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Toward a Definition of "The" Constitution

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TOWARD A DEFINITION OF "THE" CONSTITUTION*

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I. INTRODUCTION

Professor Michael Perry's *The Constitution, the Courts, and Human Rights*[1] is a longish essay that fits squarely into the mainstream of current constitutional commentary. He seeks to justify "human rights" decisions of the Supreme Court—in my judgment, successfully. In this paper, I do not wish to enter the controversy over "interpretivism" and "noninterpretivism," for I think the Court has always put content into nebulous constitutional language that has always been "noninterpretivist." Indeed, there is no way, as Justice White asserted in his dissenting opinion in *Miranda v. Arizona*,[2] for the Justices to do otherwise. The real and enduring problems of American constitutionalism transcend the current constitutional controversy. Those problems, as I will try to show, call for a conception of the Constitution that goes beyond the Document of 1787, its amendments, and the gloss the Supreme Court has placed upon those ancient words. We need, I believe, a thorough re-examination of the fundamental nature of American constitutionalism. A few years ago Professor Kenneth Dam called attention to our "fiscal constitution;"[3] I will maintain in this essay that Americans have a Political, an Economic, and an emergent Corporatist set of constitutions.

I do not agree with all that Perry says. For example, he thinks, as do Herbert Wechsler and divers others, that a "principled" decision is the *sine qua non* of constitutional adjudication.[4] One would think at

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 This essay is based on the author's work in progress, a book tentatively entitled *Getting There From Here: Constitutional Changes for a Sustainable Society.*

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1. M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982).

2. 384 U.S. 436 (1966). Said Justice White:

> [T]he Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution. *This is what the Court historically has done. Indeed, it is what it must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.*

Id. at 531. (White, J., dissenting) (emphasis added) (footnote omitted).

3. Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271 (1977).

4. M. PERRY, *supra* note 1, at 25-29. *See* Wechsler, *Toward Neutral Principles of Consti-*

this juncture that Wechsler's muddled notions would have been given a decent burial, but apparently not.[5] Since I have elsewhere discussed such matters at some length, I do not propose to repeat what was said there.[6]

This essay, then, is a preliminary examination of an up-to-date definition of "the" Constitution and American constitutionalism. Constitutionalism in the United States is far more complex than many believe, certainly much more so than what is routinely presented to students by the professoriate and to the public by journalists. In large part, students and public alike are exposed to a set of myths about the Supreme Court and the Constitution; some bits of folklore about the judges who have the self-appointed task of interpreting the Document of 1787; more or less detailed analyses, as presented by law and political science professors, some judges in off-bench statements (and in their opinions), and a handful of journalists, employing a far too narrow framework of what those 101 men (plus one woman: Justice Sandra O'Connor) have said about the ancient instrument. The literature produced by that fairly small, identifiable group, though offered as constitutional "law" and thus as the *ne plus ultra* of American constitutionalism, in fact bears little resemblance to the immensely complicated politico-legal processes by which the nation is governed. A basic, and indeed indispensable, myth of that literature is that the Supreme Court is *the* authoritative interpreter of "the" Constitution. That simply is not accurate—on two scores: first, the Justices are not the only governmental officers with power to say, and say authoritatively, what the Constitution means (the Constitution in the sense of the Document); and second, there are numerous decisions of a constitutive nature in the American polity that do not receive judicial scrutiny. All of this will, I hope, become clearer in the ensuing discussion.

One other matter merits mention at this time: the intellectual imprisonment of most commentators (including, alas, Professor Perry) by the invisible bonds of the ideology of "legalism"—the belief that law is a discrete entity, separate and apart from the rest of society, an entity that can be fruitfully studied as such without reference to the politics and the economics of the social order. Law is considered to be "there." Most of the literature on the Supreme Court and the Constitution pro-

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tutional Law, 73 HARV. L. REV. 1 (1959). For another view, see A. MILLER, THE SUPREME COURT: MYTH AND REALITY chs. 2-5 (1978).

5. A recent celebration of Wechsler is Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 983 (1978). *Compare* Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

6. *See* A. MILLER, TOWARD INCREASED JUDICIAL ACTIVISM: THE POLITICAL ROLE OF THE SUPREME COURT (1982).

ceeds from the assumption, sociologically unsound, that law and the legal system and the State are not closely intertwined. That there is no there "there" (as Gertrude Stein once acidly described Oakland, California) should be obvious to all, but apparently is not. American constitutionalism cannot be understood as a "thing" separate from the political economy of the nation. In what follows, I assume the commonplace—that judges are lawmakers—and take my theme from a recent book by Martin Shapiro:

> If judges . . . are inevitably lawmakers, what happens to our prototype of independence, preexisting legal rules, adversary proceedings, and dichotomous solutions, and more particularly, what happens to the substitution of legislation for legal rules consented to by the parties? In the first place, lawmaking and judicial independence are fundamentally incompatible. *No regime is likely to allow significant political power to be wielded by an isolated judicial corps free of political restraints. To the extent that courts make law, judges will be incorporated into the governing coalition, the ruling elite, the responsible representatives of the people, or however else the political regime may be expressed.*[7]

Should one doubt that judging is "closely associated with sovereignty or ultimate political authority,"[8] as Shapiro remarks, let him ponder for a moment the true meaning of *Dames & Moore v. Regan*,[9] the 1981 Iranian Hostage decision of the Supreme Court. That decision was by no means aberrational. It was, as I have said elsewhere, "a political decision by a political Court."[10]

One constitutional antiquarian, Justice Hugo L. Black, once asserted: "It is of paramount importance to me that our country has a written constitution."[11] Black denied the validity of what some call the "living" Constitution. Few join Black in that position, although some stoutly deny that some of the Court's decisions that make up part of the living or operative Constitution are legitimate. Black's simplistic view of "the" Constitution, thus, has its counterpart in the simplisms of some commentators—those, to take only one example, who strenuously maintain that the task of constitutional interpretation is to ascertain the intentions of those who drafted the Document.[12] It is a sad commentary on the state of scholarship that after almost 200 years of con-

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7. M. SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 34 (1981).
8. *Id.*
9. 453 U.S. 654 (1981).
10. Miller, Dames & Moore v. Regan: *A Political Decision by a Political Court*, 29 UCLA L. REV. 1104 (1982).
11. H. BLACK, A CONSTITUTIONAL FAITH 1 (1968).
12. *E.g.*, R. BERGER, GOVERNMENT BY JUDICIARY (1977); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

stitutional history there is no accepted method of judging, or accepted description of the nature of the judicial process. Small wonder, therefore, that Professor Richard Davies Parker can say that "[o]ur elders have brought constitutional theory to a crossroads."[13] Parker was not quite correct: constitutional theory, rather than being at a crossroads, is at a dead-end. The "elders" Parker mentions have led those who are concerned about constitutionalism into an intellectual cul-de-sac. More and more, the literature tends to be rehashes of ancient controversies, accompanied by the writers' value judgments—not unlike the lucubrations of medieval scholastics. One reason, I believe, for so much modern scholasticism is the failure to inquire into exactly what "the" Constitution in the United States is. Take, for instance, almost any issue of *The Supreme Court Review* or any of the annual *Harvard Law Review* summaries of the past term of the Court (or, for that matter, almost any law or political science journal article dealing with the Court and Constitution,) and one quickly perceives that "the" Constitution is the sacred Document so revered by Justice Black. That, put bluntly, is not enough.

"What is a constitution?" is a question not easily or quickly answered, save on a superficial and elementary level. High school civics texts, as well as Justice Black, provide that type of response. The Document of 1787 was written by a group of supermen since revered in America's history as the Founding Fathers, men assumed to have had a wisdom denied other mortals and who, consequently, should govern us from their graves. For many Americans, the Document has a mystical significance; it is an object of awe and reverence that projects a religious fervor to secular life, a unifying symbol around which Americans can rally. As the supreme law of the land, it is befogged by myths and belief-systems that give the ancient parchment a significance far transcending constitutions in other nations. Walton Hamilton rhetorically asked in 1938, in language that suggests some of the complexities of defining "the" Constitution:

> What is the Constitution? A writing set down on parchment in 1787 and some twenty-one times amended? Or a gloss of interpretation many times the size of the original page? Or a corpus of exposition with which the original text has been obscured? Or "the supreme law of the land"—whatever the United States Supreme Court declares it to be? Or the voice of the people made articulate by a bench of judges? Or an arsenal to be drawn upon for sanction as the occasion demands? Or a piling up of hearsay about its meaning in a long line of precedents? Or a

13. Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223, 223 (1981).

> cluster of abiding usages which hold government to its orbit and impose direction upon public policy? Or "a simple and obvious system of natural liberty" which even the national state must honor and obey? And is the Constitution engrossed on parchment, set down in the United States Reports, or engraved in the folkways of a people?
> And last of all, has the United States a written or an unwritten Constitution?[14]

Even that statement, sophisticated as it is, falls considerably short of the mark. A more accurate definition is needed. For present purposes, the following shorthand definition is suggested: A constitution—*the* Constitution of the United States—is *a set of institutions,* both public *and* private, *by which society (human activity) is organized and directed.* Those institutions, furthermore, are both *licit* and *illicit.* The Constitution, moreover, consists of a set of *procedures* for making decisions and the *substantive* content of those decisions. Finally, it is both *written* and *unwritten, formal* and *living,* and *always in a state of becoming.*

Any social or political order consists of a "myth system"—a more or less clearly stated set of rules of behavior that purportedly guide human conduct—and an "operational code" that tells people when, by whom, and how certain things may be done *outside the myth system.* I take the labels from Professor Michael Reisman's *Folded Lies,*[15] a study of bribery. Reisman in turn drew from the work of Nathan Leites, who in 1951 published *The Operational Code of the Politburo.*[16] According to Reisman, the operational code is a private and unacknowledged set of rules that govern behavior. He distinguishes between what he calls *jurisprudence confidentielle*—"a set of confidential or secret theory and practice of law, known to a few key lawyers who sometimes perform legal functions in accord with it"—and *jurisprudence publique,* the "jurisprudence presented to the public and studied assiduously by students."[17] Further:

> *Jurisprudence confidentielle* is never expressed openly. High government lawyers and private practitioners who may advise the elite will be privy to secret agreements that they interpret; pleadings and arbitrations, sometimes rendered by judges of public courts acting in their private capacity, will be suppressed by agreement of the parties; opinions ren-

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14. Hamilton, *Introduction,* in THE CONSTITUTION RECONSIDERED vii, xv-xvi (C. Read ed. 1938). *See generally* NOMOS XX: CONSTITUTIONALISM (J. Pennock & J. Chapman eds. 1979).

