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TOWARD "CONSTITUTIONALIZING" THE CORPORATION: A SPECULATIVE ESSAY

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I. INTRODUCTION

In 1215 the barons of England stared down King John on the meadows of Runnymede and wrested from him the Magna Carta. For them, it was a famous victory: it began the process by which the power of the sovereign was formally limited by law. The rights there gained were eventually extended to commoners and given expression in the Bill of Rights to the American Constitution, which has as its core concept due process of law. As is evidenced by the Supreme Court's incorporation of most of the first eight amendments into the due process clause of the fourteenth amendment, a development that wrought a silent constitutional revolution (beginning with the Gitlow case in 1925 and ending in the 1960s), due process is the fundamental limitation on government at all levels. Not an absolute, it is nonetheless a command of "a legally-concretized requirement of reasonableness" directed toward public officials in their treatment of persons within the United States, whether natural or artificial, citizen or alien. Today, due process has two, perhaps three, dimensions: procedural, substantive, and "affirmative." It tells public officers, in

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1 The Bill of Rights was added to the Constitution in 1791. Nearly two centuries later, a serious movement for a written bill of rights surfaced in Great Britain, mainly, it seems, to halt the allegedly overweening influence of the labor unions. See Miller, A Bill of Rights to Protect Our Liberties?, 47 POL. QTLY. 137 (1976).


theory at least, how they must act (procedure), what they can do (substantive), and, at times, what they must do (affirmative).  

Now, almost two centuries after the Bill of Rights was added to the Constitution and more than seven centuries since the Great Charter was promulgated, the time has come to think hard and seriously of the need for a new Magna Carta that will limit not only the power of the State (public government) but also the vast and growing powers of the private governments of the nation. These decentralized wielders of political power—the giant corporations, the labor unions, the large foundations, the big universities, the veterans legions, the farmers leagues—are only ostensibly private. They are in fact as public as is, say, the National Aeronautics and Space Agency. As the late Professor Wolfgang Friedmann wrote, "[t]he corporate organizations of business [and, presumably, other social groups] have long ceased to be private phenomena. That they have a direct and decisive impact on the social, economic, and political life of the nation is no longer a matter of argument." We live, in short, in a corporate society:

In law there are . . . two major kinds of persons: physical persons of the sort that you and I know, indeed are, which the law calls "natural persons," and "juristic persons." These "juristic persons" are intangible entities which none of us natural persons has ever seen. They include what we commonly think of as corporations, along with many other entities: churches, certain clubs, trade associations, labor unions, professional associations, towns, and others. In law, these persons must be treated somewhat differently from natural persons: they have no fixed life span, and thus may exist in perpetuity, they have no corpus, and thus cannot be physically imprisoned (though they can be punished in other ways, including death, a sentence not infrequently imposed by judges), they have no intrinsic capacity of acting, and so must act through agents in the form of natural persons.

One might ask, to all this, "So what's new?" The answer is that the modern corporation, the juristic person formed for specific purposes by its members, is new, and its presence has

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created societies with different structural foundations than those which existed in the past. ⁶

My purpose in this speculative essay is to suggest that the corporate society should be made amenable to the fundamental principle of due process of law in all of its dimensions. This can be done quite easily. It would merely take a Supreme Court decision or a series of decisions. No statute is necessary; nor is a constitutional amendment. In briefest terms, the concept of governmental action under the Constitution needs to be expanded to cover the significant social groups of the nation. Like natural persons, juristic persons should be held to the view that citizenship has its duties as well as its rights. ⁷ A Constitution that permits a person to be marched up to the front, there to be shot at and perhaps to be killed for his country, should be sufficiently flexible to hold corporate America to analogous duties.

I am not suggesting that juristic persons be sent to their deaths. I do suggest, however, the somewhat more reasonable proposition that any group which in fact wields enormous governing power should be made to adhere to the principles of liberty and justice that permeate the Bill of Rights. This is not a new idea, ⁸ but it is an idea whose time should come, and soon, even though the present Supreme Court is stoutly opposed to it. This essay, then, suggests what ought to be, rather than what is, in the law enunciated by the Supreme Court and other constitutional decision-making bodies.

