in an ad hoc, nonideological manner, nevertheless they were justified after the fact on ideological grounds. The businessman has never lacked for apologists among the intellectuals. Oddly enough, the patron saint of those apologists is Adam Smith, who himself decried the tendency toward incorporation. Said he: "The pretence that corporations are necessary for the better government of the trade, is without any foundation."29 Businessmen (and others) are still intellectual prisoners, as John Maynard Keynes said, of some defunct academicians; avowed pragmatists, they tend to believe the ideas of long-dead economists. And they aver that they see in history something that never existed in fact: a sharp cleavage between public and private, between government and business.30 When President Coolidge opined that the business of this nation is business, he was merely uttering a resounding truism. The point stressed is that the pragmatic stream runs deep and strong in the development of the economy. Corporations grew, not in response to government command or even societal demand, but because conditions (economic and legal) permitted growth. One of the conclusions of this Article, however, is that the supercorporation is now a necessary institution; if it did not exist today, it would have to be invented. In other words, the obligations of government require the supercorporations for their reasonable fulfillment.

Be that as it may, the emergence of the supercorporation requires no documentation here. It has become truistic that a few hundred of

28. Recounted in P. Jones, supra note 27.
the more than four million corporations in the nation in fact control the economy. As Heilbroner puts it in *The Limits of American Capitalism*, one supercorporation by itself (A.T.&T.) has assets equal to that of one million small businesses, if one takes $25,000 as the average amount of assets of a small enterprise. Fortune's annual listing of the 500 largest American corporations is readily available, and there are other studies of a like nature. Economist Victor Fuchs has recently shown that the United States is the first "service" economy — it is "the first nation in the history of the world in which half of the employed population is not involved in the production of food, clothing, houses, automobiles, and other tangible goods." Even so, this does not minimize the importance of the huge corporate combines. Nor does the fact, if it is a fact (as Daniel Bell avers), that the United States is becoming a "post-industrial society" and that the "new men" of power are the "scientists, the mathematicians, the economists, and the engineers of the new computer technology" — for the supercorporations will remain; what Bell is talking about (in part, at least) is who will control them, not whether they will exist. (Further, one should be careful not to fall into the conceit of academics and see power flowing to the man of ideas rather than the businessman). One other factor, which again does not reduce the importance of the supercorporations, should be noted: the growing significance of the "nonprofit" aspect of economic affairs; Eli Ginzberg has labelled this development "the pluralistic economy." Whatever the facts may be, what has happened, is happening, and seems sure to continue, is the growth of the pluralistic group as a center of economic power within the nation. The inevitable concomitant of that development is that those economic groups (however identified) have a political role to play. The implication is clear: A new form of social order has been created. That in turn has profound constitutional consequences.

 Whatever the nature of the American economy may be today — and whatever it may be in the future — requires at the outset close and continuing attention to the facts of economic life; or, in other words, to the prime necessity for gathering empirical data. Secondly, the situation, once identified, presents the question of the reasons for

31. *R. Heilbroner, supra* note 6, at 9. It is also worthy of note that such corporations as A.T.&T. and General Motors control more wealth than all except nine of the nations of the world.
33. Bell, *supra* note 24, at 27.
34. *See* id. at 24; J. Galbraith, *supra* note 4.
the development. The first matter will be briefly discussed; the second will be given more lengthy treatment, for it poses clearly the relationship between science and technology and economic form.

One of the prime needs is for factual data dealing with government, with business, and with their relationships. The requirement is difficult enough when it comes to domestic affairs, but is even more so when one attempts to learn about international commercial matters. It is a characteristic of both government and business that secrecy tends to be the norm; both institutions try to keep their internal operations closed to inquiry. Perhaps business is more secrecy-conscious than government, but both exhibit similar tendencies. When it comes to external concerns, then facts about business endeavor are almost totally lacking — not completely, but sufficiently so to make generalizations risky. The same may be said for government. One of the most serious difficulties encountered in conducting research into governmental activities is an inability to obtain the facts of given situations. (The newly enacted section 3 of the Administrative Procedure Act is not likely to remedy the difficulty.) Moreover, it must be kept in mind that, as Justice Frankfurter often said, one can never get correct answers without first posing the correct questions. But “correct” questions cannot be identified nor can facts be ascertained without a theory, or, if you will, without an ideology. The old saw to the contrary notwithstanding, facts do not speak for themselves. As Whitehead said, they do not exist “in nonentity.” General ideas are necessary. Morris Raphael Cohen put it in these terms: “[W]ithout the use of concepts and general principles we can have no science, or intelligible systematic account, of the law or of any other field. And the demand for system in the law is urgent not only on theoretical but also on practical grounds. Without general ideas, human experience is dumb as well as blind.” The point, in short, is two-fold: (a) there exists a great need for empirical data about the subject under discussion; and (b) obtaining such data will be most difficult. In addition, compiling facts unavoidably involves the personal valuations of the person doing the work. This presents the requirement, if objectivity is to be maximized and if the reader of the studies made is to know the point of view of the researcher, that the researcher (the compiler of facts) “face his valuations.” In other words, as Gunnar Myrdal has said, the problem of valuation cannot be eliminated but it can be minimized by those

engaging in scholarly research stating their value preferences. There is no greater delusion than that of "scientific objectivity" or "neutrality." That many act as if they were objective does not gainsay that assertion. As P.B. Medawar has said, "unprejudiced observation is mythical. . . . In all sensation we pick and choose, interpret, seek and impose order, and devise and test hypotheses about what we witness. Sense data are taken, not merely given: we learn to perceive. . . . The idea of 'naive' or 'innocent' observation . . . [should be rejected]. 'Facts cannot be observed as Facts except in virtue of the Conceptions which the observer himself unconsciously supplies.' (The point is labored, for it seems fair to say that there is much belief to the contrary; for example, exponents of "program budgeting" in government apparently proceed on the assumption that personal value judgments can be eschewed.)

A. Business Gigantism and Technology

If one asks, as he should, why there has been such a phenomenal growth of corporate enterprise during the past century, he is forced to search for the social bases of economic activity. Some lawyers, with invincible parochialism, might attribute that growth, through a simplistic cause-and-effect relationship, to favorable Supreme Court decisions, but that surely does not get to the roots of the question. The question is at least two-fold: first, why the growth of incorporation? and second, why the growth to massive size of a few of those corporations?

How are these questions to be answered? One may begin by posing the further question of whether history can supply answers. As Edward Hallett Carr has said, "How can one discover in history a coherent sequence of cause and effect, how can we find any meaning in history, when our sequence is liable to be broken or deflected at any moment by some other, and from our point of view irrelevant, sequence?" Furthermore, historical interpretation, it seems clear, is bound up with value judgments, "The search for causalities in history," in the words of Meinecke, "is impossible without reference to values . . . behind the search for causalities there always lies, directly or indirectly,

42. Id. at 149.
the search for values." One sees meaning or causation in history where one wants to see it.

The point is fundamental. If it be assumed that science and technology are the root causes of the growth of corporate enterprise, this leaves at least two important questions dangling: first, why did science and technology erupt where they did and when they did? and second, was gigantism a necessary result? As to the first, why did science and technology burst forth among the peoples of the North Atlantic littoral, at a particular time in history, and not elsewhere? We are far from having adequate answers to such questions. It seems clear that many of the basic ideas underlying science were known to the peoples of the ancient world — in Greece and Egypt and probably in China. Why were they not employed? Culture-bound anthropologists might assign a superior virtue or intelligence to the peoples of the North Atlantic states, but those are notions sure to be challenged in other parts of the globe, and are in fact disputed by more broadly gauged Western analysts (Claude Lévi-Strauss, for one). Whatever answer one gives to this basic question, the facts of corporate activity, what Kenneth Boulding called "the organizational revolution," seem clear beyond peradventure — whether or not one accepts the gloomy predictions of Roderick Seidenberg.

However one answers the question of why science and technology are confined in time and in space (in time, to the last two or three centuries, and in space, to the nations of the North Atlantic littoral), the further question obtrudes: What is the relationship between science and technology and giant business enterprise? John Kenneth Galbraith, in The New Industrial State, appears to select technology as the key to a rational explanation of gigantism (and of economic planning). Says he: "The imperatives of technology and organization, not the images of ideology, are what determine the shape of economic society..." Technology means the systematic application of scientific or other organized knowledge to practical tasks. Its most important consequence, at least for purposes of economics, is in forcing the division and subdivision of any such task into its component parts. Thus, and only thus, can organized knowledge be brought to bear on performance... Nearly all of the consequences of technology, and much of the shape of modern industry, derive from this need to divide and subdivide tasks and from the further need to bring knowledge to bear

45. Quoted in id. at 101.
49. J. GALBRAITH, supra note 4, at 7 (1967).
50. Id. at 12.

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on these fractions and from the final need to combine the finished elements of the task into the finished product as a whole. To Galbraith, six consequences result; they are: (1) "An increasing span of time separates the beginning from the completion of any task"; (2) "There is an increase in the capital that is committed to production aside from that occasioned by increased output"; (3) "With increasing technology the commitment of time and money tends to be made ever more inflexibly to the performance of a particular task"; (4) "Technology requires specialized manpower"; (5) "The inevitable counterpart of specialization is organization"; and (6) "From the time and capital that must be committed, the inflexibility of this commitment, the needs of large organization and the problems of market performance under conditions of advanced technology, comes the necessity for planning." (We shall come back to this idea of "the necessity for planning" below.)

One can agree with much, even most, of what Professor Galbraith says, and yet maintain that he has not demonstrated any necessary causal connection between technology and gigantism in business. At the very least, he suggests a situation of single causation; to him, technology is the key to "the new industrial state." But if anything is known about social phenomena, it is that causation is multiple, not unilinear. Complexity is our lot; it is too simplistic to pin the rise of the supercorporations solely on "the imperatives of technology."

It is, in other words, one thing to say that technology permits the growth of organization and the supercorporations; it is quite another to say that it makes them necessary. Just as many lawyers attribute a high degree of power to the Supreme Court and thus assume without proof that the Court has made a difference in the nature of American capitalism, so Galbraith seizes on one factor and excludes consideration of others. To make only the least controversial statement: the supercorporations could hardly have grown to their present size without a favorable legal system and without the untapped resources of a virgin continent upon which to draw.

Whatever may be the reasons for the rise of the supercorporations, one thing now seems clear: For reasons that will be set forth below, they now seem to be necessary for the fulfillment of societal goals. In short, if they did not exist, many of the goals of modern

51. Id. at 13.
52. Id. at 13-16.
54. The power of the Court is questioned in Miller & Scheffin, supra note 20, and in A. Miller, supra note 18.
government could not be met. Possibly, those goals will not be met in any event; the point here is that without collective enterprise — the supercorporations — they would be idle dreams. No more evidence need be cited to buttress that statement than to point to the USSR; there, the process of industrialization resulted in the creation of huge hierarchically structured, bureaucratically managed organizations. The main economic difference between the USSR and the USA, in this sense, "lies less in the character of the rules of the game than in who sets them. In socialism, the rules are set by political government. In capitalism, they emerge indirectly from a body of law and custom, founded on the concepts of private property and slowly developed." 55

B. A Model of the Corporation

What is a corporation? is a question not easily or quickly answered, save on a superficial level. Of course, there is no such thing as "the" corporation, for on the order of 4.5 million enterprises are incorporated in the United States; there is no model which would adequately and briefly describe the variety of types of firms (to say nothing of other forms of corporate activity, such as "nonprofit" enterprises). But some sort of rough model may be constructed for the supercorporation. The problem merits at least brief attention.

Although the corporation is a "person" within the terms of constitutional law, and thus entitled to the protections of the Constitution, it is obviously far more than that in fact. It is a collectivity, an organization with drives and purposes of its own transcending those of any segment of the constellation of interests that make it up. Two decades ago, economist-lawyer Walton Hamilton in characteristically colorful language said: "The legal make-believe that the corporation is a person, the ingenuities by which it has been fitted out with a domicile, the elaborate web of 'as-ifs' which the courts have woven, — have put corporate affairs pretty largely out of reach of the regulations we decree." 56 The corporation, he said, unlike real persons has "no anatomical parts to be kicked or consigned to calaboose; no conscience to keep it awake all night; no soul for whose salvation the parson may struggle; no body to be roasted in hell or purged for celestial enjoyment." No one can lay "bodily hands upon General Motors or, Westinghouse ... [or] incarcerate the Pennsylvania Railroad or Standard Oil (N.J.) complete with all its works." 57 In the traditional and still orthodox view, the corporation is an entity with only one kind of

57. Id. at 133.
interest: the property of its stockholders. But it is not that simple, quite possibly because the concept of property itself is not simple; the supercorporation is an entity sui generis that requires a sociological, as well as legal and economic and political, definition. In his presidential address to the American Economic Association, Professor Fritz Machlup said in 1966 that he was "sure there are at least 21 concepts of the firm employed in literature of business and economics . . . ." He then proceeded to list 10 of these, no one of which coincides with the model suggested here. Machlup's difficulty is that he views the firm through the eyes of the economist; he thus exhibits the same shortcomings as Galbraith and others who approach the supercorporation from one direction only.

In many respects, the corporation cannot be defined briefly and comprehensively. It is more nearly a method than a thing; or as observed in a leading treatise on corporation finance: "The legal attributes of the corporation are mere accidents of historical development; they do not describe the corporation as we understand it, nor do they give us any clue to its social and economic significance in our modern industrial society. The human institution of marriage may be described as a legal contract, for under the convenient caption of a contract the jurist would group marriage, the corporation, and the house-to-house delivery of milk. An agreement of two persons to live together gives no more understanding of marriage as a vital present-day institution than the filing of certain papers with the Secretary of State gives an understanding of the corporation as a present-day institution. . . . The corporation is an institution and its reality lies not in legalistic definitions but in the part the corporation plays in the complex balance of forces that constitutes the economic world of the present time. What we are interested in, if we try to define a corporation, is its function, as an institution — and a very important and significant institution — in our contemporary economic life. This is not a question of law, but of the meaning of the thing as it now exists in the economic life of the twentieth century." As yet, no one, in whatever discipline, has evolved a viable theory of conscious cooperation — although some efforts have been made. What is suggested here is that the super-

58. See Mason, Introduction to The Corporation in Modern Society at 1 (E. Mason ed. 1959).
60. Id. at 27-28. The ninth in his listing is this: "In legal theory and practice, the firm is a juridical person with property, claims, and obligations. This may be a very deficient formulation; I defer to the experts, who will surely correct it."
62. See, e.g., R. EELS & C. WALTON, CONCEPTUAL FOUNDATIONS OF BUSINESS
corporation is best viewed as a sociological community, consisting of a number of disparate and cooperating (albeit at times antagonistic cooperation) elements; it is, in a nonanthropomorphic sense, an organism built around a principle of organization for production and distribution. The constellation or federation of interests constituting the corporation may be subdivided into those internal to the firm and those external. The internal segments include:

(1) The stockholders — Those who own but do not control. They supply the capital represented by the capital stock, the corporate bonds, and other corporate financial obligations. (Perhaps they should be labelled the "security holders.") In traditional legalistics, the corporation exists to serve the property interests of the stock or security holders. That property interest is not in "the" corporation; rather, it is in a piece of transferrable paper, a promise to pay dividends when those who in fact control the corporation deem it desirable to do so.68

(2) The managers — Those who control but who do not necessarily own (if they do own, it is only a small part of the total). Included are members of the board of directors and of the managerial hierarchy. Galbraith uses the label, "techno-structure," in discussing this segment, defining it as embracing "all who bring specialized knowledge, talent or experience to group decision-making."64 The point here has been well made by Michael Young: "Every industrial society is governed by a series of managerial bureaucracies, and it is surely right to speak of them as conforming to a common type. Managerial organizations are strikingly similar, in industry along with government, in education and research along with the armed services. Almost all institutions in almost all advanced societies are run by graded hierarchies of managers, officials, or officers who do not 'own' but control; the posts filled by appointment nominally on grounds of merit instead of by election or inheritance; the officials salaried, permanent, and pensionable; the whole structure governed by written rules and regulations."65 Young, it will be noted, suggests not only the oligarchical tendencies of modern enterprise but also agrees that industrial societies tend to form similar economic institutions (what Galbraith


The thesis of the divorce of ownership and control has been vigorously disputed. See Beed, The Separation of Ownership from Control, 1 J. Econ. Studies, Summer, 1966, at 29; 1967 The Times (London) Literary Supp. 1097. The criticism is that the Berle-Means hypothesis has not been substantiated by the facts. However, that criticism may apply to the 4.5 million corporations, but not to the few hundred supercorporations.