15. M. REISMAN, FOLDED LIES: BRIBERY, CRUSADES, AND REFORMS (1979). For a well-known state judge's application of Reisman's methodology, see R. NEELY, HOW COURTS GOVERN AMERICA (1981).

16. N. LEITES, THE OPERATIONAL CODE OF THE POLITBURO (1951).

17. M. REISMAN, *supra* note 15, at 12.

> dered for corporations will be kept confidential; and vast amounts of legal material in the public sector will be classified. None of this *jurisprudence confidentielle* will be expressed by these same practitioners in the *jurisprudence publique*. . . . The *jurisprudence publique* is not a sham, for it may apply to some events and to certain groups; given the curious and almost sacramental role of generative logic in legal scholarship, *jurisprudence publique* can always be presented as a complete system of thought. But since it represents only a part of what is going on, it is inadequate as an explanatory or predictive tool.[18]

My intention here is not to develop a comprehensive theory of the *jurisprudence confidentielle* of the Constitution of the United States; but, rather, to pick up from Woodrow Wilson's comment in 1885—"The Constitution in operation is manifestly a very different thing from the Constitution of the books"[19]—and expand upon it. And I alter Reisman's concept from one of secret or confidential law, to law that is open and visible to all who would see. As used in this article, the operational code of "the" Constitution is synonymous with the "living" or "operative" constitutions.

"The" Constitution, properly perceived, consists of far more than the *jurisprudence publique* set forth in the coursebooks and textbooks studied in the law schools. A much larger fundamental law exists, and, indeed, is often considered to be part of the "natural" order of public affairs. However, since many of its institutions are nominally private, they are not considered to be part of the concept of American constitutionalism. It therefore is a form of hidden or invisible government—invisible only because of a consistent refusal to perceive the obvious. "The Emperor has no clothes," the little boy blurted out. That is not my point. Many of the Emperor's clothes can be easily seen, but only part of them are acknowledged as such.

Such a broad conception of constitutionalism runs counter to orthodox thinking. Most lawyers and political scientists see only the myth system and approach the subject along narrow lines, asserting that what is worth knowing about constitutionalism may be derived from historical study of a few documentary remnants and from analyses of Supreme Court decisions. They view the Court as the only important interpreter of the Document. When, however, the concept of constitutionalism is seen through larger and more accurate spectacles, it is readily perceivable that the province of constitutional law is much broader than the orthodoxy would have it. Some congressional and

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18. *Id.* at 12-13.
19. W. WILSON, CONGRESSIONAL GOVERNMENT 30 (1885).

presidential decisions are of constitutional dimension.[20] Of even more significance, officers of the more important social groups—of which the giant corporations are the principal exemplar—also contribute to development of the constitutional norms by which Americans live. It is true those "private" norms are not set forth in familiar legal codes or even collected in law libraries. Nevertheless, they exist as a body of living or operative law; they are a part of the operational code of the American Constitution.[21]

Constitutionalism is like religion. It is an effort to bring coherency to seeming chaos, supplying a set of beliefs that seek to canalize human conduct. And like religion, constitutionalism has a normative dimension, as witness the following definitions (which, it will be shown, are faulty because they are incomplete):

1. *F.A. Hayek:* "Constitutionalism means that all power rests on the understanding that it will be exercised according to commonly accepted principles, that the persons on whom power is conferred are selected because it is thought that they are most likely to do what is right, not in order that whatever they do should be right. It rests, in the last resort, on the understanding that power is ultimately not a physical fact but a state of opinion which makes people obey."[22]

2. *Daniel Bell:* "The common respect for the framework of law, and the acceptance of outcomes under due process."[23]

3. *Charles McIlwain:* "Constitutionalism has one essential quality; it is a legal limitation on government."[24]

4. *Carl J. Friedrich:* Constitutionalism is "a kind of political order which contrasts sharply with nonconstitutional systems, such as a totalitarian dictatorship. In order to develop such a concept, a constitution must be defined in a way that indicates the features which make it contrast with other kinds of political order. These features come into view when we ask: What is the political function of a constitution? If

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20. For Congress, the following statutes may be mentioned: The Judiciary Act of 1789, the Sherman Anti-Trust law, the Budget and Accounting Act of 1921, the Employment Act of 1946, the Civil Rights Act of 1964, the National Environmental Policy Act of 1969, and the Budget and Impoundment Control Act of 1974. These statutes concern the structure of government, and thus are constitutional in nature. As for the President, the prime example is perhaps the *de facto* war-making power of the Chief Executive. Even though the war-powers resolution of 1973 seems to limit that power, the fact remains that despite the Constitution, war-making has become an executive power. For the history, see A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS (1976). (The second volume of this important study is now being written by H. B. Cox, Sofaer having become a federal judge.)

21. *Cf.* E. EHRLICH, THE FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (W. Moll trans. 1936).

22. F. HAYEK, THE CONSTITUTION OF LIBERTY 181 (1960).

23. Bell, *The End of American Exceptionalism*, 41 PUB. INTEREST 193, 193 (1975).

24. C. MCILWAIN, CONSTITUTIONALISM: ANCIENT AND MODERN 21 (rev. ed. 1947).

that question is asked, the constitution is seen as a process by which certain political objectives are realized."[25] Professor Friedrich goes on to maintain: "Only those parts of politics which can be expressed in legal rules can be reflected in a constitution. Behind the formal organization, an informal one will always operate. It is an essential part of the living constitution, which could not function without it."[26]

My point is that formal and informal organizations must be recognized in an accurate exposition of constitutionalism and that the concept should not be limited to notions of limitations on government. It will be noted that the quoted definitions, which are variations on the orthodoxy, all invoke the idea of limiting public government. That, however, is far too narrow a conception. Surely a totalitarian nation has a constitution, even a written one as in the U.S.S.R. Constitutions and constitutionalism are, to be sure, both descriptive and prescriptive. But their prescriptions, their rules of law, by no means run in one direction. The quoted passages are illustrative of the "prevalently liberal, antiauthoritarian inspiration of the nineteenth-century constitutional state,"[27] the public law of which had two principal aspects: positive law being changeable, vested rights are constitutional proscriptions; and citizens have correlative public rights, "constitutional" in nature, in the public sphere. The problem with that view may be simply stated: If anything has been learned about how written constitutions and their putative limitations on government operate in reality, it is that they are relative to circumstances. A principle of constitutional relativity runs throughout American history.[28] The limitations the orthodoxy perceives in constitutionalism are more apparent than real. Government in the United States is now, has always been, and will always be precisely as strong as conditions necessitate. Necessity is the mother of constitutional law.

Moreover, the "legal rules" Friedrich mentions are sufficiently ambiguous to make it possible not only to contend that the "private law" of the American economy is a substantial part of the Economic Constitution, but also to maintain that the way important societal decisions are actually made—often a part of the *jurisprudence confidentielle*—must be included in the notion of legal rules. As Brian Sedgemore said about Great Britain: "Two things only can be said with

25. Friedrich, *Constitutions and Constitutionalism*, 3 INT'L ENCY. SOC. SCI. 318, 319 (D. Sills ed. 1968).

26. *Id.* at 325.

27. G. POGGI, THE DEVELOPMENT OF THE MODERN STATE: A SOCIOLOGICAL INTRODUCTION 104 (1978).

28. *See* A. MILLER, DEMOCRATIC DICTATORSHIP: THE EMERGENT CONSTITUTION OF CONTROL (1981).

certainty about Parliamentary democracy in Britain today. First, effective power does not reside in Parliament. Secondly, there is little that is democratic about the exercise of that power."[29] So it is in the United States.

Finally, certainly there is much more to constitutionalism than what Friedrich calls "the first and foremost objective" of a constitution: "that of protecting the individual member of the political community against interference in his personal sphere of genuine autonomy."[30] The self is to be safeguarded, but only by limiting public government. That is the essence of the orthodoxy. Interference with the self, however, can come from elsewhere—from the power centers of the Economic Constitution. Protection, furthermore, has both negative *and* positive (affirmative) characteristics—negative in the sense of guarding against harm, and positive in the sense that government has a responsibility to create the conditions that will permit the full flowering of the self.

II. THE POLITICAL CONSTITUTION

Lawyers specifically and Americans generally are inflicted, as has been said, with a peculiar mental handicap. They insist upon viewing law as a discrete entity separate from the warp and woof of society. The fact is that law and the State are closely intertwined, with law being, in Professor Burns Weston's terminology, "legitimized politics."[31] In the constitutive process, the political economy is the very stuff of constitutional law. The Supreme Court in its constitutional, and perhaps in all, decisions, articulates juristic theories of politics. Because of the hyper-legalistic bent of American thought and practice, the Constitution and constitutionalism are seen as a species of law—the highest law, perhaps, but law nonetheless—rather than as pronouncements of political theories and statements of social ethics. Lawyers, however, know little about political theory and next to nothing about social ethics; but the accident of history that gave them a monopoly on judging in *constitutional* matters has been carried over to the present day. (I have suggested elsewhere that the lawyers' monopoly on Supreme Court appointments should be broken.)[32]

If constitutions and constitutionalism are defined fully and accurately, they should be viewed sociologically (functionally). What, that

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29. B. SEDGEMORE, THE SECRET CONSTITUTION: AN ANALYSIS OF THE POLITICAL ESTABLISHMENT 11 (1980).

30. Friedrich, *supra* note 25, at 319.

31. Weston, *The Role of Law in Promoting Peace and Violence: A Matter of Definition, Social Values, and Individual Responsibility*, in TOWARD WORLD ORDER AND HUMAN DIGNITY 114, 117 (1976).