Some people, Ralph Nader being an obvious example, believe that an “employee bill of rights” can and should come about through the medium of federal incorporation of the giant business corporation. ⁹ No doubt it could but, as will be shown, that concept is insufficient to the need. The corporate presence in the United States goes far beyond the giant business corporation, even though that economic entity doubtless is the most important of the private power centers of the nation. This is truly “an age of collective action,” ¹⁰ and the time has come to make that fact manifest in the law of the Constitution. ¹¹

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⁷ Korematsu v. United States, 323 U.S. 214, 219 (1944). This is not to say that the corporation is a constitutional “citizen”; it is not.
⁹ R. Nader et al., Taming the Giant Corporation (1976).
¹¹ The discussion here concentrates on the giant business corporation, but only
II. Argument

A. Development of the Corporation

In 1886 one of the most remarkable feats of legal legerdemain in history occurred when the Supreme Court, without even hearing argument on the matter, asserted that corporations were "persons" within the meaning of the fourteenth amendment. Since that time the legal fiction that corporations are the same as natural persons has so solidified in American law that one may be pardoned his belief that, indeed, corporations are a part of the natural scheme of things.

A moment's reflection and a glance at history, however, will show the contrary: the corporation—certainly the giant entity which straddles the continent and sets the character of the economy—is a latecomer. Corporations did not appear in any significant number until after the Civil War, and it was well into the twentieth century before the enormous enterprises now so familiar made their appearance.

During colonial days and up to the end of the eighteenth century corporations were relatively rare. American business was carried on by small entrepreneurs, by individuals, or in partnerships. The stock market did not exist, and trading in corporate securities was unknown. Labor unions were in the future (the movement to organize the work force of corporate enterprises did not fructify until the 1930s). The United States was, during its formative years, a weak collection of agricultural and small-shop sovereignties perched precariously on the shoulder of North America and existing largely at the sufferance of the established powers in Europe. Less than two centuries later it had become the strongest and wealthiest nation in history.

The familiar history of the transformation need not be retraced at this time, but attention may be directed toward one feature of that history and development: the immense changes

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22 Santa Clara County v. S. Pac. R.R., 118 U.S. 394 (1886). See Graham, The "Conspiracy Theory" of the Fourteenth Amendment, 47 Yale L.J. 371, 48 Law J. 171 (1938). The personality of the corporation is, to be sure, a legal fiction, but surely one of the most enduring of all fictions and one that has had significant consequences. Cf. C. Stone, Where the Law Ends: The Social Control of Corporate Behavior (1975).
from 1800 to the present have taken place with essentially the same Constitution in effect. The document that was drafted in 1787, promulgated in 1789, and amended with the Bill of Rights in 1791, now serves a nation different in almost every way from that which existed in the eighteenth century. Without dwelling upon the question of how such a politico-legal document as the Constitution could survive virtually intact during that period of great change, consider another question which relates to the corporation (and trade union). That question is posed by artificially transplanting the corporate entity and trade union possessing powers proportionate to their present ones into American society at the time of the drafting of the Bill of Rights (1787). Assume the corporations and unions dominated eighteenth-century colonial life as they do American life today. Obviously, the only social force even remotely capable of challenging and controlling the corporate community is government; and government, despite all its vast powers and extended activities, does not even at the present time, have the power to control the corporation. Given that supposition, what provision would the Founding Fathers have made in the Constitution for the corporation and the union?

It is, of course, impossible to answer that question definitively. Obviously one cannot read into the minds of men long dead what they thought about a matter which did not exist during their lifetimes. One can, however, devote attention to the constitutional position of the corporation in the future. The corporation should be so assimilated into constitutional theory that not only is it subject to the limitations of the Constitution but also it is held to affirmative duties in furtherance of the public interest.

What is "the corporation"? The question is not easily answered, save in generalities. For our purposes, however, "the corporation" is any one of the 500 largest business concerns listed annually in Fortune magazine. The figure is an arbitrary one and is used merely for purposes of analysis. These are the industrial and

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13 Compare Stone, supra note 11, with A. Miller, The Modern Corporate State: Private Governments and the American Constitution (1976).

14 It is desirable to view the corporation as an entity made up of several disparate elements, including, but not limited to, corporate managers, the stockholders, the rank- and- file of union membership, and the union leaders. See Miller, supra note 12, for fuller discussion of the corporate community.