64. J. Galbraith, supra note 4, at 71.

calls "the principle of convergence"). (The nature and extent of such similarity is, in many respects, the subject matter of this Article.)

(3) The rank-and-file employees — Often these are members of the union. They are to be distinguished from the managerial class and the white collar worker who is not a member of the union. Note that this (and the next) listing suggests a coincidence of interest between corporation and union; the model suggested includes the union as a part of "the" corporation.

(4) Union managers (or leaders) — To an immeasurable yet marked extent, the officers of the union may be set aside as a separate segment of the corporate community. In their relations to the rank-and-file workers, they may be analogized to corporate management and its relationship to security holders.

Seen in this way, "the" corporation does not exist as a monolithic entity; the "it" becomes the "they"; just as property has been defined as a bundle of interests, so too the corporation may be seen, in Abram Chayes' phrase, as a "federation of association groupings." In other words, federalism may be fruitfully employed as an organizing principle in constructing a model of the supercorporation. The same principle, it is appropriate to note, may also be applied to the relations among large companies — vis-à-vis each other — and to their posture to the state. Seen in this way, the supercorporation thus can be considered to be a sociological community — the community of the factory, which, as Peter F. Drucker once put it, is the most meaningful unit of local government in the United States. However, the internal groups of "the" corporation do not constitute its entirety; they are matched in some respect by the external segments, including:

(1) Suppliers — Those enterprises, many of them corporations themselves, that provide logistic support to the supercorporation in the making of its final products. They also may supply services to the firm.

(2) Dealers — Those who retail the products of the supercorporations. As with the suppliers, the dealers are linked to "the" corporation by contractual agreements.

(3) Consumers — This group is more amorphous and nebulous; it is made up of the individual members of the public (and other corporations) who are the buyers in the market.

(4) The public generally — This is the most nebulous of all. It involves what might be called the public interest or the interest of society in the activities of the corporate community. Articulated through government, it is not necessarily the arithmetical sum of all of the disparate interests in the nation; it may at times be a transcendent interest.70

Admittedly, the model is rough. Others, such as Chester I. Bernard, distinguished between two kinds of corporate responsibilities aside from legal obligations: "(1) those which may be called internal, relating to the equitable interests of stockholders, creditors, directors, officers, and employees; and (2) those relating to the interests of competitors, communities, government, and society in general."71 On the other hand, Eells and Walton maintain that: "The varieties of claimants on the corporation — and hence upon the resources controlled by managerial decision makers — can best be understood in another way: through a study of the art of governance within the corporate constellation and through a consideration of the roles of direct and indirect claimants and contributors to the wealth and welfare of the organization."72 They then identify as direct claimants the security holders, employees, customers, and suppliers; and as indirect claimants, competitors, local communities, and the general public and governments. Of particular interest here is the assertion that a study of "the art of governance" is desirable in order to understand "the" corporation. The point is crucial and is worth extended treatment; before discussing it, however, one further aspect of the rise of the supercorporation needs mention.

C. The Corporation and the State

Writing two decades ago, Peter F. Drucker maintained in his classic The Concept of the Corporation (a study of General Motors): "It might even be said without much exaggeration that the corporation is really socially and politically a priori whereas the shareholder's position is derivative and exists only in contemplation of law"73 — which suggests that the corporation is an anthropomorphic "Group-person" in the Gierkian sense.74 Surely the corporation is a government, a

70. See pp. 51-53 infra.
72. R. Eells & C. Walton, supra note 62, at 149.
73. P. Drucker, Concept of the Corporation 21 (1946).
"private" government to be sure, but nevertheless "government through and through," as Arthur Bentley put it several decades ago. The sociological corporate community may meaningfully be seen as a political system as well as an economic entity; as Professor Earl Latham has said, "A mature political conception of the corporation must view it as a rationalized system for the accumulation, control, and administration of power." It — the supercorporation — may also be usefully viewed as a unit of federalism, of functional federalism, nongeographical but in many respects of more significance than the 50 purportedly sovereign States of the union. The 50 States make up the system of formal federalism; their importance may lie more as a source of Senators than as a repository of real power.

With respect to the national government, the "corporate states" are of far greater importance than are the 50 geographical entities. The latter are significant mainly as administrative districts for centrally established policies; they are, in large part, anachronisms in the body politic. Writing in 1908, Woodrow Wilson asserted that "the question of the relation of the states to the federal government is the cardinal question of our constitutional system." That may have been accurate when Wilson wrote, but if so, it no longer is. The marriage of science and technology to entrepreneurship has created the far more important question of the relation of the supercorporations to the federal government, even though Justice Frankfurter once observed, somewhat testily, that the "unifying forces of modern technology" have not wiped out State lines. The learned Justice was accurate so far as formal federalism is concerned, but quite mistaken with respect to functional or economic federalism. The supercorporations have produced a national economy which is superimposed upon a decentralized formal political order, and in so doing, have so warped the federal system that it bears little resemblance to that which existed in 1800. The point was made by Professor Wolfgang Friedmann 10 years ago: Not many years ago, "advocates of 'pluralism,' . . . pleaded for more recognition of the social groups within the State . . . in mitigation of the legal and ideological glorification of the State. A generation later, the question must be raised in all seriousness whether the 'overmighty subjects' of our time — the giant corporations, both of a commercial and non-commercial character, the labor unions, the trade associations, farmers organizations, veterans legions, and some other highly organized
groups — have taken over the substance of sovereignty."79 Functional federalism is a way of describing nongeographical private governments which operate within the American polity. The power of the units of functional federalism is far greater than that of the units of formal federalism.

As Max Lerner has said, "A new constitutional structure of industry and government is emerging, with a new separation of powers that is more relevant for contemporary America than the classical separation of governmental powers."80 If for "separation of powers" is read "federalism," then that statement sets out the point sought to be made here: the governmental character of the supercorporations (which will be discussed in detail in the next section) and their close tie-in with government. That government relationship is often spoken of as a "partnership," and in fact it may be so thought even though it is far from clear at this time which of the partners is dominant or senior. (This is one of the unanswered questions of the techno-corporate state.)

The close alliance between government and business may be seen in the activities of many government agencies; for example, the Pentagon, NASA, and the Atomic Energy Commission could not operate without the assistance of corporate enterprise. These are the agencies that have definite tasks to perform — national security, "shooting the moon," developing nuclear energy, and the like. Those listed are merely illustrative of a much larger picture. Moreover, those agencies that were set up to regulate segments of industry (and it is noteworthy that those industries ostensibly regulated are almost wholly products of science and technology) have close and continuing ties with the industries regulated. Often, it would appear, the concept of regulation has merged subtly into a concept of protection of the industry, thus bearing out the famous advice of Richard Olney, President Cleveland's Attorney General, to a friend who was president of a railroad and asked for informal advice as to what to do with the newly created Interstate Commerce Commission. Said Olney: "My impression would be that looking at the matter from a railroad point of view exclusively it would not be a wise thing [to try to get the ICC abolished] . . . . The attempt would not be likely to succeed; if it did not succeed, and were made on the ground of the inefficiency and uselessness of the Commission, the result would very probably be giving to it the power it now lacks. The Commission, as its functions have been limited by the courts, is, or can be made, of great use to the railroads. It satisfies the popular clamor for a government supervision of railroads, at the same time that super-

vision is almost entirely nominal. Further, the older such a commission gets to be, the more inclined it will be found to take the business and railroad view of things. It thus becomes a sort of barrier between the railroad corporations and the people and a sort of protection against hasty and crude legislation hostile to railroad interests. . . . The part of wisdom is not to destroy the Commission, but to utilize it.\textsuperscript{81} The pattern is far from uniform, but the lesson of history seems to be that Olney's advice has been proved by the evolution of the so-called independent regulatory commissions (which, it may be noted, are not independent nor do they do much regulation). Quite possibly, as has been suggested by Professor Louis L. Jaffe, this is what Congress had in mind when the commissions were established.\textsuperscript{82} Be that as it may, for present purposes the point is that even in the instances of those agencies that ostensibly regulate business, some sort of symbiotic relationship has grown up. It is not unfair, accordingly, to maintain that in the area of regulated industries the corporations act with the protection of the state, to perform functions that the state deems desirable. Or as Justice Louis D. Brandeis put it, "Whether the corporate privilege shall be granted or withheld is always a matter of state policy. If granted, the privilege is conferred in order to achieve an end which the State deems desirable."\textsuperscript{83}

A consequence is that the line between what is supposedly public and what is private is blurred, even erased entirely in some respects. Economist Robin Marris, writing from England, puts the matter somewhat differently in making what is the same basic point: "[T]he industrial capital of western democracies is no longer divided into two classes, 'public' and 'private', but rather into three, 'public', 'private', and 'corporate'. The corporate sector likes to be described as 'private', but this may represent no more than a desire to conceal . . . ."\textsuperscript{84} A continuum may be constructed showing how the supercorporations relate to government, running at the one end from those that are in fact "arms of government" (the weapons system producers, for example) to those at the other end which have only a minimum formal legal ties to government (A.T.&T. is a good example here). The point is that wherever a given supercorporation falls upon the continuum, there is a high, albeit varying, degree of dependence upon the state. Some are entirely dependent upon government largesse for their existence; these include the industries which operate only because they have a government license (for example, the radio and television networks, the airlines, the

\textsuperscript{81} Quoted in L. Jaffe, Judicial Control of Administrative Action 12 (1965).  
\textsuperscript{82} Jaffe, Book Review, 65 Yale L.J. 1068 (1956).  
\textsuperscript{83} Louis K. Liggett Co. v. Lee, 288 U.S. 517, 545 (1933) (dissenting opinion).  
\textsuperscript{84} R. Marris, The Economic Theory of 'Managerial' Capitalism 13 (1964).
natural gas pipelines). Others rely only upon a favorable legal system and an ability to influence, if not entirely control, the flow of political decisions emanating from the Congress and the public administration. All interact with the state, not only in dependence for their very existence, but also because they have now become necessary to the state. Furthermore, as Harry Magdoff recently put it, "There is more than a mild interest by the corporate organizations in U.S. foreign policy and its military complement as a convenience in sustaining a comfortable business environment." 85

Enough has perhaps been said to indicate that the antagonism between business and government is more alleged than real — both historically and contemporaneously. As President Coolidge said, the business of America is business — and the business of American government throughout history has been business. Possibly, the interlocking relationship may be somewhat more obvious today than in the past, for the requirements of the state have been greatly enhanced in recent decades (just as the needs of the supercorporations have changed), but the generalization remains valid that the state has always been as strong as it had to be (and as it was compelled to be by economic interests). 86 The mythology, of course, is different; under the set of beliefs once dominant (and still quite evident), the state was the enemy of business, something to be fought and held off. However, the type of thinking that led to the movement in law called "legal realism," by which scholars looked to what existed (and exists) in fact rather than accepting situations on faith, has cut through much of the myth in recent years. Not that we are entirely free from it; the contrary is more likely the situation, for we labor under conceptual constraints that have little coincidence with reality. There is a well-nigh infinite capacity of the human mind to deny reality, to hang on to old ideas long after they have been exploded. Just as men usually see in history what they want to see, they tend to believe what they want to believe.

What is needed is an organizing principle around which may be constructed a meaningful analysis and description of the government-business symbiosis. At highest level abstraction, that principle is here stated in terms of the "techno-corporate" state. Of a somewhat lesser level of abstraction, the term "economic planning" seems particularly useful in this context. Here, again, however carefully one uses the term, he runs the risk of misunderstanding — if for no other reason than that many businessmen (and their academic votaries) strongly condemn the concept, mainly, it would seem, because it is

85. Magdoff, supra note 53, at 247.
connected with "socialism" and other devils of current mythology. As Professor Firmin Oulês has said, "Few other expressions can be so loosely employed; those who use the word, whether as a term of approbation or abuse, seldom realize exactly what planning as a whole means or understand the differences between the various types of planning." Even so, it may be used as an organizing principle. In so doing, however, it should be made clear that the term is used here in a somewhat different context and manner from what it normally is. In the exposition, it is necessary to look to what happens in fact, as distinguished from what purportedly takes place. As Oulês says, "What matters in planning is not the official statements made on the subject nor the organizations officially set up for the purpose; the vital questions are the economic structure of the country, coordination of the various components of an economic policy and of the development of investment in the various branches of the economy. It is the contents of the bottle which matter, not its label."

In looking to the contents of the bottle of economic planning, it is best to think, not in terms of a static condition that has remained steady throughout American history, but in terms of a trend or tendency. Change having been at least endemic since 1787, if we are to understand where we are, it is desirable to know where we have been; and if we are to try to control where we want to be in the future, then trend-thinking becomes unavoidable. Since we will revert to the question of planning again below, for present purposes all that is necessary is to set forth, perhaps too dogmatically, an adumbration of economic planning in the American experience.

We may begin with a basic postulate (or assumption): Economic planning, in a certain minimal sense, has always existed in the United States. The state has never been neutral to economics; its main posture in the past was that of making decisions to help business (which by the 1850's had become corporate) enterprise. The legal system, both legislative and judicial, operated to that end, whether it was in the form of subsidies (tariffs, land grants to railroads, etc.) or in the form of private-law decisions which in effect favored business (such as the tort doctrines of contributory negligence and assumption of risk) or in the form of constitutional law decisions which invalidated attempted official limitations on business activity. Immigration policies providing a steady flow of cheap labor, an inflow of capital to the developing nation from Europe, enormous natural resources, and the absence of foreign wars were other contributory factors to the growth of the economy.

88. Id. at 47.
90. See A. MILLER, supra note 18.
The trend in history, however, is from a minimal type of planning toward active state intervention and participation in economic affairs. Throughout, the basic planning unit of the United States has been the business enterprise — now the supercorporation. What is to be seen (and what will be discussed below) is that the degree of affirmative government intervention in what are sometimes called "the prerogatives of management" has increased steadily, and has taken an exponential leap since 1930. The theme of this Article is that this trend is leading, slowly but ineluctably, to the formation of the techno-corporate state. The United States has now moved at least to a position called by Gardiner Means "facilitative planning";¹ and it seems likely that the trend will continue. (This does not mean, nor should it be taken to mean, that planning is well done; nor that the creation by slow accretion of the techno-corporate state is a situation to be welcomed uncritically. Quite the contrary.) The question, now as always, is not whether planning exists, but who does it, for what ends, to whose gain?