32. A. MILLER, *supra* note 6, ch. 11.

is, is their social purpose? As we have seen, most commentators define the terms normatively. Thus, Professor Walter F. Murphy: "The fundamental value that constitutionalism protects is human dignity."[33] Murphy differentiates between "two quite different political theories—democracy and constitutionalism. The democratic genes stress popular rule and processes to effectuate that rule. The constitutional genes emphasize individual liberty and limitations on government power, even when it is responding to public opinion."[34] That distinction need not be accepted. Murphy's view is too narrow. Constitutions refer to ways that identifiable humans order their affairs; the word also has substantive content beyond the organizational, but not for any specific set of values.

Indeed, how can any one set of public values be said to be the sole standard of constitutionalism? The normative (orthodox) view of that concept should be seen for what it is: a consequence of what Walter Prescott Webb called the Great Discoveries of the post-Columbian era.[35] For the first time in Western history—for that matter, in the history of mankind—all things seemed possible to people of good will; and certainly many things not theretofore possible did become thinkable and even do-able. In one brief moment of planetary history, and then only in a limited geographical area, economic well-being and human freedom on a widespread scale became realizable. Normative constitutionalism, in sum, is a product of what Webb called the "400-year boom." In that, Webb extended Frederick Jackson Turner's frontier theory[36] from the United States to what he called the "Metropolis"—Western Europe. That boom has ended, and with it the orthodox notion of constitutionalism.

"It is ironic," Professor Sanford Levinson asserts, "that a culture which has experienced a centuries-long 'melancholy, long-withdrawing roar' from religious faith can believe so blithely in the continuing reality of citizens organized around a constitutional faith. The 'death of constitutionalism' may be the central event of our time just as the 'death of God' was that of the past century."[37] Levinson cannot be accurate when one considers constitutionalism sociologically; he is really talking about the death of orthodox constitutionalism. Only when the concept is viewed normatively, as apparently Levinson does, can it be argued that it is either dead, as he says, or dying. There can be little

33. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 758 (1980).
34. *Id.* at 758.
35. W. WEBB, THE GREAT FRONTIER (1952).
36. F. TURNER, THE FRONTIER IN AMERICAN HISTORY (1920).
37. Levinson, *"The Constitution" in American Civil Religion*, 1979 SUP. CT. REV. 123, 151.

question that "the" Constitution of the United States is tilting toward authoritarianism, and thus is undercutting constitutionalism as a limitation on government.[38] Perhaps it was always actually authoritarian—in its operational code—and that has merely become apparent, merging with the myth system, in recent years. Professor John Griffith of the London School of Economics so contends: "Societies are by nature authoritarian. Governments even more so."[39] The widely-held belief that sovereignty resides in "the people" who delegate it to the politicians to hold in trust for them is, for Griffith, a "bit of nonsense"—a "cover-up for authoritarianism."[40] Whether Griffith is entirely correct may be debatable, although his contention is verified, as we have said, by Brian Sedgemore (based on Sedgemore's experience in Parliament). Today, constitutionalism is dead only in the sense that authority, the faith in the benevolence of which is essential to the workings of liberal democracy, is being replaced, slowly but surely, by a form of authoritarianism. (By no means is it certain that there will ever be a swing back. Quite the contrary). Griffith goes on to say (about the British constitution):

> It is still quite common to hear the constitution described—even lovingly described—as a piece of machinery cleverly and subtly constructed to enable the will of the people to be transmitted through its elected representatives who make laws instructing its principal committee the Cabinet how to administer the affairs of the State, with the help of an impartial civil service and under the benevolent wisdom of a neutral judiciary. Not only is this explanation given to thousands of school children but . . . it also finds its way—in a more sophisticated form—into the curricula of some institutions of further and higher learning.[41]

If one substitutes "the Executive" for "the Cabinet" in that statement, Griffith's remarks are obviously applicable to the United States.

Seen as a sociological construct, constitutionalism and a constitution require answers to the following questions: *Who* makes *societally important decisions, how,* and with *what effects?* The unit for study is the decision of societal importance, one that when made may be directed, to be sure, toward one person alone (as in the sentencing of a person to prison) but that has a wider importance. Lawyers have a way of squaring the circle, of doing the logically impossible by inferring a general principle from one particular; hence, even individual decisions

38. *See* A. MILLER, *supra* note 28. *See also* K. PHILLIPS, POST-CONSERVATIVE AMERICA (1982).

39. Griffith, *The Political Constitution,* 42 MOD. L. REV. 1, 2 (1979).

40. *Id.* at 3.

41. *Id.* at 5-6.

have a collective significance.

What, then, is the Political Constitution? The following exposition is more suggestive than comprehensive. A beginning may be made with a recent statement of Professor Myres S. McDougal:

> Our constitution can be observed to be not merely the document of 1789 [sic], however important, or a diffuse mass of contemporary expectations about the requirements of decision, but rather a continuous process of communication and collaboration, beginning before 1789 and coming down to date, which establishes and maintains the basic features of authoritative decision in the body politic. It is the totality of this cumulative process of communication and collaboration, and not any single component, which identifies authoritative decision-makers, projects basic community policies, allocates competences and balances effective power as between different branches of government, authorizes procedures for the making of different types of decisions, and thereby secures the flow of prescriptions which we commonly decide as constitutional law.
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> . . . .
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> Every feature of this process, including all the many different communicators and communicatees who participate in it at many different times, affect the content of the constitutive prescription emerging from the process. . . . The whole community, operating through many different official and private spokesmen in multiple channels of communication and influence, constitutes [a] continuing constitutional convention.[42]

That is far too diffuse and abstract. To be sure, McDougal is correct in maintaining that "the" Constitution is more than the original document plus amendments; but after that assertion his exposition suffers. Much more specificity is required. His message may be summed up tersely: Each generation of Americans writes its own constitution. In that, he is correct.

The Political Constitution is the visible part of American constitutionalism, seen in the Document of 1787 and in the numerous interpretations by the Supreme Court, Congress, and the President. It may also be seen in the many silences of the Document (most of which have been made explicit by subsequent political action). At the barest minimum, the Political Constitution establishes a structure of government—in the tripartite division of powers of the national government and in the spatial split between that government and the states. Add the Bill of Rights—a putative set of limitations on public government. The Political Constitution also is a theological instrument, the principal evidence of America's civil religion of Americanism (or nationalism or

42. M. MCDOUGAL, THE APPLICATION OF CONSTITUTIVE PRESCRIPTIONS: AN ADDENDUM TO JUSTICE CARDOZO 29 (1978).

patriotism).[43] And finally, its institutions routinely interact with those of the Economic Constitution. Each constitution has a number of basic principles. Those for the Political Constitution are set forth here; the next section develops the principles of the Economic Constitution.

The first principle is that the Political Constitution is bifurcated. It will be recalled that Woodrow Wilson, writing in 1885, noted the difference between the Constitution "in operation" and that "of the books."[44] Formal constitutional law says, or at least appears to say, one thing, but reality is often different. Examples are easily found. In plain language, the Document provides for a way of electing presidents; but since almost the beginning that way has been supplanted by the operative Constitution's method—political parties (not named in the Document), with electors of the Electoral College voting in accordance with the popular vote in each state rather than for the person considered to be best qualified. "The American method of selecting the president is one thing in the written constitution, and another in the actual constitution."[45] So wrote Arthur Bentley in 1908. Going to war, or at least the calculated use of violence in other lands, has become presidential—despite the clear language of article I that it is the prerogative of Congress. The first amendment speaks in absolute terms and is directed only toward Congress: "Congress shall make no law . . . . "[46] In fact, the amendment is far from absolute and also binds the states.

"The" Constitution is bifurcated for several reasons. First, there are many silences in the original constitutive instrument, silences that have had to be filled by political and judicial action. Second, some of the Document's provisions have not worked out in practice (e.g., election of the President), so they have been amended *sub silentio.* Third, all of the litigable parts of the Document are couched in terms of high-level abstraction, so that a series of interpretations must be made to accommodate nebulous language to new factual (and social) situations. Finally, other centers of actual governing power have appeared since 1787, so that Americans today are governed as much, perhaps more, by ostensibly private groups than by public government itself.

The gap between the formal and the living (or operative) law is the difference between the myth system (the precepts of the written Document) and the operational code (what actually occurs in society). Whatever the labels, it is clear beyond doubt that "the" Constitution is

43. *See* LEVINSON, *supra* note 37. *Compare* S. HUNTINGTON, AMERICAN POLITICS: THE PROMISE OF DISHARMONY 30 (1981).

44. W. WILSON, *supra* note 19, at 30.

45. A. BENTLEY, THE PROCESS OF GOVERNMENT, A STUDY OF SOCIAL PRESSURE 295 (1908).

46. U.S. CONST. amend. I.

more unwritten than written. Americans today are tied to the Document of 1787 only symbolically or metaphorically.

The second principle is that the Constitution of 1787 is only ostensibly one of rights and limitations; in fact, it is one of powers and of control. The "nineteenth-century constitutional state"[47] was, and is, in fact a part of the myth system. Government, as Franz Neumann cogently pointed out, has always been precisely as strong as conditions of succeeding generations of Americans required:

> No society in recorded history has ever been able to dispense with political power. This is as true of liberalism as of absolutism, as true of laissez faire as of an interventionist state. No greater disservice has been rendered to political science than the statement that the liberal state was a "weak" state. It was precisely as strong as it needed to be in the circumstances. It acquired substantial colonial empires, waged wars, held down internal disorders, and stabilized itself over long periods of time.[48]

The term "the liberal state" in that quotation refers, not to modern liberalism (which is interventionist), but to the liberalism of John Stuart Mill, and others who espoused the "negative, nightwatchman state."

Seeming constitutional absolutes, as in the Bill of Rights and the thirteenth amendment, have always been interpreted by judges and others to be more cautionary admonitions to act reasonably in the circumstances than interdictory rules of law. What is reasonable, furthermore, becomes in the last analysis what the Supreme Court, sitting as a little lunacy committee, considers the circumstances to warrant. For example, both the first and thirteenth amendments speak in unqualified terms, but both have been interpreted not to mean what they say. Congress and the states can constitutionally make *some* laws abridging freedom of expression; and neither compulsory military service nor jury duty are proscribed by the thirteenth amendment.