15 I fully recognize the inherent ambiguity of the term “the public interest” and the difficulty, perhaps impossibility, of defining it. See Miller, The Public Interest Undefined, 10 J. Pub. L. 184 (1961).
commercial giants which span the continent and which have so altered the historical model of the market that former economic and legal concepts now need reexamination. General Motors, U.S. Steel, A.T.&T., A.&P., Ford Motor Company, Sears Roebuck, General Dynamics, all exemplify the corporate enterprise of which we speak. Within each of the major functional areas of economic activity, a handful of large corporations—two to five, as a rule—supply the bulk of the goods and services. The free market extolled in song and oratory is gone—if, indeed, it ever existed. In its place is "oligopoly": the domination of the market by a few enterprises. Some economists still long nostalgically for the classic free market. They illustrate what author and former judge Thurman Arnold was fond of asserting: "economics is theology."16 They display a touching faith in a bygone age—one which may never have existed save in their imaginations.

The corporation, furthermore, consists of a number of different interest groups. At least six may be identified. First, there are the ostensible owners, the shareholders who own the stock. These do not control; and rather than owning the corporation, they may more accurately be said to own shares entitling them to whatever dividends the managers (those who do in fact control) see fit to allow.17 The second group is comprised of those same managers. The managerial structure is matched in many corporations by the top leadership of the trade union having jurisdiction over the particular enterprise. A fourth group is made up of the rank-and-file workers. Then there are the suppliers to the corporation, and, in some cases (notably the automobile industry), the franchise dealers of the mother corporation. Finally, as a sixth group, there are the consumers of the product. The pattern varies in some instances, but it may nevertheless be said that the corporation is a collectivity with at least those six disparate segments. A seventh interest—the over-all public interest—is also involved.

But the infant which in 1886 the Supreme Court declared to be a "person" in the eyes of the law and under the Constitution has grown into a constituency which in some instances numbers in the hundreds of thousands and involves an annual budget often running into the billions. Because it is legally a person, that consti-

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16 See, e.g., T. Arnold, Fair Fights and Foul (1965).
17 The divorce of ownership from control has been part of the accepted wisdom since Berle and Means published their seminal work. A. Berle & G. Means, The Modern Corporation and Private Property (1932).
tuency enjoys the protections afforded by the fourteenth amendment, which provides that a state shall not "deprive any person of life, liberty, or property without due process of law. . . ." A similar provision in the fifth amendment limits the power of the federal government. Although corporations and other social groups are not mentioned specifically in the Constitution, lawyers' magic has managed to include them. For several decades the due process clauses were used by the Court to strike down legislative action which interfered with the liberty protected by the fourteenth amendment. Attempts to limit maximum hours of labor in industrial work and to set minimum wages were held by the Court to violate the liberty of the corporation and also, ironically, of the wage-earners who were the subject of the legislation. That fifty-year period, it may be said, marked a classic instance of judicial legislation by the United States Supreme Court. The corporation enjoyed the protection of the Constitution without suffering any accompanying obligation to live up to the letter or spirit of the fundamental law.

It is one thing, however, to say that a corporation is a person and quite another to delineate the nature of that artificial person. The serious question is whether the American business corporation, which has waxed strong under the American constitutional order, will now be required to accept the duties of a person in the legal sense. Since natural persons (human beings) have certain duties and responsibilities under the constitutional system, should artificial persons have corresponding ones? Much is heard about the social responsibility of the businessman. Whether that responsibility is or should be legally recognized is our question.

B. Altering the Constitution

The rise of an organizational basis to American society has brought severe stresses to bear upon the Constitution. When the fundamental law was written in 1787 the framers of the Constitution envisaged but two legal entities: the individual person and the government. Nothing intermediate was contemplated. But since about 1870 "there has been a worldwide increase in the number,

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19 It may be noted in passing that while the corporation is a person under the Constitution it is not a citizen—a distinction which delights lawyers but tends to puzzle others.
20 In fact, James Madison argued that the chief merit of the Constitution lay in its attempts to lessen the disasters of factional ambition. J. V. PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT, 285 (1927) in The Federalist Papers No. 10.
size, and power of organizations. . .whose activity is directed toward the economic betterment of their members."

The corporation-union, which we call the corporate community, is at once the most powerful and pervasive of these organizations. It has become apparent that these large economic organizations are here to stay, however much some may long for a Thoreauvian bean patch or a Jeffersonian commonwealth, because they perform functions which are considered desirable, even essential, by most Americans. They have even attained intellectual acceptance.

But their presence poses such crucial questions about the nature of the constitutional order that it is fair to say that in at least four ways corporate activities have altered the basic fabric of the constitutional scheme. The growth in the number of economic organizations is not the only cause of this change, but it is certainly one of the principal factors. The American businessman who considers himself to be conservative, is, oddly enough, one of the most radical, not to say revolutionary, figures in America today.