Professor Galbraith finds in "the imperatives of technology" a need for planning arising from "the long period of time that elapses during the production process, the high investment that is involved and the inflexible commitment of that investment to the particular task."² Planning is essential because business management "aims to minimise [sic] uncertainty, to minimise [sic] the consequences of uncertainty, or both,"³ and looks to the state to absorb some of the major risks. It is, says Galbraith, the compulsion of technology, rather than ideology or "political wile," that requires corporate management to seek the help and protection of the state.⁴

Singling out technology as the key to an explanation of planning seems, to repeat what was said above, much too simplistic. If planning is viewed under the trend suggested here, then quite obviously technology is only one of the factors leading toward the greater participation of officialdom in business affairs. Other influences would surely include the closing of the American frontier, the rise of equalitarianism (long ago forecast by de Tocqueville),⁵ the emergence of the United States as the single most powerful nation in the world (connected, of course, to science and technology), and the need for a system of rationing scarce resources (as radio and television frequencies, airline franchises, and the like — which, again, are connected with technology). Galbraith's model is inadequate. He apparently thinks of technology as an "irre-

92. J. GALBRAITH, supra note 4, at 19.
93. R. MARRIS, supra note 84, at 232.
94. J. GALBRAITH, supra note 4, passim.
95. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Vintage ed. 1945).
pressible force of nature, to which we must meekly submit." That may be accurate, but it will take more than his bald assertion to make it so.

One further aspect of modern economic planning may be mentioned: As the system has grown, and as it works now, it tends to favor segments of American society, without accompanying benefit to (although not necessarily at the expense of) other segments. Put another way, the American system of planning may be said to have produced the American form of the "welfare state," and that at least three different groups tend to benefit from that system. There are, in other words, three versions of the welfare state — the "rich man's," the "poor man's," and the "intellectual's." Of the three, the most controversial is the least expensive — the "poor man's" version. This is the program which funnels funds to dependent children, unemployed, "poverty" projects, and all of the other examples of governmental intervention to aid the disadvantaged. It is one of the ironies of the age that it occasions the most heated debate and is usually the first to be thought of when someone suggests reducing the federal budget. There is still a moral stigma attached to being poor; those who want some measure of economic and psychic security are scorned and derided by the very ones who have it. (This is exemplified by a former President of the United States, a man who has spent his entire life since adolescence on the government payroll and who, even today, takes advantage of the free medical services of the Government even though he is a millionaire; and also by a former candidate for the Presidency who had the good fortune to inherit a department store from his parents. Economically secure, they sneer at those who yearn for that security.)

Much more expensive is the "rich man's" version, which in many respects should be combined with the "intellectual's" version, for these two groups often act in tandem. These versions are also much more respectable. The rich man's welfare state may be seen in many diverse programs; for example, the tax laws tend to favor (despite the myth to the contrary) those with wealth, the oil depletion allowance being only one of the more prominent; subsidies are routinely paid to corporations in industries considered to further the "national interest" (shipping, airlines, etc.) and also to farmers (who more and more tend to be "corporate," rather than individual); the automobile industry is subsidized by massive highway programs (built, it should be noted, with little regard to aesthetics or the humanistic values); and corporate combines are kept in existence through contracts for the production of items the value of which is dubious or at least subject to question.

96. 110 CONG. REC. 10,480 (1964) (Law Day Address of Vice Admiral Rickover).
In many respects, much of the rich man's welfare state exemplifies the "military-scientific-industrial complex" against which President Eisenhower warned in his farewell message.

Complementing the rich man's version is that of the intellectual, particularly the scientist and technologist who can with little difficulty obtain government contracts or grants for a bewildering variety of purposes. With the federal government spending on the order of $15 to $20 billion annually, with our commitment to technology being in Professor Harold Green's phrase "irresistible, irrevocable, and irreversible," this segment of welfarism seems likely to continue and even to expand. The net result is that, just as some of the largest supercorporations owe their very livelihood to government contracts, so too do some of the most prestigious universities in the nation. The "federal grant" university has become a familiar part of higher education. Furthermore, literally thousands, even millions, of people — scientists and technologists as well as "blue collar" and other workers — are dependent upon federal funds. Not, be it noted, as members of the civil service, but as employees for corporations, for universities, for "non-profit" corporations. Further, these groups (and these individuals) have an interest in the continuance of such government programs, and raise thereby serious problems of governance.

Writing several years ago, Professor Carl Kaysen called the "proposition that a group of giant business corporations, few in number but awesome in aggregate size, embodies a significant and troublesome concentration of power" a cliché. He went on to say that a few large corporations exert significant power over others; "indeed . . . over the whole of society with respect to many choices, and over large segments of it with respect to others." Power he viewed as "the scope of significant choice" open to "any actor on the social stage." The question is indeed one of power, power in a political sense. That the supercorporations exercise significant political power requires separate treatment.

III. Private Governments

We have argued above that the American people live in a new economic order, in which the most important segments are the supercorporations. Each of those enterprises, although a person in law, is

in fact a collectivity, a federation of interests, a private government, a political order. The outlines of the “corporate states of America” are set forth in this section.

The key question, as has been said, is one of power; to the definition of Professor Kaysen may be added that of Professors Lasswell and Kaplan: “Power is participation in the making of decisions: G has power over H with respect to the values K if G participates in the making of decisions affecting the K-policies of H.” It will readily be seen from such definitions that the concept is not easily reduced to a formula; however, for the following discussion power will be considered to be the ability or capacity to make decisions affecting the values of Americans. How, then, does the supercorporation exercise power? If it does in any significant way, can it then be called an instrument of American governance? The several ways in which power is exercised may be summarized under the following headings.

(1) The supercorporations make decisions of national or societal importance. They set national policy in significant areas of concern — allocation of resources, the direction and nature of investment, and so on. Alone or in concert with others, they set prices (either collusively, as in the electric conspiracy cases, or in the system of “administered” prices, which may be thought of as a form of taxation), carve up markets (often in concert with government, as in the airlines), and even go so far as to subsidize the arts and education.

(2) Much of officially announced public policy is in fact an amalgam of private bureaucracies interacting with public officialdom. The supercorporations often can “veto” proposed public policies and also, in some instances such as the supersonic transport, can actually establish policy. Professor Galbraith maintains that public policy often is a resultant of the interactions of the technostructures within the supercorporations and their counterparts in government. So it seems to be. Policy thus becomes the product of a parallelogram of conflicting group forces, with government often the broker among those groups but also having an interest of its own to further. As has already been stated, some of the public agencies established for the ostensible purpose of regulating industry, or other facets of American life, act in fact as surrogates of the very activities purportedly controlled.
pare, in this regard, the Interstate Commerce Commission, the Federal Communications Commission, and the National Labor Relations Board; compare also the Veterans Administration with the Department of Agriculture; NASA with the Pentagon; and so on. It is here, in the setting of “requirements,” i.e., that which the government will buy or subsidize, that the military-industrial-scientific complex may be seen. But the situation is much broader than even the huge scope of military and scientific affairs.

(3) The supercorporation is often an agency of administration for government. Government, faced with mounting responsibilities the root cause of which is often science and technology but which is not permitted to expand the formal civil service, farms out staggering amounts of the public administration, of governing power, to private organizations. “Contracting-out” is particularly evident in research and development. There is scarcely an American governmental organ, including Congress, that does not participate in the system, a system that is creating an “external bureaucracy” in ostensibly private organizations. Those organizations may be profitmaking, as corporations, or “nonprofit,” such as universities. It should be remembered, in this context, that as Bishop Hoadly said many years ago, the true lawmaker is he who has the power to interpret the laws (to administer) rather than the person who first prescribes the norm.

(4) The supercorporation is a private government because in its internal operations it is a political order. The task of those who control the enterprise is to make a profit, but not necessarily to maximize profits; rather, profits are “satisficed,” for the oligarchs who control the firm (thereby exemplifying Michels’ “iron law of oligarchy”) must perforce balance the interests of the corporate community and take into consideration the “public interest.” Quite often, the enterprise operates private judiciaries; for example, in the system of industrial jurisprudence that has developed during recent decades and in the “Automobile Dealers’ Day in Court Act” of 1956.

108. There is, it might be said, “vertical integration” in American government, between the governed and the governors. See M. Bernstein, Regulating Business by Independent Commission (1955) for an account of the phenomenon in the very area where government agencies were set up to regulate.

109. It could scarcely be otherwise, unless public policy became solely a matter of fiat or dictate.


The supercorporation, alone or in concert with others, operates to legislate in the field of contract law. Contract law, as it developed, was the analogue, if not the product, of free-enterprise capitalism, a system based on individual enterprise or, at most, small shops. It is the legal concept appropriate to an economic system in which reliance is placed on exchange rather than tradition or custom or command for the distribution of resources. In an individualistic society, all law is ultimately based on contract, that is, derived from choices freely made by responsible individuals. But the demise of laissez faire and the rise of corporate combines have created a "new feudalism" in which contracts are not so much the result of bargains struck as of adherence to already established terms. Government contracts provide the classic illustration, but in the private sector most transactions still called contract are really "contracts of adhesion." The relationship tends to be one of power, not of bargain, in which the group dominates to set the terms and conditions under which agreements are made. Administered prices furnish the ready example; the contract of adhesion is the analogue of administered prices and price leadership. Freedom of contract has degenerated into the "freedom" to choose which agreement one will "adhere to." Standard-form contracts, in other words, are legislative prescriptions of the corporate communities and trade associations.¹¹⁴

Finally, the supercorporation is a private government in those firms that control the mass media of communication. Again, they act in concert with government, particularly when a license is required (as in radio and television), but also, as Jacques Ellul maintains, because the media are employed by government in a pervasive system of propaganda that is so characteristic of the modern age.¹¹⁵ This, it may be noted in passing, helps to make nonsense of the Supreme Court's asseverations about the "marketplace theory of truth."¹¹⁶ In this time, as in the past, "the dictum that truth always triumphs over persecution is one of those pleasant falsehoods which men repeat after one another till they pass into commonplace but which all experience refutes."¹¹⁷

When John Stuart Mill said that in 1874, the mass media had not yet come into existence. Today, with government secrecy policies, managed

¹¹⁴ See F. Kessler & M.P. Sharp, Contracts: Cases and Materials 1-13 (1953). It is worthy of mention that the law of contracts, as purveyed in the casebooks used in law schools, by and large tends to reflect an age long gone — the pre-supercorporation, if not the pre-industrial, age. See W. Friedmann, Law in a Changing Society (1959).

¹¹⁵ J. Ellul, Propaganda (1965).


news, immensely complex public policies remote from a person’s immediate experience, lack of candor by government officials, and other examples of pollution of the stream of information, the problem is enormously more difficult, the marketplace of truth a much more obvious fiction.118

In many respects, the corporation with substantial involvement in world trade — the transnational or multinational corporation — provides better illustration of the firm as an instrument of governance (even though, as noted above, it is difficult and often impossible to garner precise factual data about those enterprises). The point may be made by first emphasizing the governmental (i.e., political) nature of the corporation domestically and then discussing the multinational firm. Corporations are governments for a number of reasons, to summarize what has been said in this section; they develop and allocate resources, attract the loyalties of millions of individuals, and generally perform functions indispensable to the members of American society. Although not so considered in orthodox constitutional theory, they perform and have performed vital public functions. This was recognized by a seminal thinker, Henry Carter Adams, who wrote in 1902 that every great industrial enterprise is clothed with a quasi-public interest. Not only are the public as consumers interested in administration of the economy, but, of more importance, a business organization is a depository of social power, and for this reason cannot be properly administered independently of social considerations. Said Adams: "Corporations originally were regarded as agencies of the state. They were created for the purpose of enabling the public to realize some social or national end without involving the necessity of direct governmental administration. They were in reality arms of the state, and in order to secure efficient management, a local or private interest was created as a privilege or property of the corporation. A corporation, therefore, may be defined in the light of history as a body created by law for the purpose of attaining public ends through an appeal to

118. In the complex web of our social and economic structure, which tends to place the vital organs of expression and public opinion in the hands of a few individuals or of the public authorities themselves, there is constant need to ensure that the essence of democratic values is not eroded at its very source. Is it really practicable to create a climate of genuinely free opinion and discussion within a framework of control retained by a tiny minority of powerful individuals and groups? As Lord Radcliffe has recently remarked, "Censors will be very powerful but will not even be identified as censors," for what may be permitted to emerge in these various organs of opinion may depend upon what the owners and publishers of newspapers and the producers of broadcast programs consider as suitable for the public eye or ear. Hence, in the future, the idea of law must not confine itself to grappling with the technical problem of giving effect to human values through legal machinery, but must take thought as to what means may be devised for ensuring that the stream of free thought does not dry up at its source, by virtue of monopoly control.
private interests."  Of course, since Adams wrote (and even before), the myth was to the contrary: The corporation was a property interest existing for the sole betterment of the shareholders.

That the corporation is a government existing cheek by jowl with public government in a pluralistic system, and exercising economic sovereignty, has been asserted by a number of qualified observers in recent years, including Earl Latham, Richard Eells, Adolh A. Berle, Alexander M. Pekelis, Wolfgang Friedmann, Robert E. Hale, Peter F. Drucker, John K. Jessup, Justices of the United States Supreme Court, and judges on other federal and State courts. Government by private groups is an operational reality in the United States. However, it may be one thing to label the supercorporation a government so far as domestic affairs are concerned and quite another to conclude that a corporation is a private government internationally. General Motors or the Ford Motor Company or any other supercorporation, as centers of economic power, wield such an influence and exercise such a control over many segments of domestic life that it is not difficult to consider them to be governmental in nature. Turning, however, to external affairs, can it be said that the large corporation operating mostly or substantially externally (e.g., the Arabian-American Oil Company) is also a private government? The answer can only be affirmative. In fact, it may be easier to equate, in politico-legal theory, the international “private” corporation with government than it is for the domestic firm. Sigmund Timberg has described the situation well, in an article discussing the corporation as a technique of international administration; says he:

England, Holland, and the other great trading powers of the seventeenth and eighteenth centuries were delegating political power to their foreign merchants, when they permitted those merchants to engage — collectively and under the corporate aegis — in foreign trade. In Maitland’s classic phrase, these were “the companies that became colonies, the companies that make war.” The same proposition holds for the modern large corporation. The modern state undeniably delegates political power to large private corporations, as it does to the large labor unions with which the corporate behemoths deal. The authorization of collective activity has, at least since the time the early Christian and Jewish communities had their difficulties with the Roman Emperors, always been a state prerogative. Furthermore, the activities authorized for a large corporation involve such functions as price-fixing, the division of markets, the setting of wages, and the general development of local communities, functions which in a

120. Redford, supra note 113, provides a good brief discussion.
pre-Industrial Revolution era had been the primary responsibility of the State. It has been said of international cartels that some of the more powerful of them "are little empires in themselves, and — their decisions are often more important than those of 'sovereign political' entities like Holland, Denmark or Portugal."

The same could be said even more forcefully of the political strength of that more cohesive unit, the international combine; the notion that international combines and cartels are strong political entities is no longer a monopoly of the intuitively minded economist or political scientist. Judges have described international cartels as instruments of "private regulation," and have called an American subsidiary the "commercial legation" of its British parent. Even the counsel involved in drafting international cartel agreements speak of a trade area as so-called neutral territory, or to put it another way as "spoils" belonging to the British and ourselves as allies in the late war. Such a consistent use of political terms is more than a mere metaphor; it is a recognition of an underlying reality. 121

The ultimate question, in formalistic terms, is one of sovereignty — which is ultimate power — and sovereignty, according to Bodin and others, is indivisible. But does that accord with the facts? Is there, in Lord Bryce's term, a "practical" sovereign as well as a "legal" sovereign? 122 The corporation does not necessarily acquire sovereignty merely by being permitted to exist; after all, during the growth and heyday of nationalism corporations handled a nation's credit or its transportation, as well as performing other important functions. But "practical" sovereignty did flow to the corporations, particularly in international affairs but also domestically, when the state, either through indifference or preoccupation with other matters or by being subtly "taken over" by the supercorporations, endowed them with new and significant characteristics. "These new attributes were irrevocable immortality, a very large area of immunity from supervision by the state, and an indifference to (at times even a conflict with) the general political objectives of the state." 123 Another way of putting the matter would be to say that public government has formal authority by which it ostensibly rules economic affairs but that in fact corporations exercise effective control over much of the details of those relationships. Shared power over economic affairs does not mean, however, that the power-wielders operate wholly independently of each other. Quite the contrary. Often the political sovereignty — the formal authority —


123. Timberg, supra note 121, at 744.
of public government is invoked to aid the economic sovereignty of the corporations. As Wolfgang Friedmann has said, "Public and private activities, and with them, public and private law, are today increasingly intermingled." 124

The consequence is clear and unmistakable: A constitutional change of major dimensions has taken place. The label for the product of this profound alteration is the "techno-corporate" state.