By focusing on Supreme Court decisions, lawyers and others have traditionally viewed the Document of 1787 as one of rights or limitations. Perhaps the most influential constitutional textbook of the nineteenth century was Cooley's *Constitutional Limitations*.[49] That conception of history ignores the numerous affirmative subventions by government into societal affairs, principally to help develop and exploit the new lands of the west—pursuant to principles of government articulated by Alexander Hamilton in, among other writings, his famous

47. G. POGGI, *supra* note 27, at ch. V.
48. F. NEUMANN, THE DEMOCRATIC AND THE AUTHORITARIAN STATE 8 (1957).
49. T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS (4th ed. 1878).

Report on Manufactures.[50] It also is oblivious to such encroachments on individual freedom as the Alien and Sedition Acts of 1798,[51] many actions taken by Lincoln to quell what he maintained was a rebellion against the Union, and the oft-times savage repression of dissent.[52] Finally, the orthodoxy does not acknowledge that many outwardly limitative laws and constitutional proscriptions were *administered* contrary to their letter as well as to their spirit. Although it is true that at times the Court is "free to go behind the face of the law and inquire into the fairness of its actual enforcement,"[53] that practice began only in 1886 with *Yick Wo v. Hopkins*,[54] and by no means is it an invariable practice. Even that sporadic inquiry into the fairness of enforcement has been greatly diluted, in equal protection cases at least, by the Justices' discovery that plaintiffs alleging discrimination must prove a subjective intent by the administrator to do so.[55]

It would have been difficult to convince black Americans who had been freed from slavery that the Document of 1787 was one of *their* personal rights or one of limitations on governments at all levels, when, as was the fact, those very governments kept them in a rigid *de facto* caste system of peonage. The reason for the purblindness that enables scholars to speak of a Constitution of Rights (or of Limitations) is easy to locate: lawyers use tunnel vision and believe that Supreme Court decisions are the sole means of articulating what the Constitution means. Among other matters, the Justices never ruled on subsidies by government for economic development, the constitutionality of the Alien and Sedition Acts, the caste system imprisoning most blacks with invisible chains, or the brutal treatment of native Indians. But the Justices did sustain Lincoln's extraordinary, even extralegal, actions during the Civil War, and did not object to savage treatment of the nascent trade union movement after that war. Capital—the business corporation—could collectivize itself and receive government largesse, but labor—the working class—was long denied the right to act in concert; and government aid to it, as in wage and hour laws, was for years invalidated by a Supreme Court that in fact was an arm of the capital-owning class.

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50. X THE PAPERS OF ALEXANDER HAMILTON 1 (H. Syrett ed. 1966). *See* J. MILLER, ALEXANDER HAMILTON AND THE GROWTH OF THE NEW NATION ch. 19 (1959).

51. The Alien & Sedition Act of 1798, ch. 58, 1 Stat. 570.

52. Discussed in A. MILLER, *supra* note 28. *See also* Miller, *Reason of State and the Emergent Constitution of Control*, 64 MINN. L. REV. 585 (1980).

53. E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 417 (rev. by H. Chase & C. Ducat, 13th ed., 1973).

54. 118 U.S. 356 (1886).

55. *See* Binion, *The Disadvantaged Before the Burger Court*, 4 L. & POL'Y. Q. 37 (1982); Soifer, *Complacency and Constitutional Law*, 42 OHIO ST. L.J. 383 (1981).

That limited vision about constitutionalism still prevails in large part. Much, perhaps most, scholarly treatment of the Constitution today is a form of reductionism; it consists of detailed, at times readable, analyses of specific Supreme Court decisions. Dozens of books and hundreds of essays have been and are being published, almost none of which takes a truly functional view of the Court and Constitution. Judicial opinions are parsed with an intensity similar to the medieval Scholastics who spent endless hours in futile disputations over the meaning to be given to Aristotle and other ancients. Few scholars, today or yesterday, are prepared to acknowledge that constitutional law when perceived broadly, and correctly, was—in the past, is now, and will continue to be—instrumental rather than interdictory. Law, however created, is a purposive human endeavor; and the correct question to ask about Supreme Court decisions is this: *cui bono?* Who benefits in fact from them? I have discussed this question elsewhere,[56] so will content myself with citing a passage from Professor Morton Horwitz that seems to be relevant to constitutional law as well as the common law about which he wrote:

> By 1820 the legal landscape in America bore only the faintest resemblance to what existed forty years earlier. While the words were often the same, the structure of thought had dramatically changed and with it the theory of law. Law was no longer conceived of as an eternal set of principles expressed in custom and derived from natural law. Nor was it regarded primarily as a body of rules designed to achieve justice only in the individual case. Instead, judges came to think of the common law as equally responsible with legislation for governing society and promoting socially desirable conduct. The emphasis on law as an instrument of policy encouraged innovation and allowed judges to formulate legal doctrine with the self-conscious goal of bringing about social change.[57]

The point is that the nineteenth-century Constitution—the Document of 1787 as interpreted—was teleological, goal-seeking. Only a few official actions were limited; in the main, those that were seen to trample on "vested rights" of money and property.

Some commentators, notably Professor Edward S. Corwin, whose mind was only partially corrupted by legalism, have perceived in part a more accurate picture of the Constitution. In 1951, Corwin called attention to the overt emergence of a "constitution of powers in a secular state,"[58] building upon judicial approval of New Deal programs for that conclusion. He surely was accurate then. Had he extended his

56. A. MILLER, *supra* note 6.
57. M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 30 (1977).
58. E. CORWIN, A CONSTITUTION OF POWERS IN A SECULAR STATE (1951).

analysis back into American history, however, he would have seen that government was always one of "powers" when conditions were considered by ruling elites to warrant the exercise of powers. Since 1951, and perhaps earlier, still other types of powers have become evident and have been employed—again with judicial approval: those that validate controls on human behavior, controls that emanate from public and private governments. One can now correctly speak about an emergent "Constitution of Control"—a development which marks a sea change in the nature of "the" Constitution. In briefest terms, crisis government is becoming the norm.[59]

No formal announcement has been made of the change; but none need be. The Constitution of Control is a logical inference from a series of official decisions coming from the courts, Congress, the Executive Branch, and the private governments of the nation. Only a few illustrative instances need be mentioned. For courts, censorship of the press in the *Progressive*[60] case; the alleged but not actual victory in the *Pentagon Papers*[61] case; and *Haig v. Agee*,[62] upholding cancellation of a dissident's passport are evidence enough. Congress legislated discretionary wage and price controls,[63] used by President Nixon but now off the books, and in the National Emergencies Act[64] lent congressional approval to the use of emergency powers by the Executive. The President has committed military services in such places as Korea, Vietnam, and the Dominican Republic—all without express congressional mandate, and all part of the undeclared World War III with the Soviet Union, which began in 1944.[65] The National Security Agency routinely intercepts *all* overseas telephone and cable messages coming from the United States, a procedure that has received judicial approval as a "state secrets privilege."[66] And the private governments of the nation

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59. *See* Miller, *Constitutional Law: Crisis Government Becomes the Norm*, 39 OHIO ST. L.J. 736 (1978).

60. United States v. The Progressive, Inc., 467 F. Supp. 990 (W.D. Wis. 1979). *See* Cheh, *The Progressive Case and the Atomic Energy Act: Waking to the Dangers of Government Information Controls*, 48 GEO. WASH. L. REV. 163 (1980).

61. New York Times Co. v. United States, 403 U.S. 713 (1971).

62. 453 U.S. 280 (1981).

63. Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 799 (expired Apr. 30, 1974).

64. Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified at 50 U.S.C. ch. 34, §§ 1601, 1621-22, 1631, 1641, 1651 (Supp. II 1978)). *See* SLATER, THE NATIONAL EMERGENCIES ACT OF 1976—END OF EMERGENCY GOVERNMENT? (1978).

65. *See* Kenworthy, *Reagan Rediscovers Monroe*, 2 DEMOCRACY 3 (1982). "[W]e are in the third phase of World War III. . . . " *Id.* at 80. World War III is a "cold war," and is fought on the periphery of the major contestants, and often with surrogates. World War III can be said to have begun in 1944, once the defeat of Nazi Germany seemed assured. *See* Dugger, *On to World War IV?*, THE PROGRESSIVE, June 1982, at 20.

66. Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978). *See* Hayden v. National Security

routinely "legislate" the terms and conditions of the contracts of adhesion that make up the bulk of the promissory transactions between individuals and corporations.

More evidence could be cited, but heeding William of Occam, need not be. Constitutional rights and limitations still exist, to be sure, at least on paper, but the overriding criterion of public policy is a conception of the "public" or the "national" interest. The myth system speaks in terms of the Document of 1787, in words of limitation, but the operational code, now as always, is one of powers and increasingly of control. I am not suggesting that the State is always able to enforce *its* conception of the national interest, but I am saying that the individual *qua* natural person is insignificant in the constitutional order.

The third principle is that America has a government ruled by politics, rather than interdictory law. Only by an indefensible fiction can decisions on the constitutionality of governmental actions be said to be either logical derivations from the constitutional text or latter-day discoveries of the intentions of those who wrote the Document of 1787. On the contrary, those who exercise governing authority, including the Supreme Court and other interpreters of "the" Constitution, are limited mainly by the political process. Despite the myth system, decisionmakers in general can do whatever politics permits. Some learned professors to the contrary, that is not "nihilism," but simply stating the obvious.[67] Like it or not, power rather than law is supreme—always has been and likely always will be. We may not like that, but it is something with which we have to live.

Illustrative Supreme Court decisions are legion. One will suffice: the recent Iranian hostage case[68] in which the Court validated President Carter's transmutation of a species of property—the claims of the plaintiff, Dames & Moore, against Iran—into a "bargaining chip" for public use in negotiations. The decisions, taken as a whole, exemplify Professor Griffith's observation that

> law is not and cannot be a substitute for politics. This is a hard truth, perhaps an unpleasant truth. For centuries political philosophers have sought that society in which government is by laws and not by men. It is an unattainable ideal. Written constitutions do not achieve it. Nor do Bill of Rights or any other device. They merely pass political decisions out of the hands of politicians and into the hands of judges or other persons. To require a supreme court to make certain kinds of political

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Agency, No. 78-1728 (D.C. Cir. Oct. 29, 1979); *In re* Halkin, 598 F.2d 176 (D.C. Cir. 1978).