First, corporate communities, by creating a truly national economy, have so altered the historical nature of the federal system that it is no longer recognizable: the marriage of technology to economics has produced in the corporation an economic order which obliterates state lines; but a decentralized political order still exists in the fifty separate state governments. The consequence strains historical federalism. A nation which began with a system of "dual" federalism, with the states the more powerful segment, has now become one of "national" federalism, or more accurately, "national cooperative" federalism. Policies are enunciated in Washington and law follows, either in the form of uniform state laws or through congressional legislation taking over and occupying an entire field of regulation. The development may be seen clearly in the vast and growing system of federal grants-in-aid—a system whereby federal appropriations are used to accomplish what appear to be purely local ends. Examples are urban redevelopment, highway construction, airport construction, and the welter of policies administered by the Department of Health, Education and Welfare. Increasingly, therefore, the states are becoming administrative districts for centrally established policies.

One of the forces which greatly influenced that basic constitutional change was the growth of national corporate communities.

A second alteration wrought by burgeoning economic organization involves the impingement upon individual liberty by centers of economic power. The Founding Fathers feared governmental despotism and wrote into the Constitution limitations upon official power. They did not, however, foresee the power of private groups, power which in some instances can be as despotic as the government and surely as onerous to human freedom. For instance, a union with a closed-shop agreement can prevent some willing laborers from obtaining jobs. Similarly, a corporation can often treat its suppliers and franchise dealers, not to mention its managerial employees, in a manner which severely limits their liberty. The Founding Fathers well knew that power over a man's subsistence amounts to a power over his will: "necessitous men are not free men."

Third, just as the corporate communities have largely erased state lines as far as commerce is concerned, so today are they in the process of dimming national boundaries. Business has burst outward from a predominantly national market and is racing toward a multinational, if not a truly international, economy. For the American businessman the development is fairly recent. Since the end of the Second World War a process has taken place which, when finally completed, will likely be as important constitutionally as was the "nationalizing" of the economy in the period of 1870-1950. Restlessly seeking markets and raw materials, the corporate manager is roaming the world and setting up new economic forms which at some time may be transformed into new political and legal systems. In short, a new economic order seems to be in the making, at the core of which is the corporate community expanding its horizons to include at least a multinational perspective.

In 1960, David E. Lilienthal presaged what would take place during the ensuing quarter century. He foresaw that by 1985 it would be as common to operate industrial enterprises in a number of foreign countries as it was then for large American manufacturing enterprises to operate in several states of the Union. One result would be the establishment of new supranational authorities. That this would pose new challenges to the Constitution of 1787 is obvious. Lilienthal believes that the development will be toward a new form of federalism, with multinational corporations existing
as "prominent citizens living under the developing economies." Speaking in a different context, then-Chairman of the Senate Foreign Relations Committee, Senator J. William Fulbright, put the matter in this way: "The question we face is whether our basic constitutional machinery, admirably suited to the needs of a remote agrarian republic in the eighteenth century, is adequate for the formulation and conduct of foreign policy of a twentieth-century nation, pre-eminent in political and military power and burdened with all the enormous responsibilities that accompany such power." To the extent that private corporations transcend national boundaries in their operations they contribute to the acute problem of adapting the Constitution of 1787 to the problems of the modern era.

Fourth, the rise of corporate communities has contributed to the diffusion of political power. The Constitution was drafted in its original form so as to fragment the powers of government by use of the federal-state system, by division on geographical lines, and by a tripartite division within the federal government itself. The theory was simple: splinter power to prevent despotism, the concentration of power in one man or one group. Liberty was to be preserved through the inevitable conflicts of organizations and officials sharing power over the same subject matter.

Well and good: the constitutional system has indeed worked well for the 190 years of American constitutional history. But it has done so as much because of factors lying outside the Constitution itself, and even outside the political order, as it has because of intrinsic merit. Why? For one thing, the problems faced by America during most of its history (up to very recent years) were internal—i.e., domestic—in origin. Only since World War II has the question of the adaptability of the Constitution to external problems become acute. A serious question of the day is whether the fragmentation of power established by the Constitution works to the benefit of the American people as a whole when it comes to foreign affairs.