However, at the same time that the corporations have waxed large and strong, government has undergone an exponential change. During this century it has proliferated far beyond the wildest thoughts of the Founding Fathers. This, in briefest terms, is the rise of the Positive State, a government with affirmative obligations to perform wholly different from the functions of the "negative, nightwatchman state." It is to this that we now turn.

IV. THE "POSITIVE STATE"

Writing several decades ago, Leon Duguit asserted that: "Any system of public law can be vital only so far as it is based on a given sanction to the following rules: First, the holders of power cannot do certain things; second, there are certain things they must do." 125 The "cannot do" of that formulation is a shorthand expression for much, perhaps most, of historical American constitutional law. The "must do" is just now coming into view, so far as constitutional doctrine is concerned, although it has become a familiar political feature during the past three decades. In this section, the outlines of what by any criterion is probably the most significant constitutional change in American history — the coming of the Positive State — are set forth. The Positive State has undermined the preconceptions of classical constitutional theory in much the same way that the modern corporation, as Gardiner C. Means has said, "has undermined the preconceptions of classical economic theory as effectively as the quantum undermined classical physics at the beginning of the twentieth century." 126

In briefest terms, the Positive State is a shorthand label for the express acceptance by the federal government — and thus by the American people — of an affirmative responsibility for the economic well-being of all. It involves a societal shouldering of a duty to take action to create and maintain minimal conditions within the economy —

125. L. DUGUIT, LAW IN THE MODERN STATE 26 (1919).
of economic growth, of employment opportunities, of the basic necessities of life. Exemplified in a broad range of programs, federal and State, it is the American version of the welfare state. (That all do not share equally in the largesse distributed, in one way or another, under welfare programs has been discussed above.)

The Positive State received its charter in 1946 when Congress enacted the Employment Act, surely one of the most important legislative actions ever taken in American constitutional history. In form a statute and thus outwardly not of the dignity of a constitutional precept, it nonetheless overshadows most, if not all, of the true constitutional amendments. Written in constitutional language of high-level abstraction with little particularity or precision in prescription, the Act should be considered as making constitutional law, but by Congress and not, as is the usual situation, by the Supreme Court. Its enactment symbolized a series of other statutes that brought about a radically different government-business symbiosis from that which existed prior to the 1930's. Often mislabelled the Full Employment Act, its purpose may be found in its preamble:

The Congress declares that it is the continuing policy and responsibility of the Federal Government to use all practicable means consistent with its needs and obligations and other essential considerations of national policy, with the assistance and cooperation of industry, agriculture, labor, and State and local governments, to coordinate and utilize all its plans, functions, and resources for the purpose of creating and maintaining, in a manner calculated to foster and promote free competitive enterprise and the general welfare, conditions under which there will be afforded useful employment opportunities, including self-employment, for those able, willing, and seeking to work, and to promote maximum employment, production, and purchasing power.

With that pronouncement, economic planning, which as has been suggested has always been a feature of American government, now became overt and expanded. Prior to 1946, of course, a series of Supreme Court decisions had already given approval to facets of planning. Not that much of the 19th-century style of planning got to the Court. Quite the contrary; most activities were not litigated, the exceptions being attempts by State governments to deal with interstate commerce and both the federal and State governments in the post-

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Civil War era to deal with some of the problems brought on by industrialization. It is worth at least passing attention that the law of the former, on State attempts to tax and regulate interstate commerce, is still viable; but that the latter — that is, economic due process — has been largely repudiated. One can go back to the mid-19th century to find examples of federal economic-planning activities that did get to the courts; perhaps the Legal Tender Cases is as good an illustration as any. Munn v. Illinois began the concept of "businesses affected with a public interest," a concept that permitted State regulation of a limited class of businesses. Munn lasted until the early 1930's, until the Supreme Court decision in Nebbia v. New York which in effect said that any business which government chose to regulate was affected with a public interest.

This familiar history need not be recounted at this time. What is emphasized is that, while some manner of planning has existed throughout American history, there is a great difference in the type of planning (and of government) that has come into being since the constitutional watershed of 1937. The difference may be one of degree or it may be one of type, depending on how one reads American history. It is the change from the "negative state" to the Positive State. The Supreme Court legitimized the Positive State in the series of decisions beginning in 1937, but which may have had their real beginning in the early cases of Nebbia v. New York, Home Building & Loan Ass'n v. Blaisdell, and the Gold Clause Cases. The turning point did come in the 1930's, whatever landmark case one chooses. In the judgment of the writer, the important corner was turned in West Coast Hotel Co. v. Parrish decided prior to the famous Jones & Laughlin decision upholding the National Labor Relations Act.

130. Recounted in the rise and fall of "economic due process." See McCloskey, Economic Due Process and the Supreme Court, in Supreme Court Review 34 (P. Kurland ed. 1962).
131. The doctrine still retains some viability in State supreme courts construing State constitutions. Since 1937, however, only one decision, Morey v. Doud, 354 U.S. 457 (1957), has invalidated business regulation under the Federal Constitution, and that was on equal protection, not due process, grounds.
133. 94 U.S. 113 (1876).
135. The history is recounted in A. Miller, supra note 18.
137. 290 U.S. 398 (1934).
139. 300 U.S. 379 (1937).
140. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). A number of commentators use this case as the turning point.
Although still in the process of being worked out, enough is known even now to enable one to trace the contours of the new posture of government. They include the following:

(1) The change from a Constitution of limitations to one of powers; or, as Edward S. Corwin termed it, "a Constitution of powers in a secular state." So far as litigation is concerned, the emphasis to 1937 was on limitation — with the Supreme Court acting, mainly negatively, as "the first authoritative faculty of political economy in the world's history . . ." The "constitutional revolution of the 1930's" reversed that, insofar as economic policy is concerned. Perhaps the Parrish opinion of Chief Justice Hughes provides the transitional key, in which the due process clause, rather than being a limitation on governmental power, "becomes an actual instigation to legislative action of a levelling character." The notion of limitation still remains, but not in economic policy matters. Witness the language by Hughes:

The principle which must control our decision is not in doubt. The constitutional provision invoked is the due process clause of the Fourteenth Amendment governing the States, as the due process clause in the Adkins case governed Congress. In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

That statement changed the nature of liberty under the Constitution and ushered in the Positive State. Tacit recognition was given to the view that liberty could be infringed by forces other than government and, of even more importance, that those forces may require the affirmative intervention of government to counteract them. Individuals, as well as governments, could now be limited by due process. In economic terms, the power of the state could counteract the power of private

141. E. CORWIN, A CONSTITUTION OF POWERS IN A SECULAR STATE (1950).
142. J. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 7 (1924).
143. E. CORWIN, LIBERTY AGAINST GOVERNMENT 161 (1948) (emphasis added).
collectivities. In other words, due process does not mean only liberty against government; it can also be used by government to restrain the liberty of some in the "interests of the community."

When Parrish was followed shortly thereafter by the Jones & Laughlin case and the Social Security Cases,\textsuperscript{145} upholding congressional encouragement of labor union activity and (in the latter set of cases) congressional employment of the taxing and spending powers to further "the general welfare," the legal barriers to the Positive State crumbled.\textsuperscript{146} The gates were opened to other acts of Congress and of the Executive, usually but not always in tandem, which brought overt welfarism to American government. The point should be refined: What happened is that government largesse, which had been confined to the business community theretofore, was now extended to other societal groups. It is to be emphasized that government welfarism in the 19th century, which went mainly to business enterprise, of course benefited others as well; subsidies to the railroads, for example, were of benefit to the community at large, and even tariffs tended to help other members of the corporate community than the entrepreneurs. The point is simply that the federal government assumed responsibility for the guidance of economic affairs in the interests of all; the principle of equality, long present in the nation, received official cognizance. That principle was spelled out explicitly in the Employment Act of 1946.\textsuperscript{147} In constitutional doctrine, this has meant the desuetude of the concept of economic due process and the decline of the Supreme Court as an authoritative faculty of political economy.

(2) "Democracy," Professor Frank H. Knight recently said, "has assumed the task, enormously more difficult than enforcing a law known to all, of deciding what the law ought to be and making any changes called for."\textsuperscript{148} In present context, this means that with the coming of a Constitution of powers, the American democracy has assumed the task, immensely more difficult than merely umpiring the private decisions and disputes in the market, of deciding what economic policy ought to be and of taking action to effect necessary changes. In other words, the second noteworthy feature of the Positive State is the advent of an overt system of economic planning by the federal government.

\textsuperscript{145} Helvering v. Davis, 301 U.S. 619 (1937); Steward Machine Co. v. Davis, 301 U.S. 548 (1937).
\textsuperscript{146} Presciently foreseen by E. CORWIN, THE TWILIGHT OF THE SUPREME COURT ch. IV (1934), although Professor Corwin failed to foresee the emphasis on civil libertarian issues by the Court during the past 20 years.
Although, as has been said above, it is not inaccurate to say that some sort of economic planning has existed throughout American history, today's version is basically different. The trend toward more active and direct governmental participation in economic matters may be viewed as a system in which decisional power over economics is shared, in greater or lesser degree, by the officials (usually in the public administration) and the corporate managers. The American system of planning now is "facilitative"; it involves basic reliance on the private character of economic and commercial enterprise but insists that certain decisions of the corporate community be taken "in the public interest." As such, it falls far short of the almost completely planned economies of Communist China and the Soviet Union.

All economic processes involve the making of decisions; those decisions are made in two principal ways — by government authorities who seek to manage the operations of the economy and by the market, through the decisions of enterprises, unions, workers, farmers, investors, and consumers. Both features exist in all economies, although different emphases are given. In the United States, the market is relied on with government making those minimal decisions considered desirable to influence the nature and character of that market — chiefly in the direction of economic growth and employment opportunities. Conversely, communist nations depend mainly on the plan, although some scope is given to free choice by workers and farmers and other individuals. Thus the federal government facilitates economic growth and seeks to control inflation through the use of such techniques as wage-price guidelines announced by the Council of Economic Advisers. That Council, established by the Employment Act of 1946, is the nerve center of the American planning operation. (This does not mean that it operates in a vacuum. It has close and continuing contacts with the business community, particularly the managers of the supercorporations and trade union officials.) That planning may be minimal, but it nonetheless exists. All nations — developed and less developed, private enterprise and state socialist — can be located, as Theodore Geiger has said, "somewhere along a continuum which ranges from comprehensive and detailed planning by the national authorities of all significant aspects of economic activity to reliance upon decentralized nongovernmental decision making in accordance with market conditions as influenced by government policies."

149. This is not to say that the concept of "the public interest" has been given substantive content. Quite the contrary. See Miller, The Public Interest Undefined, 10 J. Pub. L. 184 (1961).
The modern economy thus is the planned or managed economy. In the United States, the responsibilities of the Employment Act are implemented by three types of legal and economic arrangements, two of which have relatively long histories. The first, however, is, at least in its present-day scope and intensity, rather novel: the manipulation of fiscal and monetary policy to carry out the broad purposes of the Act. This is accomplished by the Government and the Federal Reserve System attempting to control the amount of money spent for goods and services in a volume sufficient to assure high levels of employment without precipitating the pressures of general inflation. Included are tax policies, adjustment of the discount rate, and governmental expenditures ("pump-priming"), which together make up a system of indirect controls of economic activities. By "indirect" is meant that the government is not a participant in the decisions business managers make; what it does is to take action that, in its cumulative impact, alters the milieu in which the businessman operates (and which, for a number of firms, is a direct source of funds for corporate viability). Accordingly, it narrows or circumscribes the range of choices that corporate managers may make. But this is not so much to control but to stimulate the market, and thus to help produce economic growth without the debilitating effects of inflation. It is to be noted that governmental activity of this type both aids business (even when it controls) and uses business to help accomplish given ends (maximum employment, for one; national security, for another). The norm here is cooperation, however outwardly antagonistic it may seem. The conflicts that occur, in the main, are over details of facilitative planning, not whether it should take place.

The second and third instruments for carrying out the Employment Act are complementary: on the one hand, the competitive and regulated markets for goods and services, and on the other, the labor market in which corporate managers and union leaders are authorized to legislate the rules governing the relationships of business enterprise and its labor component. The market is a complex system of interaction between business units and consumers and government; it is, as Eugene V. Rostow has observed, an economic order which is also a system of law. Similarly, the business-labor symbiosis has produced a system of industrial jurisprudence, a sort of common law of the corporate community. In these instruments, as with the first, one essential point is to be noted: activity, whether public or private or, as is so often the case, a combination of both, is aimed at producing what, for want of a better term, may be called "the common good." The
techniques through which the Employment Act is implemented, in other words, all aim at maximizing the general, as distinguished from the particular, interest. True it is that the individual decisions of businessmen and union officers are usually taken in an effort to further their particular or parochial interests without much reference to what the over-all social impact might be. But this is accomplished, nay, permitted, by government only because of the assumption (thus far, largely warranted) that these parochial decisions will through the cautious guiding hand of government inure to the common good. The “invisible hand” of Adam Smith has been replaced by the visible, albeit indirect, hand of the federal government, which intervenes just enough in the private sector to create the conditions that fulfill the goals of the Employment Act. (Not that those goals are fully realized; far from it. There is here, as elsewhere, a considerable gap between aim and reality.)

When viewed in terms of effects, the American-style economic planning institutionalizes the government-business partnership. Government uses the business enterprise to achieve societal goals. That this is accomplished often without any legal link (contract, incorporation, etc.) should not be allowed to obscure the underlying and fundamental reality. If, as has been said, science and technology permit the growth of the corporate communities, then the programs of the Positive State make them necessary. Without them, those programs could not be accomplished — unless government chose to produce the manifold goods and services “in house.” “Managerial capitalism” in many respects differs little from “managerial socialism”; the industrial enterprises of both systems are basically similar. Where they differ is how “the rules of the game” are set. The difference, as Raymond Aron has shown, is fundamental; what they have in common is not necessarily more important than the differences between them. The rules of the game in managerial socialism come from the centrally imposed plan; in managerial capitalism, they are a resultant of an intermixture of public and private influences with a large measure of discretion or autonomy left to corporate managers (within certain broad limits).

In return for a certain degree (rather high) of security, the enterprise pays the price of shared control over decisions. The supercorporations are not guaranteed immortality by government, but they may act with the assurance that government will not take any action that

153. R. ARON, THE INDUSTRIAL SOCIETY ch. 3 (1967). See also R. HEILBRONER, THE LIMITS OF AMERICAN CAPITALISM 90 (1966): “An economic transformation of capitalism of such magnitude that its big businesses become, in effect, public agencies is not a serious possibility for the foreseeable American future, barring a military or other calamity that would wreck the existing order.” But he goes on to say that within 20 years there may be “a much more elaborate system of controls over the level of its total output and its grand division among various social purposes than exists at present.” Id. at 94.
will endanger their existence (for example, the antitrust laws are not likely to be invoked against bigness); further, they have some degree of assurance that government will step in and help maintain their viability should they run into troublous times. This latter point deserves special treatment. Mentioned above has been the notion of the "rich man's" version of the welfare state, through the operation of which a number of corporations are kept alive by government subsidy or largesse — as clear an illustration of the corporatist nature of the American political economy as can be shown. (American corporativism is being built by slow accretion, rather than by fiat; it thus retains the possibility of not being akin to the repressive forms of corporativism known in other nations, such as Mussolini's Italy and Franco's Spain.)