67. See Fiss, *supra* note 5, for assertions that some constitutional commentators are "nihilists." To the same effect, see J. ELY, DEMOCRACY AND DISTRUST (1980).

68. Dames & Moore v. Regan, 453 U.S. 654 (1981).

decisions does not make those decisions any less political.[69]

In *Dames & Moore*, Justice Rehnquist writing for the Court, sustained the President's executive agreement, choosing harsh international reality over abstract constitutional (legal) norms. He crafted his opinion in familiar lawyers' language, but it—both the decision and the opinion—reeks with the odor of compromise forced by necessity.[70] Principle (the idea of law as it has been received and understood), as usual, gave way to *realpolitik*. In the last analysis, the Court had no other choice. To invalidate President Carter's hurried deal would have placed the conduct of American external relations in an intolerable position. The decision thus classically exemplifies Professor Martin Shapiro's previously quoted comment: "No regime is likely to allow significant political power to be wielded by an isolated judicial corps free of political restraints."[71] The key word there is "isolated." I do not say that the Court does not wield political power—of course it does—but I do say that it does so as a constituent part of the governing coalition—in fact, though not in theory, as an arm when the need arises of the avowedly political branches of government. Machiavelli maintained that "[a] republic or a prince should ostensibly do out of generosity what necessity constrains them to do."[72] My suggestion is that a republic—the United States—purports to do under the law what brute political necessity requires that it do. Put even more bluntly, *Dames & Moore* is a pure example of a political Hobson's Choice; the Justices not only had to take the first horse in Mr. Hobson's livery stable, it was the only horse there.

The larger point is that, when all is said and done, politics and politics alone, not interdictory law, determines the thrust and measure of significant governmental action. The decisions may be couched in familiar legal form—statutes, judicial decisions, executive orders—but that is merely the counterpane of what, after Professor Horwitz, is an "instrumental conception" of constitutional law.[73] Americans live under the Constitution, or at least seem to do so, but the Document at most is the principal artifact of the myth system of the American polity. Even as interpreted by the Supreme Court, it does not reflect the realities of socio-economic life. *Dames & Moore* was not the first (and certainly will not be the last) time the realities of politics collided with apparently clear constitutional precepts—with politics emerging the victor. A

69. Griffith, *supra* note 39, at 16.
70. *See* Miller, *supra* note 10.
71. M. SHAPIRO, *supra* note 7, at 34.
72. N. MACHIAVELLI, THE DISCOURSES, I.51 (L. Walker trans. 1950).
73. *See* M. HORWITZ, *supra* note 57 and accompanying text.

form of *realpolitik* has always prevailed both externally *and* domestically. Despite orthodox theory to the contrary, the Constitution is relative to circumstances. Government in the United States has, thus far at least, been able to meet successfully every emergency that has arisen.

The Supreme Court goes along, because it is "an essential part of the system of government," with a function to underpin "the stability of that system" and to protect it by resisting "attempts to change it."[74] Said somewhat differently, judges in the United States and particularly those on the Supreme Court are governmental officers with the mission of protecting the existing political order against undue change—and thus to shelter those who control and benefit most from that order. Although cast in the legalisms familiar to lawyers, Supreme Court opinions justifying or rationalizing decisions are political documents written by a group of political Justices. That, to be sure, tends to make judicial independence (from the governing coalition) a part of the myth system, but not part of the operational code of the United States. When matters of important State policy are concerned, the Supreme Court and courts generally should be seen as arms of the State, different only in appearance but not in type from the legislative and executive branches of government. Furthermore, there is far more discretion routinely exercised by all government officers, including judges, than most people—especially those who unthinkingly parrot the slogan of a "government of laws, not of men"—realize. The rules that bind governmental behavior are to be found at the lowest levels, and then mainly in the myth system. Justice William J. Brennan expressed the judicial posture in these words:

> Under our system, judges are not mere umpires, but, in their own sphere, lawmakers—a co-ordinate branch of *government*. While individual cases turn upon controversies between parties, or involve particular prosecutions, court rulings impose official and practical consequences upon members of society at large. Moreover, judges bear responsibility for the vitally important task of construing and securing constitutional rights.[75]

Justice Brennan expanded that idea in a footnote:

> The interpretation and application of constitutional and statutory law, while not legislation, is lawmaking, albeit of a kind that is subject to special constraints and informed by unique considerations. Guided and confined by the Constitution and pertinent statutes, judges are obliged to be discerning, exercise judgment, and prescribe rules. Indeed, at times

74. J. GRIFFITH, THE POLITICS OF THE JUDICIARY 213 (1977) (paperback ed.). *See* Miller, *The Politics of the American Judiciary*, 49 POL. Q. 200, 201 (1978).

75. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 595 (1980) (Brennan, J., concurring).

judges wield considerable authority to formulate legal policy in designated areas.[76]

In that extraordinary statement, Justice Brennan went far to buttress the validity of the third principle.

The fourth principle is that questions of political economy are usually presented as questions of law and dealt with by lawyers and lawyer-judges. The United States is the most legalistic of all nations. No other country, certainly none with any substantial power, allows public policies to be set in lawsuits between private parties or between government and an individual person. The classic example came in the 1930s when national monetary policy was formally established in a Supreme Court decision between two private litigants in a dispute over the princely sum of $15.60.[77] Some Europeans, bemused by the decision, were unable to understand why the United States could allow a bare majority of nine lawyer-judges to pronounce policy in a matter of such national importance. That decision is yet another example of a political decision by a Court that was, in fact, a part of the governing coalition.[78]

Although monetary policy has now become completely politicized and, thus, is no longer a matter of judicial cognizance, Alexis de Tocqueville's well-known observation that in the United States many political questions ultimately come before the courts still remains accurate. It can be extended to say that under the formal Constitution—under, that is, the myth system—problems of political economy, and thus of the constitution of American society, are routinely handled by lawyers, whether as advisers to the Executive, as judges, as members of Congress, or as officials in the bureaucracy. Lawyers provide the means to legitimize decisions made under the operational code, by obtaining for them the imprimatur of officiality.

The fifth principle is that the State is the primary entity or institution. Even though it is an abstraction—no one can lay hands on the State—it nonetheless exists as the fundamental source of all of the rights and privileges, duties and responsibilities of the citizenry. The State should be distinguished from *government,* which is the apparatus of the State; and from *society,* which is the congeries of groups and individuals that are ruled through government by the State. Under

76. *Id.* at 595 n.20.

77. Norman v. Baltimore & Ohio R.R. Co., 294 U.S. 240 (1935).

78. *Norman,* along with Perry v. United States, 294 U.S. 330 (1935); Nortz v. United States, 294 U.S. 317 (1934) and United States v. Bankers Trust Co., 294 U.S. 240 (1935) were heard by the Court together and are commonly referred to as the "Gold Clause Cases." For a discussion of this famous dispute, see R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941).

"the" Constitution, the State is sovereign—despite the rhetoric about popular sovereignty.

After the break-up of the Roman Empire, the Church, together with decentralized political units, exercised dominion over the remnants. One result was the Holy Roman Empire, a curious combination of ecclesiastical and political authority. Out of that chaos, that partial anarchy, emerged the pattern of relationships among increasingly autonomous States, which in time became nation-states, each of which claimed sovereignty in the sense of ultimate and unappealable power over designated territory and its populace. The Peace of Westphalia (1648) was the cornerstone of what became the modern system. What today seems to be the natural order of affairs, the nation-state, had its origin less than 400 years ago. Professor Leo Gross described the development in these terms:

> [A] new system characterized by the coexistence of a multiplicity of states, each sovereign within its own territory, equal to one another, and free from any external earthly authority [came into existence]. The idea of an authority or organization above the sovereign states is no longer. . . . This new system rests on international law and the balance of power, a law operating between rather than above states. . . . [T]he idea of an international community became an almost empty phrase and where international law came to depend upon the will of states concerned with the preservation and expansion of their power. . . .[79]

Within this system, each nation-state is a discrete geographical entity having one and only one goal: the pursuit and enhancement of its own interests. In the post-World War II period, more nation-states, some tiny unto insignificance, have been formed than ever before. About 160 exist at the present time—more than three times as many as when the United Nations was created in 1945.

Since its inception, the single most important characteristic of the United States has been unitary internal sovereignty. All societal activities involving the "authoritative allocation of value"[80] are performed by authority of a single decision center—the State itself (as expressed or implied in the Document of 1787)—without regard to whether those actions may be differentiated (in the federal system) or seemingly private. As Gianfranco Poggi has put it, "no individual or corporate body can engage in activities of rule except as an organ, agent, or delegate of the state; and the state alone assigns and determines the extent of those

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79. Gross, *The Peace of Westphalia, 1648-1948*, in INTERNATIONAL LAW AND ORGANIZATION: AN INTRODUCTORY READER 54, 55, 64 (R. Falk & W. Hanrieder eds. 1968) (footnote omitted).

80. D. EASTON, THE POLITICAL SYSTEM (1953), *quoted in* G. POGGI, *supra* note 27, at 92.

activities according to its own rules, backed by its own sanctions."[81] Even though the people are considered under the myth system to be the ultimate depository of sovereignty, the State is monistic. It is one unit, with a single currency and a national language and a legal system that, although divided into parts in the federal system, is in fact unified.

Sovereignty in the United States lies in the State, not in the people. Although a disembodied entity existing only in contemplation of law, the unitary State is sovereign, with a governmental triad being its apparatus. The slogan of popular sovereignty, to be sure, is often employed; but it is a rhetorical device to organize and placate the people. The "We, the people"[82] statement in the preamble to the Document should not—cannot—be taken literally. To paraphrase Lincoln, we have a government *of* the people, but not *by* the people and not always *for* the people, if the word "people" means the populace at large.