Furthermore, the Constitution may have survived because, in

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23 Fulbright, American Foreign Policy in the 20th Century Under an 18th-Century Constitution, 47 CORNELL L. Q. 1, 1 (1961).
24 Recent scholarship has suggested that there was an efficiency side to separation of powers. See L. Fisher, PRESIDENT AND CONGRESS: POWER AND POLICY (1972).
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part, it has not been a barrier to the realization of the reasonable goals of the American people: the fundamental law has, by continuing to adapt, been sufficient to the needs of the people in different times and under different conditions. Our Constitution is a living instrument of governance; rather than being "a mere lawyers' document," it is "the vehicle of a nation's life." Chief Justice John Marshall put the point in classic form when he emphasized that "we [i.e., the Supreme Court] must never forget that it is a constitution we are expounding." That Constitution, he went on to say, was intended to endure for ages to come and, consequently, to be adapted to meet various crises of human affairs.

That adaptation has been effected by all organs of government, national and local. Congress and the President have made important constitutional decisions, although lawyers, speaking with invincible parochialism, often assert that the Supreme Court is the only organ worth studying for constitutional decisions. That, however, is simply not so. The procedure by which the Constitution is updated by succeeding generations includes other organs of government as well, although the Supreme Court has been central to that process. Supreme Court decisions have had the effect of making legitimate vast constitutional changes wrought initially by other segments of government, both national and state.

The system has worked, also, because leaders of the disparate political branches of government have been willing to cooperate more often than not. The federal system and the separation-of-powers doctrine, although designed to limit power, were based as well on the assumption that political leaders would act as reasonable men and cooperate where the general good of the people was involved. (Only one time in American history did this assumption fail: during the Civil War.) "Government is not a body of blind forces; it is a body of men, with highly differentiated functions, no doubt, in our modern day of specialization, but with a common

20 W. Wilson, Constitutional Government in the United States (1908).
task and purpose. Their cooperation is indispensable, their warfare fatal.27

Fragmentation of power has worked, therefore, only because it has at times been ignored.28 Even so, to return to the fourth constitutional challenge, the proliferation of economic and other power centers within American society poses the question of whether such splintering has been carried too far. If so, is there a corrective? We have noted above how power-fragmentation, in the views of some observers, is not desirable in the conduct of foreign affairs. Focus now upon the complementary aspect: domestic affairs. In order to discern the nature of the problem the process established by the Constitution for making public policy must be analyzed: how do such decisions get made in fact. Reduced to its essentials, the decision-making model set up by the framers of the Constitution is simple enough: Congress legislates law, the President executes that law, and the judiciary interprets it. The model is too simple, however, because no government, certainly not that of the United States, ever operated in such a fashion. No thoughtful student of American government today believes that the tasks of governing can be placed in three such mutually interlocking watertight compartments. Even so, as recently as 1952 the Supreme Court apparently adhered to such a model. In the case involving President Truman's seizure of the steel mills the Court held that the President had no independent lawmaking authority.29 Only Congress, according to the Court, can make a law; and presidential lawmaking is invalid.30 Speaking generally, it is fair to say that the decision of the Court was faulty both historically and as a matter of contemporary practice. If such a model ever did exist, the increase of decentralized power within the American polity has substantially warped that simplistic model of constitutional decision-making. Since the line between what historically has been considered to be public and what private has been blurred, even erased at times, by the growth of the group basis of society and the consequent interaction with government, a serious question thereby posed is how the government, given the system

27 Wilson, supra note 20, at 56-7.
30 Id. at 588.
as it has developed, can insure that "national interest" decisions are made by the leaders of the centers of private power?

Not long ago, advocates of pluralism saw a need for greater recognition of social groups within a nation. Now, however, "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." Public policy in the United States appears to require a consensus of the groups most affected, beneficially or adversely, by those policies. Policies sanctioned by the lowest common denominator among interest groups are the ones which are adopted because they please the most people and offend the fewest. This means that government—(i.e., the State)—is not all-powerful. It cannot operate as it wishes, and it cannot fail to take into serious consideration the demands and wishes of our organizational society.

Outlined above have been four ways in which the offspring of the marriage of technology to economics—the corporation—has substantially altered the historical Constitution. Attention should be directed toward a constitutional theory which will encompass both the historical learning and the present and future social facts. Of the four challenges to American constitutionalism which have been mentioned, two raise questions which are of central importance today. First, to what extent should an individual be able to invoke the Constitution as a restraint upon arbitrary action taken by private groups which affect his values? Second, to what extent can private groups make decisions that are truly national?