But of perhaps even more importance than the fact of public aid to private collectivities is the manner in which such decisions are made. It is here that economic planning, American style, shows its greatest shortcomings. The system has worked best in two strictly limited areas — defense and space. The question here is whether those two goals should be almost the sole preoccupation of the techno-corporate state? "The challenge facing America," says Michael Shanks, "is not a technical one, it is a challenge of social, political, and psychological adjustment, to adapt the ideals of the eighteenth century to the facts of the twentieth." The race that really matters is that of exploiting the discoveries of technology for the maximization of the nation's wealth and happiness (and for the betterment of mankind). Of what avail to "shoot the moon" if American society disintegrates (as it is at this writing)? Thus one perceives what may be called a confusion of priorities evident in the system of American planning. This prompts the question: Why? Why build a supersonic transport which will carry a few members of the jet set a few hours faster across an already tiny planet, when the cost is not only noise pollution but a failure to deal with some pressing human problems of a crowded planet (and nation)?

The question of confusion of priorities can be little more than posed. One answer that may be given, even though at best it is but a partial clue, is in the manner in which public policy decisions are made in the American government. This in turn poses the problem of constructing adequate descriptive models of the decisional process. This will be discussed further below. Suffice it at this time to say that it is here that President Eisenhower's warning about the power of the "military-industrial-scientific" complex applies, if it does at all.

(3) Third in this listing of the contours of the Positive State are the changes that have occurred and are continuing to occur in the
constitutional framework of government, principally within the basic divisions of power (federalism and separation of powers). This topic could itself be the subject of a separate article or book; what is said now is the briefest of adumbrations. The essence of this proposition is that power is being centralized in the United States; the development may be seen in the desuetude of historical federalism, in the decline of Congress, and in the consolidation of power within the executive branch in the office of the Presidency.

First, as to federalism: When the decision in *NLRB v. Jones & Laughlin Steel Co.*,\(^{155}\) upholding the National Labor Relations Act, was followed soon thereafter by cases validating the Social Security legislation,\(^{156}\) the constitutional underpinnings for a new form of federalism were established. "Dual" federalism now became "cooperative" federalism, and thus posed squarely the continuing viability of a system of formal federalism. This led Harold Laski in 1939 to assert that "The federal form . . . is unsuitable to the stage of economic and social development that America has reached . . . I infer . . . that the epoch of federalism is over . . . ."\(^ {157}\) That belief was echoed in 1955 by Karl Lowenstein: "Experience . . . demonstrates that, whatever strength of tradition and emotional values of political theory federalism is still imbued with, the economic imperatives of the technological state require unified if not uniform economic policies throughout the entire territory and do not brook that kind of economic fragmentation which goes with effective member-state sovereignties."\(^ {158}\) Like it or not, fight against it as one will, the political, economic, and technological conditions of the modern era do not permit now, and ever increasingly will not permit in the future, that diversity that is federalism. The *formal* structure of American government will probably remain, for political organizations have a way of existing, like vermiform appendixes, long after their functions have atrophied; but the substance and the content will be elsewhere, plump as some will (for example Max Ways) for something called "creative" federalism,\(^ {159}\) the important decisions are being and will continue to be made in Washington and other *national* institutions (such as the supercorporations). A nation with a central income tax and with overt economic planning cannot be truly federal; by the same token, a federal nation, the economy of

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155. 301 U.S. 1 (1937).
which is dominated by the supercorporations, cannot be federal. A national economy superimposed upon a decentralized political order has the inevitable result of changes (in fact though not in form) of the political order. Furthermore, the "corporate states of America" — the supercorporations — are vastly more important than the 50 allegedly sovereign political States. 160

As with federalism, so it is with the separation of powers (a misnomer, it should be noted, for what the Constitution established is a system of separate institutions sharing the same powers — quite a different thing). Here the trend, throughout American history and accelerating in recent years, has been toward the aggrandizement of power in the Executive. As recently as 1885, Woodrow Wilson could maintain that "the predominant and controlling force, the center and source of all motive and all regulative power, is Congress. . . ." 161 The Legislature is the aggressive spirit." 162 Today the "aggressive spirit" is clearly the Executive, both in proposing legislation and in its final content. Congress, faced with the mounting tasks of government and institutionally unable to keep up with the details of administration, has ceded sweeping power to the public administration and has permitted the President to acquire without delegation greatly enhanced powers. (This, it may be noted, makes the Supreme Court's decision in the Steel Seizure Case 163 of 1952 seem to be a curious anachronism.) The House Armed Services Committee put the matter effectively and accurately in 1962 in these words:

To any student of government, it is eminently clear that the role of the Congress in determining national policy, defense or otherwise, has deteriorated over the years. More and more the role of Congress has come to be that of a sometimes querulous but essentially kindly uncle who complains while furiously puffing on his pipe but who finally, as everyone expects, gives in and hands over the allowance, grants the permission, or raises his hand in blessing, and then returns to the rocking chair for another year of somnolence broken only by an occasional anxious glance down the avenue and a muttered doubt as to whether he had done the right thing. 164

There can be little question about a decline in the legislative role of Congress. This has meant that, if Congress was to have anything but

160. As John K. Jessup once put it, the political States are more important as a source of Senators than as a repository of sovereignty. Jessup, A Political Role for the Corporation, FORTUNE, Aug., 1952, at 154.
162. Id. at 36.
a nominal function, it would have to find a new role. This it seems to be doing in the area of participation in administrative activities. "Needed in the modern state" says Professor Samuel Huntington, "are means to control, check, supplement, stimulate, and ameliorate this bureaucracy." It has now become obvious that the judiciary cannot adequately accomplish this task. If control of the bureaucracy is to be done, save in a few spectacular instances, judicial review is too episodic and sporadic, too dependent on the accident of litigation and the shortcomings of the adversary system to permit the sustained oversight that is apparently necessary. As George B. Galloway has said, our solution has been to look for Congress to assume new functions; not legislation but control of administration is becoming its primary duty. Not that it does it well or systematically; far from it. Save for the Joint Committee on Atomic Energy and one or two other instances, Congress does not have the resources requisite to an adequate oversight of the public administration. It is trying, but the results are not promising. The point was well made in 1967 by Lord Jackson of Burnley in his presidential address to the British Association for the Advancement of Science; speaking of the British Parliament, he said that "Parliament needs to find a way of getting to grips more effectively with scientific and technological issues;" if it does not, he went on to say, "its functions would be little more than endorsing, on limited information, decisions already taken at ministerial level." The same may be said of Congress.

The other facet of separation of powers is the judiciary. No longer an authoritative faculty of political economy, in that it no longer makes constitutional decisions of an economic nature, the Supreme Court vis-à-vis the public administration operates as an interpreter of statutes. This means, among other things: (a) its decisions are always subject to possible review and reversal by Congress; this in fact has happened, often in economic matters, on a number of occasions in recent years; and (b) its administrative-law decisions tend to establish only a specific or particular norm rather than a general principle; in other words, a court decision about agency A is likely to be ignored completely by agency B — and may in fact be resisted, even ignored,

166. See Miller & Scheflin, supra note 20, at 536-45, for a statement of the shortcomings of the adversary system.
Furthermore, for one reason or another the Justices have admitted incompetence to deal with many of the highly complex issues of the technological era, and thus have deferred to the administrative judgment, and until recently have also made it all but impossible for anyone to challenge a federal expenditure in court. The conclusion is that both Congress and the Supreme Court have abdicated to the "other branch" in recent decades.

With the locus of governmental power having moved to the public administration (the "executive branch"), another centralizing tendency has become evident: toward the consolidation of power in the institutionalized office of the Presidency (the Bureau of the Budget is the most important segment). The office is both one man and many; it is personalized and bureaucratized. Probably it is accurate, as Richard Neustadt has said in Presidential Power, that the power of the Chief Executive is mainly that of persuasion and that he looks out on a collection of "feudalities" within the executive-administrative branch, but there can be no question that he is also a binding force. "In many spheres of action the executive establishment can scarcely move except as it invokes the President." He legitimates action of the public administration in his constitutional capacity of Chief of State and Head of Government. Slowly but seemingly surely, this is leading toward an accretion of power in the Office of the Chief Executive. The increased activities of government, often in the area of economic planning, have created the need for consistency or congruency in policy. Where that takes place, when it does (which is far less than some imagine), it is by little-known and little-sung administrators who man the several offices in the institutionalized Presidency — men with a "passion for anonymity" who exercise considerable power. The need in economic planning, as Professor Oulès has said, is for coordination of public policy; to the extent that it exists, it is accomplished by staff officers (mainly in the Bureau of the Budget). This does not mean that full coordination occurs. One of the as yet unsolved problems of the Positive State is the lack of consistency in policy. But it does mean

170. There is no such thing as a "common" or "general" law of judicial review. Cf. Stark v. Wickard, 321 U.S. 288, 311 (1943) (Frankfurter, J., dissenting).

171. See, e.g., Railroad Comm'n v. Rowan & Nichols Oil Co., 311 U.S. 570 (1941). This can also be seen in the doctrine of "primary jurisdiction" in administrative law. See K. Davis, Administrative Law § 30 (1951).

172. See Flast v. Cohen, 392 U.S. 83 (1968), holding that a taxpayer has standing to challenge a federal spending program where it is alleged that the program is in derogation of a specific constitutional prohibition.


175. F. Oulès, supra note 87, at 28–29.
that coordination is greater now than in the past — and will likely be even more in the future. One of the unstated effects of the institution of PPBS (planning-programming-budgeting system — in other words, the application of systems analysis to the governmental process) throughout government is that it will lead toward that greater congruency in policy now so lacking. The development will be fought by the leaders of the feudal baronies within the executive-administrative branch, just as Congress is fighting its diminished role, but the likelihood of success seems small.

(4) Next in this adumbration of the characteristics of the Positive State concerns both the nature of law and the role of the judiciary: the politicization of law and the legal process. The Positive State is the "administrative state," and is exemplified by broad discretion vested in the administrators — whether they are department heads (for example, the military secretaries in government-contract matters), commissioners of the regulatory agencies, the President himself and his advisers, or most other parts of what was once called the "headless fourth branch of government" but what may more circumspectly be called the "executive-administrative branch." Within that branch is to be seen that merger of law and politics in action that travels under the banner of "public law."

Writing in 1962 about the regulatory commissions, Judge Henry J. Friendly maintained that "the basic deficiency, which underlies and accounts for the most serious troubles of the agencies, is the failure to 'make law' within the broad confines of the agencies' charters" and that "once this basic deficiency is remedied, other ills will largely cure themselves; and that shadows and miseries will long be with the agencies if it is not." Judge Friendly's point was that much of the "justified dissatisfaction" with administration is the failure of administrators and others "to develop standards sufficiently definite to permit decisions to be fairly predictable and the reasons for them understood." The indictment is sound, although the Judge's remedy may be faulted for being too heavily weighted on the side of making the public administration look like an idealized version of the judiciary. What it means, in brief, is this: administrators, having been invested with the power to regulate "in the public interest," have failed to produce workable meanings of that term. In other words, power to regulate in the public interest has given the administrator uncanalized discretion and,

176. See Neustadt, supra note 174, at 103, for a statement of the problems of getting consistency among the administrative agencies. But the trend seems clear, and PPBS will help to accelerate centralized control.
178. Id. at 5-6.
179. See Miller, supra note 149.
of even more importance, has transformed many of the commissions and departments into little political arenas. By establishing the agencies, Congress merely succeeded in transferring the political battleground westerly along Pennsylvania Avenue. A result is government by elite — by putative expert.

Public economic policy, insofar as it is determined administratively, tends to be the outcome of the conflicts of political forces. Government institutions are at once the object of that struggle and one of the participants in the contest. The aim is to control the flow of public policy decisions. Particularistic interests, such as the supercorporations, energize political forces and battle for influence in that process. Regulation and administration, particularly in the higher echelons, tends to be politics. In the lower rungs, where so-called "low-visibility" decisions are made, less discretion may exist (and less politics may be involved). Political scientists have by and large accepted the notion that regulation is a political process. "'Politics' is now rightly viewed," says Professor Marver Bernstein, "not only as unavoidable, but as essential to the formulation of policies that bear some rational relation to economic and technological conditions." 180 This, however, means that, as Charles A. Horsky has put it, ours is emphatically "a government of men, not of laws." 181 Law has been merged into the political process.

The point is fundamental — and of the most profound significance. Law increasingly has become a purposive tool for the furtherance of desired goals rather than a set of interdictory commands limiting the discretion of administrators or channeling their decisions. If administration is politics, the received notions, the conventional wisdom about the nature of law, become suspect and require re-examination in the light of the imperatives of the day. Legal scholars have not as yet accomplished this necessary task, but do it they must if ever a philosophical reconciliation of law and politics is to be forthcoming and if ever the administrative process is to receive legitimacy in the light of the historical Constitution. 182

(5) Fifth of the prominent features of the Positive State is the active encouragement by the State of associational activity. The point is discernible in several ways. One has already been mentioned: when

in 1886 the Supreme Court, without argument, assumed that the corporation was a person within the meaning of the fourteenth amendment, it at one stroke brought at least a measure of legitimacy to that form of business enterprise. Other Court decisions follow the same trail; for example, the High Bench has said that bigness by itself is no violation of the antitrust laws, thereby making it possible for the supercorporation to grow.

More recently, the Court has recognized a "right of association" protected by the first amendment, although this relates mainly to ethnic groups. It has also given the constitutional imprimatur to union activity in the cases upholding the National Labor Relations Act and amendments. This means that the union, as a part of the corporate community, has been approved (encouraged) by all three branches of government.

For its own part, Congress not only goes along with interpretations of the antitrust laws (not always, as the recent Bank Merger Act indicates), but also legislates to further union activity. Furthermore, it has developed over the years a system of subsidies to private associations — corporations, for one, but others as well. And at times it has created corporations for the attainment of specified ends; the Communications Satellite Corporation is a classic example of the technocorporate state in action, for it is an arm of the state. It most clearly exemplifies the corporate state, American style.

(6) The last in this listing of prominent features of the Positive State may be stated in the form of a trend: toward the progressive blurring of what purportedly is public and what supposedly is private in the relationships of government and business. The development may be seen in a number of ways: the reciprocal participation by business leaders in government decisions and by government officials in business decisions; the dependency of large segments of the business community on government for its economic viability; judicial recognition of the corporate way of doing business, with a consequent halting beginning toward the "public-izing" of private business through the imposition of constitutional norms; and the employment by government of corporations, profit and nonprofit, as administrative devices.

What is to be seen here is the gradual merger of political and economic power. Government and business are growing closer together. There can be little doubt that, with the proliferation of government and with the reciprocal needs of each institution for the other, a progressive blurring of the alleged line between public and private is taking place. One consequence, to be discussed in the next section, is the extent to which (if at all) constitutional norms do — or should — apply to the supercorporations. If such ostensibly private organizations as political parties can be made subject to the Constitution, can the principle be extended?

Another name for the merger of public and private is the "government-business" partnership. Businessmen recognize that such a relationship exists. Witness, in this connection, the following statements:

Since the early part of this century we have been developing a new form of public-private society. . . . Call it what you will, the fact remains that this kind of government is here to stay, and those who would accomplish almost anything of public interest must work with the government. I say work "with it," not "for" it. 189

There is an old saying that facts have a way of outrunning thoughts. The facts of today's world are such that the old attitudes of many businessmen toward government, and the old attitudes of many government people toward business, are no longer relevant. There can be no longer any question as to whether or not these two groups can or will work together; they must work together. The vast changes that are sweeping our nation make cooperation a necessity. 190

Those are statements by prominent businessmen; they exemplify the new philosophy. But if there is a government-business partnership, and that cannot be gainsaid, then it by no means should be considered an unalloyed blessing. The rise of the Positive State has ameliorated, if not solved, some of the pressing problems of yesterday; but it has brought with it, particularly in its relations with the supercorporations, a number of equally difficult problems. If the price of liberty is eternal vigilance, then the price of good government is eternal concern. Basically the problems of the techno-corporate state are constitutional. But some of them are principally economic, others mainly political, while still others are questions of law. They are lumped together in the next section, because in fact each of them has characteristics that cut across politics and economics and law — and other disciplines as well (such

189. Melvin H. Baker, Chairman of the Board of National Gypsum Company and a Vice-President of the National Association of Manufacturers, quoted in Christian Science Monitor, July 2, 1959, at 12, col. 7.