The sixth principle is that the State is corporatist. A half-century ago Mihail Manoilesco maintained that "[t]he twentieth century will be the century of corporatism just as the nineteenth was the century of liberalism."[83] So it seems to be, although the term is seldom used as such. In the United States, corporatism, to use Philippe C. Schmitter's useful categorization, tends to be *societal* rather than *state*.[84] It is the successor to political pluralism that for decades was the prevailing ideology of political scientists (and still is the ideology of such legal scholars as Alexander Bickel and John Hart Ely). Since I have discussed my belief that the United States is indeed a corporate State at some length elsewhere,[85] and since America as an exemplar of societal corporatism will be the focus of attention in the conclusion to this essay, no further exposition is required at this time. Suffice it only to say that corporatism under "the" Constitution of the United States is a joinder of the political power of public government with the economic power of private governments—that is, of the institutions of the Political and Economic Constitutions—and a consequent formation of a metaphysical entity, the Corporate State, that transcends both fundamental laws. Thus, the State is what we will call a "super-group person."[86]

The seventh principle is that government, as the apparatus of the State, is apparently but not actually one of splintered powers. One of

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81. G. POGGI, *supra* note 27, at 92.

82. U.S. CONST. preamble.

83. M. MANOILESCO, LA SIÈCLE DU CORPORATISME (rev. ed. 1936), *quoted in* Schmitter, *Still the Century of Corporatism?*, 36 REV. OF POL. 85, 85 (1974).

84. Schmitter, *supra* note 83.

85. A. MILLER, THE MODERN CORPORATE STATE: PRIVATE GOVERNMENTS AND THE AMERICAN CONSTITUTION (1976).

86. The term comes from Otto von Gierke. *See infra* note 153 and accompanying text.

the consequences of the rise of societal corporatism is the progressive blurring of lines of authority and political power set forth in the Document of 1787. Three lines of development are discernible: in the federal system, in the separation of powers, and in the supposedly discrete domains of public and private. Popular wisdom accepts the notion, stated in classic terms by Justice Louis D. Brandeis, that the national government's powers were split to better protect liberty: "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency [in government] but to preclude the exercise of arbitrary power."[87] That sentiment was echoed in 1965 by Chief Justice Earl Warren: "[S]eparation of powers was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny."[88]

What was obvious to Brandeis and Warren, however, has now been refuted, at least in part, by modern scholarship. Louis Fisher, for example, has convincingly argued that a separate Executive was created by the 1787 Convention *to promote efficiency*, precisely because government under the Articles of Confederation was demonstrably inefficient.[89] America had congressional government under the articles, which led the "runaway" Convention to establish an independent Executive. Brandeis and Warren unthinkingly repeated the propaganda of James Madison, who in *The Federalist No. 51* said:

> But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this; you must first enable the government to control the governed; and in the next place oblige it to control itself.[90]

Madison saw matters somewhat differently from other prominent figures of the age, perhaps because *The Federalist Papers* were written

87. Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).
88. United States v. Brown, 381 U.S. 437, 443 (1965).
89. *See* L. FISHER, PRESIDENT AND CONGRESS: POWER AND POLICY 1-27 (1972).
90. THE FEDERALIST NO. 51, at 337 (J. Madison) (Mod. Libr. ed. 1937).

to convince people of the essential benevolence of the new constitution. James Wilson's views are particularly apposite:

> In planning, forming, and arranging laws, deliberation is always becoming, and always useful. But in the active scenes of government, there are emergencies, in which the man, as, in other cases, the woman, who deliberates, is lost. . . . But, can either secrecy or despatch be expected, when, to every enterprise, mutual communication, mutual consultation, and mutual agreement among men, perhaps of discordant views, of discordant tempers and of discordant interests, are indispensably necessary? How much time will be consumed! and when it is consumed; how little business will be done! . . .
>
> If, on the other hand, the executive power of government is placed in the hands of one person . . . is there not reason to expect, in his plans and conduct, promptitude, activity, firmness, consistency, and energy?[91]

Under the Articles of Confederation, government was seriously faulty because powers were *not* separated, resulting in ineffectual government.

The original intentions, therefore, were quite different from what is set forth in a few scattered Supreme Court opinions and in much of the political science literature. That, however, is not the real point, which is that *powers were not really separated in fact, and each branch of the national government exhibits separate institutions sharing powers. Accordingly, the myth system to the contrary notwithstanding, the praxis among the three branches is cooperation rather than conflict.* Throughout American history, with some instances to the contrary, officers in Congress, the Executive Branch, and the judiciary have tended to act as one. The national government is multiheaded. In theory, no one of the branches is preeminent. In fact, the tendency is toward Executive hegemony, with the Executive—consisting of both the presidency and the bureaucracy—sharing power with Congress. (The courts have become not only "the least dangerous branch," but also the least important branch—although, again, the myth system says otherwise.)

"Separation of powers" as separate institutions sharing power have all but smashed the Brandeis-Warren conception. Woodrow Wilson knew this as long ago as 1908, when he wrote that "warfare" between Congress and the President would be "fatal."[92] (Even then Wilson paid scant attention to the Supreme Court.) Separation of powers in fact means that a complex web of routine interactions between President, Congress, and interest groups exists. Ever increasingly, the norm is

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91. *Quoted in* Sharp, *The Classical Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385, 413 (1935).

92. W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES (1908).

cooperation.

It could scarcely be otherwise. No nation, let alone a superpower, can long afford to have the powers of government splintered. Paralysis would be the result, at a historical moment when the ability to take action has never been more needed. Some built-in structural problems may still exist, to be sure, as the well-known Washington lawyer Lloyd Cutler recently argued.[93] Battle they may, at least in the media, but Congress and the President (and the bureaucracy) cooperate more than they conflict.[94] Compromises of course are the result; but the important matter to perceive is that, as badly as it works, the tasks of government do get done. The problem is to get them done better—and that is a major challenge that constitutional lawyers face at this time. I argue elsewhere that fundamental alterations in the governments established by the Political Constitution will help attain a sustainable society.[95] Cutler, in advocating change in the separation of powers, hits only one symptom of a deep-seated, pervasive malaise in the governmental process. The problem is systemic, and the Band-Aid Cutler recommends will do little toward attainment of a more humane, or sustainable, society.

As with the so-called "doctrine" of separation of powers, which is not a doctrine but an unrealized political theory, so too with the principle of federalism. Political power in the United States is apparently split spatially between the central government and fifty states. The original theory was that the federal government possesses only limited, delegated powers; but that theory has long since lost its potency. Federalism was supposed to be "dual," with the dominant segment being the states. Power has slowly accreted to the national government, a process that began early in the nineteenth century, and the system has so changed that there can be no question today that the general government is preeminent. Regardless of how often politicians, such as President Reagan, speak of a "new" federalism, a superpower in the nuclear age, dominated economically by supercorporations and technologically knit together by communications and transportation, simply cannot brook the diversity and decentralization of dual federalism. What Harold Laski once called the "inexpugnable" variety of America is fast vanishing.[96] A continental-sized nation, with a central income tax, multistate economic organizations, and with commitments all over the planet and reaching far out into space, will not—cannot—revert to the

93. Cutler, *To Form A Government*, 59 FOREIGN AFF. 126, 127 (1980).

94. *Cf.* J. SUNDQUIST, THE DECLINE AND RESURGENCE OF CONGRESS (1981).

95. A. MILLER, GETTING THERE FROM HERE: CONSTITUTIONAL CHANGES FOR A SUSTAINABLE SOCIETY (work in progress).

96. Laski, *The Obsolescence of Federalism*, 98 NEW REPUBLIC 367 (1939).

purported halcyon days of a small-shop, agriculturally dominated society.

"Cooperative" federalism is the consequence, with the states ever more becoming administrative districts for centrally established policies. Those policies emanate from both the organs of public government (Congress, the Executive, the Supreme Court) and from the institutions of the nationwide private governments of the country (of which the giant corporations are the principal exemplar). The United States, in sum, has become a "united state"—[97] and there is no likelihood of reversion to the *status quo ante.* The problems of public policy are *national* more than local, and will be resolved, if, indeed, they are resolved, by *national* (uniform) policies. The meaning, for present purposes, is that the line of demarcation between national and state power and authority is being extinguished. As with separation of powers, cooperation is the norm.

The same pattern is visible in the activities of institutions in the public and private sectors of the nation. Inasmuch as this is but another way of stating that the United States exemplifies societal corporatism—even State corporatism at times—further discussion will be deferred until the final section of this essay.

The eighth principle is that within the tripartite division of powers of the central government, the Executive Branch is becoming dominant. That branch consists of two main segments—the office of the presidency, made up of over 5000 men and women who cluster around the Chief Executive and who constitute the nerve center of government (to the extent that such a center exists); and the federal bureaucracy. The latter has three segments: the civilians in the public administration, headed by political appointees; the military services; and an "external" bureaucracy, consisting of employees of nominally private organizations that continuously contacts and contracts with the government. Although the three branches are supposedly "equal in origin and equal in title,"[98] since the beginnings of the republic the presidency has steadily gained actual power vis-à-vis both Congress and the courts. Once again, the gap between the pretenses of the myth system and the realities of the operational code may be perceived.

The Document of 1787 speaks cryptically. Article II begins: "[t]he executive Power shall be vested in a President of the United States of America."[99] Nowhere is "the executive power" defined. The office was left to gather power from experience. As the United States moved from

97. T. LOWI, THE END OF LIBERALISM 295 (2d ed. 1979).
98. Gordon v. United States, 117 U.S. 697, 701 (1864).
99. U.S. CONST. art. II, § 1, cl. 1.

an underdeveloped nation, dependent upon capital and cheap labor from Europe and struggling to eke out an existence from the fabulous but nonetheless forbidding riches of an unexploited continent, to emergence in this century as *the* superpower of the world (at least for a time—about 1945 to 1970), the need for presidential leadership in government became ever more apparent. Those presidents considered to be the "best" are the ones who were also the strongest, who by one means or another assumed the power of direction of the nation. Examples are easily found: Washington, Jackson, Lincoln, Theodore Roosevelt, Wilson, Franklin Roosevelt, Truman—to name them chronologically.