The first question involves the historical development of constitutional law and could be answered by a relatively small change in the present flow of decisions dealing with constitutional construction. If the corporate community is a "private" government, as has been suggested, should it be treated as such under the Constitution? The second question presents a political problem of the first magnitude and strikes at the heart of the American Constitution.

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31 Friedmann, supra note 5, at 165.
C. Limiting Private Power

The corporate community (taken here as the model of private groups) exercises two types of power. On one hand, it makes decisions relating to the direction and intensity of investment, the nature of economic development, and other similar economic factors. On the other hand, it makes decisions which directly affect an individual and his values. The first group of decisions may be considered by some as creating a situation that demands public or external control. Control techniques might entail total socialization through mixed public and private enterprises, cooperatives, mixed companies, capital and labor partnerships, public regulation by commission, and antitrust legislation or other similar social restraints. While all of these raise peripheral constitutional questions, not one calls for the application of constitutional precepts to the decisions of the corporate community; indeed, in this aspect of the group decision-making process it is difficult to see how the Constitution could be validly applied. Control, if it were imposed, would not be through the means of resort to a basic higher law.

In the second category of decisions—those that directly affect the value position of individuals—the question arises whether the Constitution can and should be applied to private exercises of power. The Constitution is often said to run against governments only. Is it now time to recognize the dimension of private governments?

We can start with the following propositions:

(1) The Constitution was framed on the theory that limitations should exist on the formal exercise of power in government but not on power exercised unofficially.

(2) The essential element of individual liberty, however, is freedom from any arbitrary restraints or restrictions, wherever and however imposed.

And we can conclude that:

The Constitution should be so construed as to limit all arbitrary applications of power against the individual—whether exercised by the government or by private power groups. The main flow of group decisions in the corporate community would not be thrown into litigation or controversy by such a constitutional construction, but only those which directly and substantially affect an individual. Furthermore, it would take only slight modification of present constitutional doctrine to effect such a constitutional construction.
Hobbes once likened private associations to "worms in the entrails of man" and sought ways to minimize their influence. Madison, in The Federalist Papers, dealt extensively with them. The problem is not how to eliminate them but how to curb their excesses. One way of doing this, insofar as individuals are concerned, is through application of the basic limitations of the Constitution to certain group decisions: Governing power, wherever located, should be subject to the fundamental constitutional limitation of due process of law. This proposition, as it is worded, excludes the great majority of group decisions—those which do not directly affect an individual—as well as all nonarbitrary uses of power. It assumes that groups such as the corporate community have responsibilities as well as rights under the Constitution, and one of those responsibilities is not to act arbitrarily toward certain individuals.

Let us consider two different situations in order to see how the proposition would operate. Take the situation where an employee of a corporate community is discharged from his job for the announced reason that his loyalty to the United States is in question. Should he be accorded "due process of law"? Would it make any difference if the enterprise were one which had a number of federal contracts, as distinguished from an enterprise depending entirely on non-governmental business? Or take the situation where a member of an ethnic group, say a Negro, is denied employment because of his race. Should he be able to contest that decision on constitutional grounds? If so, under what theory should he proceed?

The basic proposition would cover both of these situations. The factory worker discharged for loyalty reasons should be afforded "procedural" due process of law; the Negro denied employment should be granted rights under a theory of equal protection of the laws, or, possibly, a theory of "substantive" due process. For both, the constitutional problem is essentially the same: persuading the United States Supreme Court to recognize that the corporate community performs some governmental functions.

The historical trend of judicial decision making has been to bring more and more organizational activity within the reach of the limitations of the Constitution. (That trend has been halted, at least for a time, by recent Supreme Court decisions.\textsuperscript{22}) Since

\textsuperscript{22} E.g., Hudgens v. NLRB, 96 Sup. Ct. 1029 (1976).
1789, moreover, public governmental activity has increasingly been made subject to due process limitations. The next logical step would be to draw private governments into the tent of state action. This is not a particularly startling proposition, for a number of Supreme Court cases have shown that the concept of private action must yield to a concept of state action where public functions are being performed. State courts in Kansas and California have reached similar decisions. Compare the following statements of, respectively, the United States Supreme Court and the California Supreme Court. The Supreme Court comments that

[If the Railway Labor Act confers an exclusive bargaining power on a union] . . . without any commensurate statutory duty toward its members, constitutional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights.\(^\text{32}\)

In like manner the California court writes:

. . . Where a union has . . . attained a monopoly of the supply of labor by means of closed shop agreements and other forms of collective labor action, such a union occupies a quasi public position similar to that of a public service business and it has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations. Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living.\(^\text{34}\)

Recent Supreme Court decisions have backed off from this trend. It is my contention that these recent decisions have been wrong in theory and sociologically arbitrary.\(^\text{35}\) What is true of a labor union is certainly true of the corporate community of which the union is a part. When an employee is discharged or threatened with discharge from the community, a compelling argument can be made that this should not be done in an arbitrary way. The employee should get "his day in court"; he should have due process of law. His capacity to earn a living, perhaps the most important value he has, is directly affected. If we go a step further and find

that the enterprise for which he works is the recipient of federal contracts, the employee should be able to invoke the due-process clause of the fifth amendment in addition. The employer can be considered to be an agent of the federal government, clothed with the protection of that government, and therefore subject to the same constitutional limitations as the federal government.

The same arguments would appear to be equally applicable to the Negro in the second example. He is not yet a member of the community to which he has applied for a job, and not yet subject to its governing power, but he is being subjected to its arbitrary power. Whether the attack on that power is based on equal-protection grounds or on substantive due-process grounds, the problem would again be to convince the Supreme Court that the conduct of the corporate community was a form of state action. If the particular enterprise that refused the job were a federal contractor, there would seem to be no insuperable barrier to the Negro's invoking the due-process clause of the fifth amendment.

These are the types of decisions made by the corporate community, whether by corporate management or union management, that should be subject to constitutional proscriptions. Possibly the bulk of decisions, if controlled at all, would have to be met with other techniques—probably legislation by Congress or by the growth of countervailing power centers.

D. The Problem of Consensus

"There can be no grosser mistake," observed Sir Henry Maine, than the impression that "Democracy differs from Monarchy in essence. . . . The tests of success in the performance of the necessary and natural duties of a government are precisely the same in both cases."36 Those "necessary and natural duties" of government are the defense and advancement abroad of the vital interests of the nation, and of order, security, and solvency at home. Can the American constitutional democracy insure the making of the "hard" decisions—those that assert a national or public interest against private inclination and against what is easy and popular? Or is there a Gresham's law of politics in which the "soft" decisions tend to triumph over the "hard" ones? These are tough questions which go to the heart of American constitutionalism.

36 H. MAINE, Popular Government 60-61 (1886).
Our Constitution is largely a charter for the resolution of purely domestic matters. Although war is mentioned, the framers obviously considered international peace to be the normal state of affairs. The original constitutional theory of limited government—that government is best which governs least—is no longer tenable. The essential negativism of the Constitution toward government requires alteration in the light of the affirmative duties of the State.\(^37\)

The national or public interest must have an authoritative spokesman. In the constitutional system as it exists today, however, no one, not even the President, can speak for this interest.

Our pluralistic society needs to reach common agreement on values and ideals and needs to be willing to sacrifice for the general good. Even once consensus is reached it must reflect more than the normal bargaining and compromises: it must in some way transcend parochial interests and reach the overall public interest. The last forty years illustrate the nature of the problem.

In the 1930s, after much political battle, Congress enacted legislation which had the effect of legitimizing labor unions in all industries engaged in interstate commerce (which, as we have seen, encompasses most business activity). The Supreme Court, in a famous decision in 1937, upheld the statute—the National Labor Relations Act\(^38\)—which meant that corporate management and union leadership were left to the bargaining table to settle such matters as wages, hours, and working conditions of employees. Although Congress did not say so expressly, the system of collective bargaining was based on the assumption that the decisions reached thereby would be in the public or national interest. In other words, Congress, assuming that the general good would be served thereby, intervened in the economy to permit unions to balance the power of corporations.

Unfortunately, the system has not continued to work in the same way. In the intervening years what appears to have happened frequently is that corporate managers and union leaders get together for their mutual benefit, and little or no attention is paid to the public interest. Wages have risen, but so have prices. The result is inflation and an inability to compete on the world market to protect the international viability of the dollar. The situation

\(^{37}\) See Miller, supra note 12, on the rise of the "positive state".

became so acute in the late 1950s and 1960s, that the President, at the instance of his Council of Economic Advisers, sought to set guidelines for wage and price increases which were to be taken into consideration by those who sat around the collective-bargaining table; in effect, it was an attempt to put a “third man”—John Q. Public—at that table.