190. Frank N. Ikard, President of the American Petroleum Institute in Where Business and Government Meet, 7 PETROLEUM TODAY, Fall, 1966, at 25.
as philosophy and psychology and sociology). And they are listed, with only brief discussion, although it is emphasized that each poses difficult and complex problems of its own; each deserves treatment as a separate article (or volume).

V. SOME BASIC PROBLEMS OF THE TECHNO-CORPORATE STATE

If it is agreed that the techno-corporate state is an actuality (at least a potentiality) in the United States, the system has evolved in an ad hoc manner. This new constitutional order did not arise because of some Machiavellian conspiracy of people (technocrats or "creeping socialists") bent on subverting the wisdom of the Founding Fathers, but because of certain felt necessities — hydraulic pressures that developed slowly and that found a vent in the programs of the Positive State. In so doing, other problems have arisen — and old ones have remained, thus illustrating the fact that there are no final solutions to human problems but only a succession of partial answers. The problems set forth below are listed without more than passing reference to what should be the initial problem — that of answering the question, *What is a problem?* In other words, how do we know that given situations are problems? That must be answered at the outset, if for no other reason than that the means and criteria by which problems are identified may determine the answer. If, as was asserted above, facts do not speak for themselves, neither do problems. The identification of problems will take more than a commitment to intellectual ad hoc-ism, of waiting for situations to develop, and then treating each problem as a discrete example mainly by looking backward to see where man has been. The pragmatic approach will not do, whatever variation of the 17 types of pragmatism one follows. (During the early years of the Kennedy administration, the highest accolade one could get was that he was a "hard-headed pragmatist," which even in this short span of time seems strangely awry.) The trouble with pragmatism is that it provides no goals; a pragmatist really doesn't know where he is going or wants to go, only that he is on his way. At the very time, thus, that science and technology have created the urgent need to manage change within the confines of the techno-corporate state, which includes the clarification of goals at the barest minimum, some sort of ad hoc recognition and dealing with problems is still employed. Whatever one thinks of Vietnam, it surely is a classic example of where that type of "thinking" leads: a problem is not a problem until it is a crisis, until, that is, it has reached the

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point where one can no longer "retain his options"; it is then too late to deal with it properly. What this suggests is that "empiricism" or "ad hoc-ism" can no longer be the principal means of proceeding within the framework of the policies of the techno-corporate state. The initiation of "program budgeting" within government is a recognition of the validity of that statement, although PPBS itself presents some rather obvious shortcomings. Be that as it may, what are the problems of the modern state, that state we have called "techno-corporate"? They include the following.

(1) Inflation: Programs designed to enhance employment opportunities, to provide for economic growth, and to fulfill the general objectives of the Employment Act, have the tendency, thus far unsolved, of causing inflationary spirals in the economy. The "voluntary" controls so far imposed by the American system of economic planning have not yet been able to stem the tide. In the offing, accordingly, are more stringent economic controls — in prices, in wages, in monetary affairs. Should they come, there is little doubt that the Supreme Court would uphold any constitutional challenge to their validity. More control, if and when it does come, will be dependent on close cooperation among all the important economic power centers of the nation — government, the corporations, the unions, the farmers, to name only the more prominent.

(2) A tendency toward autarchy: The question is whether the actions taken to further internal economic integration that are characteristic of the Positive State can be made without suffering external disintegration. Government intervention into the economy, made for reasons of national security and economic well-being, may lead toward economic nationalism. Trade becomes an instrument of national policy. Employment is made secure and the enterprise maintains viability by "exporting unemployment." A qualification might be noted here in the tendency of the nations of the North Atlantic to form the "rich man's club." There may, in other words, be economic intergration among those nations — at the expense of the rest of the world, principally the developing nations (the poverty-rows of the world).

(3) The State as a "group person": The Positive State, as a collectivity, is the hypostatization of the public interest — and the

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192. Not least of these is the assumption that objectivity is attainable by those who use the system.
193. See Miller, Foreign Trade and the "Security State": A Study in Conflicting National Policies, 7 J. Pol. 37 (1958), for a delineation of this and other shortcomings of the Positive State.
194. Id.
public interest is greater than the arithmetical sum of the private interests of the nation. Government in the modern era has to some degree taken on a momentum of its own, separate from and greater than the individual interests of the nation. President John F. Kennedy put the thought in express terms in 1962, in the context of a prior assertion by the Secretary of Labor concerning the public’s interest in collective bargaining negotiations. In response to a question at a press conference, the President said: “These companies are free and the unions are free. All we [the Executive] can try to do is to indicate to them the public interest which is there. After all, the public interest is the sum of the private interests, or perhaps it’s even sometimes a little more. In fact, it is a little more.”

With these words, the President articulated a theory of government basically different from that which historically existed (at least in theory). Within the concept of the public interest as so stated by the Chief Executive may be found both the essence of positive government and many of the problems inherent in the new posture of officialdom vis-à-vis the persons and groups of American society. It also posed directly the question of who was senior or dominant in the government-business partnership.

The state as a “group-person,” to use Gierke’s label, poses dangers of the first order of significance. Amaury de Riencourt maintained several years ago that the United States is a “human society” that “is not merely an aggregate of separate human individuals; it is an entity of its own right, endowed with a life of its own, a collective life greater and far more lasting than the lives of the separate individuals who belong to it . . . .” a formulation not dissimilar from that of President Kennedy. The essential danger in the state as group-person was pointed out in 1933 by Ernest Barker:

If we make groups real persons, we shall make the national State a real person. If we make the State a real person, with a real will, we make it indeed a Leviathan — a Leviathan which is not an automaton, like the Leviathan of Hobbes, but a living reality. When its will collides with other wills, it may claim that, being the greatest, it must and shall carry the day; and its supreme will may thus become a supreme force. If and when that happens, not only may the State become the one real person and the one true group, which eliminates or assimilates others: it may also become a mere personal power which eliminates its own true nature as a specific purpose directed to Law or Right.

196. N.Y. Times, Mar. 8, 1962, at 14, col. 5 (emphasis added).
199. Barker, Introduction to O. Gierke, supra note 197, at lxxxv.
Just as "the" corporation has become a group-person, in Earl Latham's label, "an anthropomorphic superperson whose reality is as real as that of human beings," so too has the state. As Barker says, when one seeks to discover what lies behind the legal group-person and constitutes its inner core, "[W]e must not talk of 'fictions' which hover in a shadowy and unreal existence above a number of real individuals; we must not talk of 'collections' or 'brackets' or contractual nets, flung over so many individuals to bind them one to another in the bonds of an impersonal nexus." What is to be seen is that two "group-persons" exist: on the one hand, the supercorporations, and on the other, the State. The net result, it is suggested, is not that these two entities operate side-by-side, independent of each other, but that by slow accretion the myriad transactions between them are creating a new group-person, which we have called the "techno-corporate" state. When President Kennedy said that the public interest was more than the arithmetical sum of the private interests of the nation, he was recognizing the state as group-person. Whenever actions are taken and justified "in the national interest," without delineation of the reasons therefore but merely "on faith," further tacit recognition is given to the notion. American constitutional law, although not in explicit terms, is in accord: the concept of *raison d'etat* is now a viable principle of that law.

What is postulated here is an extension of that idea, with government (public) and the supercorporations (profit and some nonprofit) acting in concert and forming a new type of American social order. A fusion of political and economic power is taking place. The supercorporations are not only "arms of the state," they are an integral part of the American system of governance. The corporate managers are not elected; they are nonrepresentative; but their decisions, however made, are as important as those of the elected representatives of the people. The fusion of power means that the net result is a synthesis, a decisional structure in government that is neither "public" nor "private" but a combination of the two and different from both — and, what is vastly more important, greater than either separately. The state as group-person is the corporate state, American style. It presents all of the problems of centralized power that have plagued mankind since the dawn of civilization. Some of these are listed below.

(4) Government by elites: The myth to the contrary notwithstanding, for a number of reasons the "popular rule" model of govern-

mental decisionmaking does not reflect reality. A feature of the techno-
corporate state is the control over decisions by an elite structure. 
Galbraith discerns an elite in what he terms the “techno-structure” of 
“the new industrial state,” consisting of “all who bring specialized 
knowledge, talent or experience to group decision-making”;203 members of this elite are to be found in both public and private government. 
The industrial system, he maintains, advances its interests with “sub-
tility and power,” and the techno-structure tends to become “an exten-
sion of those parts of the Federal bureaucracy — notably the armed 
services, NASA, AEC and other agencies concerned with technological 
development — on which it most depends.”204 The values and goals 
of the individual are bound together with those of the enterprise and 
government through the operation of what is called the “principle 
of consistency.”205

Modern elite theory derives from Vilfredo Pareto and Gaetano 
Mosca; their conceptual scheme “comprises the following common 
notions: in every society there is, and must be, a minority which rules 
over the rest of society; this minority — the ‘political class’ or ‘gover-
ning elite’ composed of those who occupy posts of political command 
and, more vaguely, those who can directly influence political decisions — 
undergoes changes in its membership over a period of time, ordinarily 
by the recruitment of new individual members from the lower strata 
of society, sometimes by the incorporation of new social groups, and 
ocasionally by the complete replacement of the established elite by a ‘counter-elite,’ as occurs in revolution.”208 Contemporary scholars, 
such as Harold D. Lasswell, concentrate upon the political elite. Lass-
well has defined this group in the following terms: “The political elite 
comprises the power holders of a body politic. The power holders in-
clude the leadership and the social formations from which leaders 
typically come, and to which accountability is maintained, during a 
given period.”207 The power-holders of the techno-corporate state tend 
to be the “technocrats,” those with expertise in given complex areas — 
the “engineers” that Veblen discussed or the “managers” that Burnham 
visualized — but with a difference, a difference of great magnitude.208

What Veblen and Burnham saw was rule by an industrial elite. Build-
ing on Berle and Means' classic study, The Modern Corporation and

203. J. GALBRAITH, supra note 4, at 71.
204. Id. at 379.
205. Id. ch. XIV. Galbraith’s observations should not be considered novel or 
original insights. He draws on a vast literature, although with little acknowledgment.
207. H. LASWELL, D. LERNER & C. ROTHWELL, THE COMPARATIVE STUDY OF 
ELITES (1952), quoted in T. BOTTOMORE, supra note 206, at 17.
208. J. BURNHAM, THE MANAGERIAL REVOLUTION (1960); T. VEBLEN, THE 
ENGINEERS AND THE PRICE SYSTEM (1921).
Private Property,\textsuperscript{209} which set forth the thesis that the managers had taken over control of the enterprise from the putative owners (the stockholders), Burnham identifies two types of managers: “the scientists and technologists, and the directors and co-ordinators of the process of production. The latter are the managers \textit{par excellence}. . . .”\textsuperscript{210} He thus differs from Galbraith, whose elitist theory is much more amorphous.

However one describes the present American government, he must come to grips with the question of elite theory and the part it plays. If, as with C. Wright Mills, a “power elite”\textsuperscript{211} is postulated, there must be considerable empirical data to buttress such assertions. But it takes no large amount of factual underpinning to assert that the “popular rule” model of government is at best an ideal and not a description of reality. No more naive conception of government can exist than that control by the citizenry is possible in the modern state. The same may be said for the notion that democracy is protected and sustained by a competition between elites, which balance and limit each other’s power. Jacques Ellul has put the matter well: “The organs of representative democracy no longer have any other purpose than to endorse decisions prepared by experts and pressure groups.”\textsuperscript{212} And further: “The decision-making process consists of a complex mixture of personal judgments, traditions, conflicts among the state’s many organs, and pressures from outside groups.”\textsuperscript{213}

\textbf{(5) Control of the elite:} It is not a necessary conclusion, if government by elite is accepted, that the modern (democratic) state is the same thing as an authoritarian state. Far from it. The rule of law, despite its politicization (discussed above), is of some importance. But what must be faced is that reliance on constitutions and juridical processes will not do the necessary task of effecting control of the elite in the sense of \textit{(a)} preserving the values of a democratic society while \textit{(b)} permitting the urgent tasks of government to be accomplished. Written constitutions are important but must be viewed as establishing only the \textit{formal structure of government}: what must be studied as well is the system of \textit{effective control} over important societal decisions. A “living law” analysis\textsuperscript{214} of the American constitutional order would performe have to take both factors into consideration; and would indi-

\begin{footnotesize}
\textsuperscript{209} A. Berle \& G. Means, \textit{supra} note 63. The Berle-Means thesis has been challenged. \textit{See} note 63 \textit{supra}.
\textsuperscript{210} T. Bottomore, \textit{supra} note 206, at 73.
\textsuperscript{211} C.W. Mills, \textit{The Power Elite} (1956).
\textsuperscript{212} J. Ellul, \textit{The Political Illusion} 138 (1967).
\end{footnotesize}
cate that those who actually control differ from those who purportedly do so. Similarly, juridical processes are not sufficient to the need of control of the elite, both because of the inherent inadequacies of the adversary system (a system developed in the pre-industrial era, essentially for the resolution of private law disputes) and because of the lack of competence of the judges to understand or deal with the complex issues of science and technology.

Discussed above has been the notion of the "politicization" of law. The inadequacies of the formalized controls of the American constitutional structure to operate as a meaningful check upon the technostructures of the techno-corporate state is further seen in the manner in which the decisional process operates within government. The advent of public law as the dominant part of the legal system means that decisions within government tend to be those that are technically or physically or economically possible. Law as normation — as interdictory command — has little part to play in the higher reaches of the public administration. Perhaps it has more in the lower rungs of the bureaucracy, but even so, discretion in the administrator tends to be the norm. Statutes do not administer themselves; it takes the active intervention of officials to put them into operative reality. Whether this is done rests, in final analysis, on whether the administrator wants to do it. In other words, the power to do nothing is itself a major power. Examples are numerous: to cite only two, one from a legislative command and the other from a judicial decree: (a) in 1964, Congress enacted into law a bill, duly signed by the President, which established an "administrative conference" to deal with reforms of administrative procedure.215 it was only in 1968 that the conference was formed by the President; that no one was particularly concerned about this failure is itself a revealing illustration of the operation of the American system, for if a powerful organization, such as the American Bar Association, had been interested in seeing that the legislative mandate was carried out, it seems likely that earlier action would have been taken;216 (b) in 1954, the Supreme Court decreed that the Federal Power Commission had jurisdiction over certain aspects of the natural gas industry which the Commission theretofore maintained it did not have;217 several years later, the Commission had


216. Statutes do not administer themselves. If there is any validity to the notion of the "group basis of politics," see E. Latham, The Group Basis of Politics (1952), then it would seem likely that the influence of a powerful interest group, such as the ABA, could help trigger executive action.

still not exercised that jurisdiction. There is little or nothing the Court can do in the face of administrative failures of this type.