The delphic terms of the Document of 1787 permit a President to be as "big" as he wishes; or, rather more precisely, to be as big as the political process allows. And that is exactly what all modern presidents (since Franklin Roosevelt) have been—or at least have tried to be. There will be no more Buchanans in the White House. The twentieth century, and the future so far as it can be foreseen, belongs to the Executive. In this country and all others of any consequence, government is ever increasingly dominated by the Executive. Given the state of socioeconomic and technological affairs, it could not be otherwise. Add the all-too-obvious psychological need, noted in classic terms by Fyodor Dostoevsky in *The Grand Inquisitor,*[100] of people for miracle, mystery and authority, and it may quickly be seen that the President is the High Priest—the closest thing to an American Pope—of our civil religion of nationalism (or Americanism or patriotism). I do not suggest that the President *qua* Chief Executive can do whatever he pleases. What Professor Thomas Cronin calls the "textbook" presidency is, as Cronin shows, a myth.[101] What is suggested is that among the three branches of government, the Executive—the presidency plus the bureaucracy—is by any criterion the strongest. That the trend toward aggrandizement of executive power will not only continue but accelerate seems to be about as safe a prediction as one can make about governmental affairs.

When one speaks about the presidency, four facts should be borne in mind. First, the President is both Chief of State and Head of Government; that makes the United States unique among the major powers of the world. It is as if Great Britain combined the office of the sovereign (the Queen) with that of the Prime Minister. Centering both functions in one person adds enormously to the prestige of the office and to the actual power of the President. Second, the presidency is both one

100. F. DOSTOEVSKY, THE GRAND INQUISITOR (J. Wasserman ed. 1970).

101. T. CRONIN, THE STATE OF THE PRESIDENCY (1975). *See also* R. PIOUS, THE AMERICAN PRESIDENCY (1979).

man and the Executive Offices of the President (E.O.P.), the 5000-plus people who surround the President. The E.O.P. consists of both the "inner" presidency—the man in the Oval Office plus the 1200 or so people immediately around him—and the "outer" presidency—those who occupy the offices that make up the sprawling complex that surrounds the White House. Those men and women are the locus of power in American government, to the extent that one exists. Some of them wield immense power, simply because they can invoke the name of the President when they speak. Third, because of the growing complexity of society and thus of the tasks of government, there is simply no way that Congress—two committees of 100 and 435 people—can govern in any systematic and comprehensive manner. Even given the will to rule, characteristics which by no means are in high supply in Congress, an individual member does not have the time to keep abreast of all of the manifold details of governance. Indeed, it is impossible to know more than cursorily what is in each of the 400 or so public laws enacted each session by Congress. Hence, vast delegations of legislative power are made to the Executive (and even at times to the courts and to private parties), which brings up the fourth fact: The Executive Branch is a congeries of agencies, bureaus, and departments over which the President rules as titular (and in most instances as legal) head, but which in fact often are independent fiefdoms with which even the White House has to "negotiate treaties."[102] The public administration—the bureaucracy—is a headless fourth branch of government. Nominally executive (or at least administrative), that branch has formal authority over the implementation of many of the public policies of the Political Constitution.

To the visible bureaucracy of the public administration there should be added the military services, which administer what is perhaps the most important aspect of American public policy (national security), and also a number of purported private organizations—corporations, universities, etc.—that through the medium of contracts and grants have created an "external bureaucracy."[103] Any description of the Executive must include this dimension as well as those in the civil service and the military departments. (The external bureaucracy is substantial evidence of the close and continuing links between the institutions of the Political and Economic Constitutions.)

The ninth principle is that the Political Constitution is always in

102. *See* A. MILLER, PRESIDENTIAL POWER IN A NUTSHELL (1977); R. NEUSTADT, PRESIDENTIAL POWER (2d ed. 1976).

103. *See* Miller, *Administration by Contract: A New Concern for the Administrative Lawyer*, 36 N.Y.U. L. REV. 957 (1961).

a state of becoming. It is malleable. Its terms are more invitations for debate than preordained dispositions of present-day problems. The meaning is clear: despite being silent on the point, the Document of 1787 delegated power to succeeding generations of Americans to write their own constitutions. True, the words remain the same, but the meanings given to that language change through time. One has a good legal mind when he can understand that meanings given to unchanging words can be altered through time. They are reflective of the conditions in which they are used. Since social conditions are constantly in flux, there should be little wonder that the ancient words receive differing interpretations.

Thus, adaptability characterizes the Document, but it is far from complete. Enormous societal changes, domestic and external, have thus far been accommodated within an instrument written almost two centuries ago for a far different nation that existed in a far different world. The ability to adapt, however, appears to have about run its course. Except in times of widely acknowledged emergency or crisis conditions, such as total war (for example, the Civil War and World War II) or severe economic depressions (as in the 1930's)—in which events the ostensible rigidities of the formal Constitution are silently shelved "for the duration"—the Political Constitution has built-in provisions that have become positive barriers to achievement of both efficiency and accountability in government. It is out of phase with the demands that Americans (as well as peoples the planet over) are making of the governments created by the Document. In sum, the Political Constitution has gone about as far as it can go. Systemic change is required. Its evolution within the framework set down in 1787 is coming to an end. Although it has been and still is always in a state of becoming, that "becoming" has now forced politico-economic institutions into a cul-de-sac. They are not sufficient to meet the present and emergent needs.[104]

The tenth principle is that government, as the apparatus of the State, has a monopoly on the legitimate use of violence. This is a self-evident proposition, requiring no extended discussion. The key word is "legitimate"; other sources of violence, of course, exist, but none that has the imprimatur of legitimacy. Indeed, those illicit uses of violence are subjected to punishment by the State. Governmental violence runs on a continuum from war to individual punishment (capital punishment being the extreme). I am not suggesting, it should be mentioned, that all use of violence by governmental officers is legitimate. Some examples of extralegal violence are also, albeit rarely, punishable by the

104. *See* Sundquist, *The Crisis of Competence in Government*, in SETTING NATIONAL PRIORITIES: AGENDA FOR THE 1980S 531 (J. Pechman ed. 1980). *See also* Cutler, *supra* note 93.

State.[105]

The eleventh principle is that formal as well as actual political power resides in narrow elite structures, which exercise control over segments of public policy. Professor Grant McConnell has stated the matter well:

> [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 a policy of noninvolvement in the large issues of statesmanship, save where such issues touch their own particular concerns. . . .
>
> [The distinction between the public and the private] has been compromised far more deeply than we like to acknowledge. . . .
>
> [T]he very idea of constitutionalism sometimes seems to be placed in question.[106]

McConnell is far from alone. Public policy, as enunciated in the United States, all too often is the product of the "subgovernments" or the "iron triangles" of government.[107] One leg of the triangle is the appropriate congressional committee, another is the administrative agency, and the third is the relevant interest group. The interactions of these groups produce policies that affect—perhaps within narrow areas—all Americans. Since here, again, there may be seen the interplay between the institutions of the Political and Economic Constitutions, further discussion will be deferred to Section IV of this essay.

The consequence is a paradox, which is the twelfth principle: *The political order labeled pluralism, established by the Political Constitution, is bankrupt in theory and practice.* Pluralism, the political theory that out of the clash of decentralized interest groups in American society comes the public good, is a version of Adam Smith economics transferred to politics and writ large. It is no more valid there than it is in economics. Since Arthur Bentley published *The Process of Government*[108] in 1908, pluralism has largely been the operative ideology of students of politics (it still is for many lawyers).[109] Its basic shortcomings have, however, become all too evident in recent years. Pluralism "worked" during the nineteenth century, as Bentley noted and as David

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105. *E.g.*, Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

106. G. McCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY 339, 361-62 (1966).

107. *See* D. CATER, POWER IN WASHINGTON (1964). *Compare* Heclo, *Issue Networks and the Executive Establishment*, in THE NEW AMERICAN POLITICAL SYSTEM 87 (A. King ed. 1978).

108. A. BENTLEY, *supra* note 45.

109. *See e.g.*, A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); J. ELY, DEMOCRACY AND DISTRUST (1980).

Truman iterated as late as 1951;[110] but it worked *only* because there was but one dominant group—the corporate class; the moneyed and propertied. By the 1970s, pluralism was widely perceived as intellectually bankrupt, paradoxically, because it was successful. Other groups arose—labor unions, farmers' leagues, veterans' legions, and the like—at a time when economic growth seemed to be a permanent attribute of the political economy. (I have elsewhere called that time, from roughly 1945 to 1970, the true Golden Age of America.)[111] Those groups successfully fought for and managed to capture the relevant segments of government (administrative agency; Congressional committee).

That development—the fulfillment of the demands of new groups for "entitlements"—occurred at a time when economic growth began to slow and even to cease and when, as a consequence, the ecological trap began to close. Politics became a zero-sum game, one in which for every winner there must be a loser. Those outside of a dominating group (over a segment of public policy) are left behind—the precise reason why they go to court in attempts to have perceived and felt shortcomings rectified (and thus the reason why John Hart Ely advocates a "representation-reinforcing" theory of constitutional review).[112]

The manifest failure of pluralism, acknowledged by perceptive political scientists but thus far denied by most academic lawyers, by itself poses grave challenges to the normative concept of constitutionalism. But that is not all. Another harsh fact must be added, namely, that under pluralism there is no possible way, save perhaps in widely-acknowledged emergencies, for the "national" or the "public" interest—the interests of the nation as a unified collective—to be realized. One, therefore, can readily see that the Political Constitution is badly out of phase with the pressing needs of the era. (So is the Economic Constitution, as we will see.) The cruel paradox of pluralism being a failure, principally because it has been so successful, must be confronted by anyone who would think seriously about constitutionalism in America. It is precisely that paradox that causes such leading neoconservative writers as Professor Samuel P. Huntington to lament what he calls the "ungovernability" of modern democracies.[113]

The thirteenth principle is that the individual is only apparently the sole political actor. Although the Document of 1787 recognizes

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110. D. TRUMAN, THE GOVERNMENTAL PROCESS (1951).

111. A. MILLER, *supra* note 28, at ch. 3. The golden age, of course, was far from that for those who fought and died in Korea and Indo-China.