At this writing it appears that the federal government is again making not-so-gentle hints to members of the corporate community. Whether government will prevail is at best uncertain, but history can provide some guidance. In 1962, a famous showdown between President Kennedy and Roger Blough of the United States Steel Corporation over an announced rise in the price of steel provided clear evidence of the relative inability of government to insist upon national-interest decisions by the leaders of private centers of economic power. President Kennedy won the battle, but U.S. Steel won the war because it soon raised steel prices.

The unhappy episode of wage-price controls under President Nixon provides another example. Another illustration, drawn from the penumbral area where international and constitutional law meet and merge, should buttress the point. Since the end of the Second World War, a cardinal tenet of American economic policy has been to expand a system of multilateral world trade carried on with few if any, national barriers. The drive culminated with the enactment of the Trade Expansion Act of 1962 and the so-called “Kennedy Round” of tariff negotiations conducted in 1964. It has, even so, become clear that efforts since 1945 to make meaningful changes in international trade policy have often foundered on the shoals of domestic group interests. The International Trade Organization, negotiated in the late 1940s, became a dead issue because the United States would not join it; the same happened to the Organization for Trade Cooperation, negotiated in 1955, and strongly endorsed by President Eisenhower. The point is that what the President and many others thought was in the national interest had to give way to parochial interests which feared the impact of expanded trade.

Decisions such as these, taken by corporate communities themselves or by a government strongly influenced by those com-

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communities, create a problem for consensus in a group-dominated society. The challenge remains to find a legal—i.e., constitutional—basis for a decision-making process that would be reasonably calculated to further the national interest. The challenge surpasses that of dealing with the growth of corporate centers of power, because it seeks to preserve the democratic values imbedded in the Constitution while simultaneously devising ways to transcend the shortcomings of mass democracy. It is no exaggeration to say that the American constitutional system will prosper or founder according to the manner in which this challenge is met.

III. Conclusion

Terming the corporation a person, as the Supreme Court did in 1886, does not begin to solve the problem of the place of the corporate community in the American constitutional order. The question, it should be emphasized, is not whether the corporation should receive the protections of the Constitution. Of course it should, but being a constitutional person carries with it obligations as well. Natural persons are held to constitutional duties—there should be a concept of constitutional duty for the corporate community. This duty, which is now in an unformed and inchoate state, has at least two facets. First, the corporate community (as defined above) should be held to minimum standards of decent treatment of individuals it directly affects; these standards are summed up in the concept of due process of law, which in shorthand, non-legal terminology means that the government should not deal with anyone in an arbitrary manner. Second, the corporate community should take cognizance of the overall interests of the American people when making basic decisions, such as those affecting wages and prices; in other words, it should take the public interest into account. As one observer of the legal scene succinctly put it: "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."

Should the federal judiciary, in conjunction with the other branches of government, be entrusted with the tasks outlined? If so, by what criteria should decisions be made?

For all of their shortcomings, the federal judges are probably

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better-suited than other existing governmental institutions to impose procedural due process norms on the corporate community; to do so, they need only continue from a line of cases already decided.

Since there is as yet no comprehensive and accepted theory of group-State relationships to guide legislators and since the association, individual and State are in constantly changing equilibrium, it may be that the harmonizing of these three elements, which Act on regards as "the true aim of politics," is best carried out through the flexible processes of a widely-competent judiciary; and it is partly for this reason that the pluralistic character of the State appears more securely established in America than in any other country.41

Lower federal courts, but not, generally speaking, the Supreme Court,42 seem to be moving in that direction.43 Sooner or later, the Supreme Court will bow, as it did in the 1930s, to pressures and will recognize the concept of private governments.

That leaves unanswered the toughest problem of all: the criteria of judgment. Here I maintain that the time has come for a "jurisprudence of welfare."44 This is not the time to spell out that concept in detail, but one dimension must be considered: "welfare" must include national-interest decisions. The Supreme Court already has moved in that direction, without using the term, in beginning to create a concept of constitutional duty.45 That trend should be continued.

I am not advocating what was once denounced as "government by judiciary."46 The court system is only one of the organs of government. But judges do have a role to play that includes setting a standard, or, in Bryce's words, acting as a "national conscience." Emphatically, that does not mean that judges should or will always prevail. It does mean that judges have

41 L. WEBB, LEGAL PERSONALITY AND POLITICAL PLURALISM 194 (1958).
46 L. BOUDIN, GOVERNMENT BY JUDICIARY (1932).
a continuing and important duty to perform—that of helping to translate the ideals of the Constitution into operational reality."