Within government, law as interdiction has tended to give way to an instrumental view of law and the legal process. A degeneration of the lawyer qua professional is evident today (perhaps it always existed, for what little is known of history would seem so to indicate). The legal specialist operates as a technician; he is called in, when the occasion demands it, to put proposed or existing policies into the proper legal form. Thus it is that State Department lawyers have no difficulty in finding a legal basis for the Vietnam engagement. Similarly, government lawyers have relied on a rather obscure case decided in 1940, Perkins v. Lukens Steel Co., to justify a wide range of actions in the area of federal contracts (because the Supreme Court decided that a company did not have standing to challenge federal contracting actions, the lawyers have said that this means that government has carte blanche, that is, it operates under no constitutional restraints in contracting). One is reminded, when pondering the merger of law into politics, of the observation of Justice Robert H. Jackson in 1952 that he did not consider himself bound as a Justice by what he had said as the President's lawyer — a revealing incident, indeed, for Mr. Jackson as Attorney General had issued an opinion upholding the validity of presidential seizure of private companies during a strike (in order to keep them in production); in 1952, in the Steel Seizure Case, involving President Truman's seizure of steel mills during a strike, Mr. Jackson saw the problem differently. He concurred in the judgment invalidating the seizure on constitutional grounds, a change of mind interesting in present context because it so neatly illustrates that the Attorney General's judgment is political, not "legal." To put it another way, it is a poor lawyer indeed who cannot find some basis in law for what a policy-maker wishes to do. The lawyer within government is often the handmaiden of the policy-maker. To emphasize the point a recent paper by Dr. Emmanuel G. Mesthene, Executive


219. 310 U.S. 113 (1940).

220. This is a good example, be it noted, of instrumental or purposive legal counselling by government lawyers — to further the interests of the bureaucracy, but not necessarily the greater "public interest."


222. See id. at 634 (Jackson, J., concurring). It is of course obvious that an Attorney General who refused to give a President a ruling he desired would soon find himself out of office. See also H. Cummings & C. McFarland, Federal Justice (1937), particularly the account of President Jackson's relationship with his Attorney General; Miller, The Attorney General as the President's Lawyer, in L. Huston, A. Miller, S. Krislov, & R.G. Dixon, Roles of the Attorney General of the United States 41 (1968).
Director of Harvard University's Program on Science and Technology, is apposite:

[T]he decision-maker's options ... [formerly] were legal options. They were confined to interpretation of the rules. Political scientist Robert Wood has made this point very clearly. The Politician ... always winds up asking the same fundamental questions, namely, "Can we do this?" "Can we achieve our objectives in this way, by this means?" In times when changes in the physical world were very slow, governments operated as if such changes were nonexistent. The ground rules were fixed, so that "Can we do this?" — Wood calls it the persistent political question — meant "Do the rules allow it?" "Can we do it within the rules?" And that is a question that lawyers answer. The politician's toolkit, consequently, looked like a lawyer's. It contained "bargaining skills, propaganda skills, and violence skills . . . . The political order obviously required leaders and advisors with the lawyer's special skill in value clarification, his verbal capacity, and his experience as an intellectual jobber and contractor who could make a strong case wherever one was required." The effect of this century's very rapid advance in science and technology is, in Wood's view, that: "It subtly shifts the emphasis of the persistent political question 'Can we do this?' from the consideration of legal restraints to consideration of physical restraints. In these circumstances, it is not surprising that the ranks of senior career personnel of the federal government, executives, advisors, and specialists, have been increasingly filled by the scientific skill group."

The question "Can we do this?", in other words, today more and more means, not "Can we do it within the rules?", but "Can we change the rules?" The physical conditions of political action are no longer fixed, because science and technology can make physical changes occur much faster than they ever did in the past. . . .

As with politics, so with law, economics, culture, and society: man's ability, derived from his technical prowess, to change his physical world at will and massively removes the only heretofore inviolable constraint on the shape and development of his social systems and institutions. This poses an unprecedented challenge to the public intelligence as society strives to achieve the wisdom necessary to contain and channel the very great physical power that science and technology have given to man . . . .

One need not mourn the desuetude of the lawyer, for no skill group or profession has any vested interest in perpetual existence and power; but what is to be pondered, and even mourned, is the desuetude of law.

The restraining hand of law has been swallowed up in the question of whether a given policy is physically and politically and economically possible. Dean Don K. Price has said that the “main lines of our policy, over the long run, are likely to be determined by scientific developments that we cannot foresee, rather than by political [i.e., legal or constitutional] doctrines that we can now state” — thereby echoing Mesthene and Wood. That may be so, but many of the policies that are followed will be determined by the clash of a parallelogram of conflicting political forces; those with political muscle or clout will be able to trigger the official response. Decisions, hence, will continue to be taken on an ad hoc basis, at the very time when that type of decision making is no longer viable.

In sum, then, lawyers (the big corporate firms) operate as a part of, and are used by, the elite. Wide delegations of power from Congress to the public administration, the abdication of the Supreme Court, the absence of any other institutional means of controlled administrative discretion, the desuetude of the lawyer into a technician — all of these operate to contribute to the politicization of law and the legal process. Thus one observes enormously costly programs undertaken by the Executive without the semblance of public debate (as the Apollo program of NASA); the engagement of the United States in a major war without benefit of congressional midwifery; flouting of at least the spirit of the antitrust laws by contracting policies favoring big business; the manipulation of the money market by such organs as the Federal Reserve Board (done in secret, without even informing Congress); the rise of the “doctrine” of executive privilege, whereby secrecy is maintained over administrative actions; a failure or refusal to adhere to congressional mandates or judicial decrees — these are but some of the instances that can be cited in support of the proposition of the decline of law. The signals the elite — public and private — listen to seldom come from the lawyer qua lawyer.

(6) Coordination of Government policy: Given the greatly increased number of activities conducted by Government, an obvious need arises for making the programs as consistent as possible. At present, there is no formal, institutionalized means by which this can be done; when it is accomplished, it is through the operations of the Bureau of the Budget and various ad hoc inter-agency committees — more examples of ad hoc-ism in government. Many programs are not con-
gruent today, particularly as administered, a situation that at some

time will become intolerable and will lead to greater control measures

being instituted. Federal purchasing policies, for example, run counter
to other programs and policies; big business is favored over small
business — for good and sufficient reasons, procurement officers pursue
policies that have the effect of undercutting the antitrust laws. How
this will be resolved cannot be forecast, although one would be safe in
suggesting that nothing serious will be done by government to hamper
or hinder the productive capacity of the large corporate enterprise.
The supercorporation is too important to be subjected to significant
interference with its activities. But consistency or congruency is be-
coming a necessity (which likely foretells the even greater marasmus
of the antitrust laws; even now antitrust administration is noteworthy
for proceeding against the inconsequential, as witness the announce-
ment in November 1967 that action was being taken against syndicates
that distribute comic strips).

(7) The nature of human freedom: The rise of the supercor-
porations and the techno-corporate state has undercut the historical
individualistic basis of law. The individual qua individual has lost
most of whatever significance he may once have had. A person, for

the most part, derives importance only as a member of a group. In

economics, this was clear as long ago as the turn of the century; at

that time, John D. Rockefeller maintained that large-scale organization

"has revolutionized the way of doing business . . . . Individualism has
gone, never to return." Replacing the individual is a collectivity —
as the important unit of society and as the basis of politics. As

Jacques Ellul has put it, "in an organized democracy the normal way
for a citizen to express himself is through his group. Each citizen
must belong to one or several groups . . . ." Or, as Willy Ley has

recently said, "in a technological society, which is to say a society
based on technology, work must be done by many people together, and
consequently every individual is destined to be part of a group, to say

we instead of I." The need, says Ley, is not for more Beethovens —
men able to work by themselves — but for more Wernher von Brauns,
men whose genius talks in "collective terms."

Consider the meaning of this for the nature of human freedom.

Freedom in a society dominated by big government and big business

226. See Miller & Pierson, Observations on the Consistency of Federal Procurement


227. Quoted in 1 A. Nevins, John D. Rockefeller 622 (1940).

228. Compare E. Latham, supra note 216, with Ward, The Ideal of Individualism

and the Reality of Organization, in The Business Establishment 37 (E. Cheit
ed. 1964).


230. Quoted in O. Fallaci, If the Sun Dies 201-02 (1967).
and big science means the freedom to decide which group to join — and not much more. Moreover, it is clear that all do not have even that attenuated freedom (to join a group) in the Western democracies. The elite tends to be drawn from the “upper classes.” Negroes find it difficult to find employment or to join unions. Here it is meet to note that the Supreme Court, which in recent years has outwardly been greatly concerned with civil libertarian problems (i.e., the problems of the individual vis-à-vis the state), has in fact and in effect been creating a constitutional law of group association. Ready examples are the Negro organizations and religious associations.

In sum, then, freedom tends to become Hegelian, that is, the freedom to do what one should do — as determined by the elite.

(8) Legitimacy: The supercorporation has only a thin claim to legitimacy in the American constitutional order. Power, to be legitimate under the Constitution, must ultimately be responsible and accountable and must be derived from the consent of the governed. In English history, corporate legitimacy came from recognition by the sovereign; but the corporate charter, freely granted by complaisant states, is hardly a substitute. As centers of political power, corporations, being new to the social arena, require theoretical legitimation. To Carl Joachim Friedrich, legitimacy is the right or title to rule, a concept which in the past has been founded on a number of beliefs (which in turn are based on a range of religious and metaphysical notions). These include a magical belief in descent from the gods, blood descent which equates rule with the right of property, the divine right, custom and tradition, and by those who are being ruled expressing a preference for the ruler (or the rule) and by voting for him (or it). The ruler in the American system achieves legitimacy because he has been voted into office. But those who control the supercorporations are in fact oligarchs who voted themselves into office; they are self-appointed and self-perpetuating, much like college boards of trustees. As Dean Edward S. Mason has said: “Who selected these men, if not to rule over us, at least to exercise vast authority, and to whom are they responsible? The answer to the first question is quite clearly: they selected themselves. The answer to the second is, at best, nebulous. This, in a nutshell, constitutes the problem of legitimacy.”

231. T. BOTTOMORE, supra note 206.
232. See M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT (1966).
234. The exception to this is the area of administration of the criminal law.
237. MASON, INTRODUCTION TO THE CORPORATION IN MODERN SOCIETY 5 (E. MASON ed. 1959).
Now, as Dean Mason goes on to state, "some of our best people are oligarchs," but that means that we are ruled by benevolent despots — to the extent that the supercorporation is an instrument of governance.

If legitimacy is a problem for the domestic corporation, it is even more so for the multinational firm. Professor Kenneth E. Boulding has put the matter well: "The international corporation faces a peculiarly difficult problem in establishing its universal legitimacy. Within a nation, the corporation achieves a certain legitimacy simply from the fact that it is incorporated by some public body. . . . The international corporations do not have even this shred of legitimacy, simply because there is no international body that can charter them. The international corporation, that is, operates in a kind of governmental vacuum, and it has to depend for its survival on legitimacies which are derived from special skill, from bargaining power, or from the prestige of the national government with which it is most closely associated." The "Delawares" of the planet, such as Panama and Honduras, do, of course, readily grant charters to firms doing business in world commerce, but that is hardly a substitute for chartering by, for example, the United Nations.

The economists tend to accept or ignore the question of corporate legitimacy. Witness Robert Heilbroner: "The position of business within society was never more solidly entrenched. By this I mean that its legitimacy is now virtually complete, its acceptance without question. For perhaps the first time in American history there is no longer any substantial intellectual opposition to the system of business nor any serious questioning of its economic privileges and benefits." That statement was made in context of an analysis of the supercorporations; Heilbroner equates absence of dissent with consent — which may or may not be valid. Other economists, such as Galbraith and Schumpeter and Kaplan, tend to believe that in the long run "the activities of the giant business firm tend to bring about a more nearly optimum allocation of resources, raise the level and reduce inequality in the distribution of income, and promote the secular rise in total output." They thus ignore the question of where the corporate oligarchs got their right or title to rule and thereby illustrate how a unilinear perspective (i.e., through economics alone) of the supercorporation fails to meet some essential questions.

238. Id. at 6.
240. R. HEILBRONER, supra note 6.
Accountability: If legitimacy is a problem of the techno-corporate state, then accountability is much more so. Accountability — the need "to answer in another place" for decisions and actions — is central to American constitutionalism. Discussed above, under the rubric of the politicization of law, has been the idea of the accountability of public officials; it was there suggested that they operated with only minimal guidance from that set of external constraints known as law. Turning now to the officers of the private bureaucracies, what may be said of them? We begin with a recent statement by John F. A. Taylor: "[T]heir [the corporate managers] power is arbitrary quite independently of the motives which guide them in their performances. Nothing is gained by supposing the modern captain of industry wicked or malevolent. Unread in the arts of Machiavelli, he could school philosophers and princes in the real conditioning of power." Here again, law as interdictory command has little part to play: discretion, which knows few bounds so far as law is concerned, is the rule. That discretion is exercised in an arena of conflicting drives from other power centers — unions and government and the general public. No doubt it is true that there is adherence to standards of conduct precisely demanded by the legal system, but as lawyers know, the law is not very certain; it leaves a great deal of flexibility and freedom to maneuver.

Under the classical theory of economics, still part of the accepted wisdom of many in the fraternity of professional economists, the businessman does not have to worry about ethical or legal behavior. Acting as the personification of "economic man," bent ceaselessly on maximizing profit, he is considered to be controlled by the "market." The intervention of external command or government is not necessary, simply because the "invisible hand" magically translates the pursuit of selfish gain into the overall public good. The market, in other words, is said to operate as an external standard. By merely being, it performs its vital societal function.

That this simplistic model of politico-economic behavior no longer is adequate is quite clear. (Likely it never was, except in the published lucubrations of economists who sat secure in their ivory aeries taking an Olympian and magisterial view of human affairs.) Something else is needed in an economy dominated by corporate giants, operating in the techno-corporate state. That "something" traditionally has been the law. In a certain degree, law may be said to operate to limit corporate decisionmaking. For example, the antitrust laws apparently do circumscribe some corporate actions; labor laws require bargaining
with the union over a range of disputes; and the restraints of law operate to some extent in protecting the public (pure food and drug laws, automobile safety standards, etc.). The point, however, is that in the higher reaches of corporate activity, law plays little or no part. The problem this poses is twofold: How may accountability be effected with respect to (a) the internal segments of the corporate community and (b) the external segments, including the public at large? The first is essentially a matter of due process of law, to use constitutional language; the latter is a matter of how to see to it that true "public interest" decisions are made.

Only brief attention may be given in this Article to these difficult questions. As to due process, we may begin with a recent statement of sociologist William M. Evan:

There is a growing awareness of the need for restricting the powers of the corporation. In particular, it is being argued that the courts and the legislatures should extend constitutional guarantees of procedural due process to the corporation or that corporations should develop their own "supplementary constitutional systems." The venerable doctrine of due process . . . includes a complex of procedural safeguards against the exercise of arbitrary and unlimited power. These norms seek to insure that disputes are resolved impartially and fairly. This complex of norms includes the right of all parties to a conflict to be heard, the right to confront witnesses, to cross-examine them, and to introduce evidence in one's behalf.243

Should procedural due process be applied to the supercorporations, it would be applicable to those decisions that touch and concern members of the corporate community directly. Included would be employees, suppliers, and dealers. Some are already protected; for example, members of the union have attained it by legislative mandate. But the question that is posed by the problem of accountability is broader — should due process become a constitutional command directed at corporate managers and should it be imposed judicially?

Taking those questions in reverse order, what due process that does exist now within the corporate community has by and large been the result of legislative commands — labor laws, the Automobile Dealers Day in Court Act,244 etc. That is a limited coverage. If the principle is to be extended, as Evan suggests, should it be by more legislation? Some so believe; for example, Professor Harry Welling-

ton of the Yale Law School. He argues that it would place too large a burden on the courts, and that it would be otherwise improper to ask them to take on a larger jurisdiction — that of the units of private governance, the supercorporations. The argument has merit, but can be countered, even overcome. If the sovereign state of Delaware is subject to the limitations of the fourteenth amendment, then why should not the "corporate state" of DuPont or General Motors? By applying the Constitution to such entities — by "constitutionalizing" the supercorporation — it may be possible to retain the benefits flowing from the private ownership of business while simultaneously attaining a higher degree of fairness in the social order. Requiring that the supercorporations, which, it will be remembered, are defined to include the labor unions, follow due process norms may help maintain a wall of separation between state and corporation that legislation, simply because it has to be broader and more encompassing, would tend to eliminate. We have posited above the emergence of the techno-corporate state as a "group-person"; imposition of accountability to the corporations through legislation would, in other words, further that development, whereas the more limited judicial activity would slow it down. The apposite analogy is the federal system: there judicial decisions, the myth to the contrary, have had far less to do with changes in traditional federalism than have massive taxing and spending programs by Congress.

However, if due process of law is to become the way in which a measure of accountability is brought to the corporate enterprise, one major constitutional leap must be taken, namely, the concept of "state action" will have to be dropped by the Supreme Court, at least in part. The Constitution has since the Civil Rights Cases of 1883 been said to run against governments only. The need is to recognize that governments can be both official and private. Some signs of such a development are already evident. Political parties, once thought to be private, are now considered sufficiently public to have the Constitution applied to the conduct of primary elections. The 1946 decision of the Supreme Court in Marsh v. Alabama directly applied the Constitution to a corporation (the Gulf Shipbuilding Company); it exists as a time bomb ticking away in the United States Reports ready for use when thought appropriate. That that time may be imminent is a possible conclusion from the clutch of recent decisions relating to race

246. 109 U.S. 3 (1883).
relations (the "sit-in" cases, principally) in which the Court has all but erased the state action concept.249 The bomb exploded, at least partially, in a decision in May, 1968, *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*, holding that a privately owned shopping center could not prevent picketing by union members on its premises; this decision extended *Marsh v. Alabama*. (One member of the present High Bench, Mr. Justice Douglas, considers the corporate charter a sufficient link to the state to make the Constitution applicable.)251 In addition, there are scattered decisions by both federal and State courts, concerning union membership in the main, that tend in that direction.252 So, too, do actions of the avowedly political branches of government: If one takes an expansive view of the manner in which the Constitution may be altered, then the precepts of the Civil Rights Act of 1964253 and presidential actions relating to nondiscrimination in employment by government contractors254 constitute a recognition that ostensibly private entities should (must) follow the Constitution.

It should not be inferred that corporate due process has proceeded very far or has even been recognized as valid by many commentators. For that matter, for much of public government that process which is "due" is notably absent, as witness, for example, federal contract awards and the distribution of federal largesse. Despite *Marsh* and other judicial decisions and the actions by Congress and the President, the concept has far more potentiality as a means of effecting corporate accountability than it has actuality. However, it may be an idea "whose time has come," as Alexander Pekelis predicted 20 years ago.255 The next generation of constitutional lawyers, he said, would ever increasingly be concerned with private governments. Corporate due process, within a broadly defined corporate community, will be a major part of that concern.

Turning now to the other part of accountability — "public-interest" decisions — we may begin with a statement of Professor Grant McConnell: "[A] substantial part of government in the United States has come under the influence or control of narrowly based and largely autonomous elites. These elites do not act cohesively with each other on many issues. They do not 'rule' in the sense of commanding the entire nation. Quite the contrary, they tend to pursue

252. See the citations in Miller, *The Corporation as a Private Government in the World Community*, 46 VA. L. REV. 1539, 1553 n.54 (1960).
255. Pekelis, supra note 248.
a policy of noninvolvement in the large issues of statesmanship, save where such issues touch their own particular concerns." The problem this poses is to establish a means whereby decisions on such issues can be taken "in the national interest." We have learned the invalidity of the assumption that the decisions of the corporations redound through the invisible hand of the market to the benefit of all. But we have not yet determined how to institutionalize a system of insuring that the supercorporations work in tandem, rather than at cross purposes, with government. Suggested above in this Article is the view that such an institutionalization is being effected through the overarching concept of economic planning. Even if that be accepted, some quite difficult problems remain.

One is the substantive content of the concept of the public or national interest. No one has as yet been able to produce workable meanings of the concept. Another is the question of who is to determine that meaning? Is it the President? Does he have to give reasons (i.e., justify those assertions)? If public policy decisions often tend to be made by the "techno-structures" in industry and government, are they to be equated with the overall common good? Merely posing such questions will reveal that the problem, although of highest importance, is more emergent than solved. The problems of governance in the techno-corporate state may be the age-old problems that have always faced homo sapiens, but they have taken on added urgency in recent decades. They pose the complex problem of the management of social change so as to preserve and enhance the democratic values. That is a problem that makes the technical problems of science insignificant. Scientists and technologists tend to take on the manageable, to undertake problems that have a good chance of resolution. Compare in this respect a statement by Dr. Alvin Weinberg with one by Adam Yarmolinsky: said the former, "The technologist is appalled by the difficulties faced by the social engineer; to engineer even a small social change by inducing individuals to behave differently is always hard even when the change is rather neutral or even beneficial.... By contrast, technological engineering is simple...." Said the latter: "Social scientists particularly have to deal in situations in which any sensible person would throw up his hands and go home."

(10) The concept of constitutional duty: Traditionally, the Constitution has been considered to run against governments only; it

257. See Miller, supra note 149.
has been a set of negative limitations — of a number of "thou shalt nots" — rather than affirmative commands. The coming of the Positive State and of the techno-corporate state now presents the emergent question of whether the Constitution embodies a concept of a duty to do certain things as well as a concept of a duty not to do others. If the Positive State is a form of government that has taken on affirmative duties through the political process, these duties have been constitutionalized to the extent that they have received the imprimatur of the Supreme Court (either directly or by refusing to rule). In that sense, the modern state does envisage affirmative duties; but does it do so in areas where Congress has not acted? Evidence is available tending to show the emergence of such a concept; these may be found in judicial decisions concerning race relations, legislative reapportionment, and review of administrative decisions.

What is required at the outset is a conception of constitutional adjudication that looks to the consequences of judicial decisionmaking as well as to the doctrine espoused — in other words, a jurisprudence of consequences is a necessity. Is the operative impact of recent Court decisions creating such a jurisprudence?

We may begin a discussion of that question with a quotation from the Declaration of Delhi, made in 1959 by the International Congress of Jurists:

"This International Congress of Jurists . . .

Recognizes that the Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized . . . ."

That statement attempts to place a radically new twist to the conventional view of the rule of law. Another dimension, in the form of a social content, is added to the concept. What has been a legal formula, equated with procedural and substantive due process and concerned


261. The nearest approach to this need is that of Professors Myres S. McDougal and Harold D. Lasswell. See Lasswell & McDougal, Legal Education and Public Policy: Professional Training in the Public Interest, 52 YALE L.J. 203 (1943). This and other publications of the two are calls for action, rather than statements of substantive content.

with the protection of the individual against arbitrary actions of the government, now includes (to the extent that it is or will be accepted) affirmative governmental obligations. In its new formulation, it symbolizes justice in a sense going far beyond its purely procedural meaning. In Aristotle’s terms, the rule of law would include distributive justice as well as corrective justice. A different relationship between state and individual is posited: if the rule of law is now to be “a dynamic concept,” duties are imposed upon the state to take action for the enhancement of human dignity. “This social content of the Rule of Law and the recognition of the necessity to make law and find law with due regard to the everchanging conditions of human existence expands the concept of the Rule of Law from the limited scope of static notions and approximates it with the Rule of Life . . . .”

A few scattered decisions and some commentary in law journals tend to support such a notion. For example, the concurring opinion of Justice Robert H. Jackson in *FPC v. Hope Natural Gas Co.*, involving public utility ratemaking, indicates that he believed that the FPC should act more intelligently in order to further the public interest. The Court, in *Phillips Petroleum Co. v. Wisconsin*, told the same Commission that it had a wider jurisdiction than it wanted to exercise. Two recent decisions in the Courts of Appeals have expanded the concept of “standing” to challenge administrative action; in so doing, they tend to impose a higher standard of conduct on the administrator. In race relations, the *Prince Edward County case*, Judge J. Skelly Wright’s decision in the *District of Columbia School case*, and the Fifth Circuit’s en banc decision on school integration are a few straws in the wind of affirmative obligation. So, too, is *Reitman v. Mulkey*, the case that struck down Proposition 14 in California; and a clutch of decisions in the October 1965 term of the Supreme Court that point in the direction of governmental duty. There are other decisions, of which those involving legislative reapportionment are particularly noteworthy. But enough has perhaps been

263. Lalive, *Foreword* to *id.* at vii (emphasis added).
264. 320 U.S. 591, 628 (1944).
said to indicate that human freedom is as much positive as negative in nature, that liberty has a social basis, and that government possibly has a constitutional duty to take action to ameliorate inadequate social conditions.

The concept has been little recognized in the literature. However, in 1967 Professor Jerome Barron argued in the Harvard Law Review that the mass media were under a constitutional duty to make space or time available to dissident groups. In other words, he maintained that a constitutional right of access to the press should become a part of the law. And Professor Archibald Cox, in the November 1966 issue of the Harvard Law Review, seems to argue in favor of a concept of constitutional duty — although he is interested primarily in the power of Congress under section 5 of the fourteenth amendment. And the present writer, in an article published in 1962, suggested that the time has come to recognize an affirmative thrust to due process of law.

There are many problems with such a concept. Who should have standing to challenge governmental action? How could a judicial decree be enforced? What criteria should guide the Court's decisions? Would this make the Court too much a group of "philosopher kings," oligarchic in nature and responsible to no one (save for the improbable remedy of impeachment)? Is it better for policies to be enunciated politically or judicially? Norman S. Marsh, discussing the Declaration of Delhi, summed up some of the problems in the concept of affirmative duty:

On the one hand if the ideal of a Free Society is accepted as the basis of the conception of the Rule of Law, it is impossible to ignore that aspect of man's dignity and worth which finds expression in a demand for a minimum standard of material well-being and educational opportunity. On the other hand, it is precisely the so-called positive rights which the traditional legal machinery is ill adapted to enforce, except sometimes indirectly by insisting that whatever benefits the State may bestow, it distributes them equally between its citizens. Moreover there is a danger that an interpretation of the Rule of Law which lays too great an emphasis on what the State should do for the individual may end by forgetting the individual in its enthusiasm for its plans of collective welfare, the development of which would mark the decline of a Free Society into something similar to the typical totalitarian State. It must also be recognized that there is a danger, if the Rule of Law is to include, or at all events to assume, a basis of economic and social justice, that the law and lawyers

273. Cox, supra note 271.
274. Miller, supra note 128.
may find it difficult to assert that measure of detachment from the immediate policies of a party or group in power which is an important aspect of the legal function in society.

It would be wrong to claim that there is a neat and conclusive answer to these problems. The most that can be expected is the different dangers are always kept in mind.

The "lack of detachment" that Marsh mentions has been noted above in the context of a discussion of the "politicization" of law and the legal process. It is already happening; one of the problems of the day is how it can be stopped or controlled.

The problem of constitutional obligation is greatly magnified when the concept of private governance is added to that of traditional public government. In other words, if the techno-corporate state encompasses both officialdom and the supercorporations, then it will be far more difficult to judicially enunciate and enforce norms of distributive justice. But the problem is there, whatever its size. The next generation of constitutional lawyers will be concerned not only with the dimension of private governments; they will also be working out the details of the concept of duty under a Constitution that speaks in terms of limitations.

(11) "Future orientation": The final problem in this listing of those raised by the coming of the techno-corporate state is the need for "forward looking." We have suggested above that "ad hoc-ism" is no longer viable. Policy by drift, by waiting for problems to evolve, is no longer adequate; "muddling through" sounds good but it is hardly up to the need in a time when scientists and technologists, aided by the pseudo-scientists (such as economists), are inventing the future.

As Olaf Helmer recently said, "The fatalistic view that the future is unforeseeable and inevitable is being abandoned. It is being recognized that there are a multitude of possible futures and that appropriate intervention can make a difference in their probabilities. This raises the exploration of the future, and the search for ways to influence their direction, to activities of great social responsibility. This responsibility is not just an academic one; to discharge it more than perfunctorily we must cease to be mere spectators in our own ongoing history, and participate with determination in molding the future. It will take wisdom, courage and sensitivity to human
values to shape a better world." The problem, as Hasan Ozbekhan recently said in connection with a discussion of "dossier technology," is that it transcends the merely technical: "We do not quite understand the complex legal, jurisdictional and, ultimately, constitutional mechanisms that are involved."

What, then, is called for is value clarification and the clarification of goals, the determination of alternative ways of reaching those goals, and attention paid to the politico-legal structures and institutions that will maximize the probability of attaining postulated goals. In short, this means a new type of thinking, the type of thinking Professor J.D.B. Mitchell called for when he noted that lawyers have not tried "to exercise the political imagination which is necessary to create the source of a system of administrative law which will be able to deal, in the future, with the state we are creating now." The technocrats of the techno-corporate state are inventing the future, aided and abetted by economists and politicians who have made G.N.P. a new idol. Progress is being equated with technological advance and economic efficiency; humanistic values are forgotten. "United States policy at home exemplifies the madness of technological ideals whereby more is invested in a voyage to the moon than in the eradication of disease, poverty and urban anomie." (That the same may be said about other nations, including the USSR, does not minimize the point.)

If technology is not to continue to be an "irrepressible force of nature, to which we must meekly submit," then steps must be taken to build the type of society that is humanistically oriented. This will take "future planning," not merely economic planning — and that will take a new type of thinking by the social engineers. Traditionally, the lawyers have been in the forefront of those who helped to engineer social change. Whether they will remain so is at best an open question. But if they do not, there does not seem to be any other skill group with the capacity to help effect necessary social adjustments. The technocrats have taken over: the economists want to be mathematicians and the political scientists want to be quantifying behavioralists. The scientists and technologists ride high in the saddle, on top of an unwieldy human community that can die by being vaporized by nuclear bombs or by asphyxiation from pollution or by being bred to death from overpopulation. We have not learned to

281. 110 CONG. REC. 10,480 (1964) (Law Day Address of Vice Admiral Rickover).
282. See Miller, supra note 182.
apply the human equation in our policies, public or private. But do it we must if something other than a technological nightmare is now to be created.

VI. CONCLUSION

In this Article, it has been suggested that the United States is becoming the techno-corporate state. This is a constitutional change of the first magnitude. The supposedly neutral values of "technicism" dominate; the men of power are those we have called the "technocrats," who operate with pseudo-objectivity.

The historical meaning of "socialism" has, in this development, been turned completely over: Those who benefit most from state activity are the already rich and affluent, while the poor and the disadvantaged, who traditionally have plumped for socialism, are told to pursue the elusive path of rugged individualism. The techno-corporate state is not a system of state socialism; ownership of the units of the economy rests with private individuals, not the government. But that difference, while important, does not prohibit a high degree of cooperation between the units of public government and of private government; they thus act as two sides of one medal. In the 1930's, an attempt was made to engraft a form of corporativism on the American political economy by fiat; the National Industrial Recovery Act\(^\text{283}\) was, however, invalidated by the Supreme Court.\(^\text{284}\) But what developed since, for reasons of technology and external threat and other coalescing drives, is that the corporate state is being built little by little, like a coral reef, through the myriad transactions between government and the supercorporations. That it will not be declared unconstitutional by the Supreme Court is obvious. Less obvious, and another question, is who is senior or dominant in this relationship? That question cannot be answered on an either-or basis; business needs government and government needs business; the technocrats in each institution have their important roles to play. What they exhibit is a coincidence in goals, in values. They believe in each other. That those goals and values may be technological, not humanistic, is one of the burdens that others must bear in this "time of troubles."

\(^{283}\) Act of June 16, 1933, ch. 90, 48 Stat. 195.

\(^{284}\) A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). The invalidation of provisions of the Act, however, was not on the ground that it established a type of corporativism, but on the narrow point of improper delegation of legislative power.