112. J. ELY, *supra* note 109.

113. Huntington, *The United States*, in M. CROZIER, S. HUNTINGTON, & J. WATANUKI, THE CRISIS OF DEMOCRACY (1975).

only two juridical entities—government and the natural person—that conception has been overtaken in the operative or living Constitution. The operational code of American constitutionalism recognizes, as has already been said, that an elite structure promulgates public policies.[114] The thirteenth principle is the corollary: the decline in importance of the individual. In economics, in politics, in social affairs generally, it is the group rather than the individual that is dominant. Individualism as a concept, even an ideology, was a late-bloomer: It does not antedate the French Revolution; and in many respects it is a "natural" by-product of the Great Discoveries, coming into being at a time when the bonds which theretofore had constricted the activities of all (except perhaps a tiny few of the best-advantaged) had been thrown off.

Because of the influence of John Locke and others who did not acknowledge the ecological basis of human freedoms, law in America was long predicated upon notions of individualism. Contract law provides the classic illustration; as does tort law. Even constitutional law was not immune, a development that reached its apotheosis when the Supreme Court read Social Darwinism into the Constitution. As long ago as the turn of the century, individualism began to die. It became anachronistic when, in the words of John D. Rockefeller early in the twentieth century, "large-scale organization had revolutionized the way of doing business and when individualism had gone, never to return."[115] Arthur Bentley, as has been said, noted the change in 1908.

Not all vestiges of individualism have vanished. Some intellectual Neanderthals still parrot the words of Adam Smith. Of more importance, the very nature of individualism was transmogrified by the Supreme Court when in 1886 it casually asserted that the corporation—a disembodied collective—was a person within the meaning of the fourteenth amendment.[116] That bit of judicial legerdemain keeps the notion of individualism alive, but in the strangest way: all persons are equal under the law, but some constitutional persons—those collectives called business corporations—are more equal than others. The theory of corporate personality collides with the reality of vastly disproportionate economic—and thus political—power of giant companies (and other social groups) and the lonely individual, the naked ape who stands alone and faces a fearful congeries of bureaucracies both public and private. The natural person as the sole constitutional political actor has been supplanted by the group. Modern man is bureaucratized man: he spends his life as a member of groups and, indeed, is wellnigh meaning-

114. *See e.g.*, P. BACHRACH, THE THEORY OF DEMOCRATIC ELITISM: A CRITIQUE (1967).

115. *Quoted in* 1 A. NEVINS, JOHN D. ROCKEFELLER 622 (1940).

116. Santa Clara County v. Southern Pac. Ry., 118 U.S. 394 (1886).

less and purposeless outside of groups. (The rare hermit may provide the exception that provides the rule.) Even the entrepreneur who believes that only his own effort, abetted by his property, has enabled him to be successful is wholly dependent upon society—the ultimate group. There are not—there cannot be—any Robinson Crusoes in the modern age. L.T. Hobhouse stated the point in these words:

> The organizer of industry who thinks that he has "made" himself and his business has found a whole social system ready to his hand in skilled workers, machinery, a market, peace, and order—a vast apparatus and a pervasive atmosphere, the joint creation of millions of men and scores of generations. Take away the whole social factor and we have not Robinson Crusoe, with his salvage from the wreck and his acquired knowledge, but the naked savage living on roots, berries, and vermin. *Nudus intravi* should be the text over the bed of the successful man, and he might add *sine sociis nudus exirem.*[117]

The death of individualism can be perceived through all fields of law—private law as well as public law. Man, as Aristotle said, is a political animal; that means he is a social animal, unable to exist without the trappings of group life—of, that is, the institutions of civilization.

The fourteenth principle is that Reason of State (the "national interest") is the overriding value of the Political Constitution. The principal goal is survival of the State, and thus ultimately the survival and furtherance of the interests of those who control the State and who profit most from societal activities.

Reason of State, "the State's first law of motion,"[118] has been defined as "the doctrine that whatever is required to insure the survival of the State must be done by the individuals responsible for it, no matter how repugnant such an act may be to them in their private capacity as decent and moral men."[119] That definiton does not go far enough. One of the great silences of the Document of 1787, Reason of State is applicable to more than survival alone; it is perceivable in other guises as well: whenever the basic interests of the State and of those who under the operational code control the State are perceived to be jeopardized, whether from external dangers or internal turmoil. In orthodox constitutional theory, the label "Reason of State" is not employed; rather,

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117. L. HOBHOUSE, THE ELEMENTS OF SOCIAL JUSTICE 140-41 (1922). *See also* A. BERLE, POWER WITHOUT PROPERTY: A NEW DEVELOPMENT IN AMERICAN POLITICAL ECONOMY 4 (1959); W. GALSTON, JUSTICE AND THE HUMAN GOOD ch. 6 (1980).

118. F. MEINECKE, MACHIAVELLISM: THE DOCTRINE OF RAISON D'ETAT AND ITS PLACE IN MODERN HISTORY 1 (D. Scott trans. 1957).

119. C. FRIEDRICH, CONSTITUTIONAL REASON OF STATE: THE SURVIVAL OF THE CONSTITUTIONAL ORDER 4-5 (1957).

the principle travels under the banner of "national security" and even the "national" or "public" interest. The terms are roughly synonymous even though they have never been adequately defined. We are thus left with the parlous condition of a constitutional silence being so nebulous that no one quite knows what it precisely means. That permits maximum discretion of those in government who can invoke it. Professor Alfred Vagts once observed that "there is in the American system of government and politics no fixed or final arbiter on the question of what constitutes national interest"[120]—which was not quite correct. The State, speaking through government, is that "fixed and final arbiter."[121] Vagts should have qualified his statement to indicate that within the triad that makes up the national government, each branch can and does make national interest decisions—usually, as has been said, by working in concert.

Admiral Alfred T. Mahan, the American philosopher of sea power, wrote in 1898:

> Self-interest is not only a legitimate, but a fundamental cause for national policy; one which needs no cloak of hypocrisy. As a principle it does not require justification in general statement, although the propriety of its application to a particular instance may call for demonstrations. . . . Not every saying of Washington is as true now as it was when uttered, and some have been misapplied; but it is as true now as ever that it is vain to expect governments to act continuously *on any other ground than national interest.*
>
> It follows from this directly that the study of interests—international interests—is the one basis of sound, provident policy for statesmen. . . . Governments are corporations, and corporations have no souls . . . [they] must put first the interests of their own wards . . . their own people.[122]

Again, Mahan was not quite correct. It is not, as he suggests, the interests of all the people that are protected by invoking the national interest (Reason of State), but the interests of those who profit most under the operational code by invocations of a societal interest. Mahan also failed to perceive that the national interest had its twin insofar as domestic affairs are concerned in the concept of the public interest.

The public interest has never been defined, although it is often invoked. President John F. Kennedy once maintained that the public interest was larger than the arithmetical sum of the private interests of the people of the nation, a sentiment echoed by President Jimmy

120. Vagts, *Introduction*, to C. BEARD, THE IDEA OF NATIONAL INTEREST xiii, xxii (1934).
121. *Id.*
122. *Quoted in* C. BEARD, *supra* note 120, at 1-2 (footnote omitted).

Carter in his farewell address.[123] The public interest is to the bureaucracy what due process is to the judiciary: it is a wellnigh illimitable grant of authority—often by constitutional and statutory silences—for governmental officers to act with discretion, to act, that is, with little or no external standards limiting their judgment. The Supreme Court goes along. The *Barenblatt*[124] case provides a classic example. There Justice John M. Harlan invoked the national or public interest (that is, Reason of State), although he did not use those labels (he employed the term "the interests of society" instead), to enable Barenblatt to be jailed for refusing to testify before Congress.

Although Reason of State is preeminent so far as official action is concerned, *the fifteenth principle is that private property, and the protection of it, is the highest in the hierarchy of personal values under the Political Constitution.* This principle, as with the sixteenth—*that propaganda is routinely employed by government and it is the function of the mass media to be instruments of that propaganda for government*—will be discussed in Section III, dealing with the principles of the Economic Constitution.

The seventeenth principle is that the State and religion (but not the Church) are closely connected. "We are a religious people, whose institutions presuppose a Supreme Being,"[125] Justice William O. Douglas once remarked. That may well be, for despite the separation of church and State under the formal Constitution as interpreted by the Supreme Court, the operational code not only provides for subventions by government for religious entities, but also enables routine interactions between government and religion. Perhaps the major subsidy for religion is the tax exemption for church property; but many others exist: school books are purchased and buildings are financed for parochial schools, for example. Through a neat bit of judicial casuistry, those are rationalized as aids to the student, not to a church—a distinction without a true difference.

That government and religion are closely interlocked may be seen throughout the federal government—chaplains in the Senate and in the armed services; prayer breakfasts in the White House; and even in the public sessions of the Supreme Court, which are opened by a functionary bellowing "God Save This Honorable Court!" Those are a few examples of a far larger pattern. Furthermore, the State and religion come even closer together when the Document of 1787 is perceived, as

123. Kennedy's statement may be found in N. Y. Times, Mar. 8, 1962, at 14, col. 5; Carter's in Miami Herald, Jan. 15, 1981, at 17A.

124. Barenblatt v. United States, 360 U.S. 109 (1959).

125. Zorach v. Clauson, 343 U.S. 306, 313 (1952).

it should be, as the chief artifact of the American civil or secular religion of Americanism and patriotism. That makes the Justices priests of a modern Delphic Oracle, vested with authority under the operational code to put meaning into the terms of the Document.

"Every tribe," Max Lerner remarked in 1937, "clings to something which it believes to possess supernatural powers, as an instrument for controlling unknown forces in a hostile universe."[126] The United States fits that model:

> In fact the very habits of mind begotten by an authoritarian Bible and a religion of submission to a higher power have been carried over to an authoritarian Constitution and a philosophy of submission to a 'higher law'; and a country like America, in which its earliest tradition had prohibited a state church, ends by getting a state church after all, although in a secular form.[127]

That much is obvious, or at least should be obvious, to any who would see: the Document of 1787 is a theological instrument. As long ago as 1838, Abraham Lincoln maintained there should be conscious adherence to the "political religion of the nation . . . reverence for the laws."[128] And all who saw her on television will recall the stirring words of Representative Barbara Jordan, just before voting on the impeachment of President Richard Nixon: "My faith in the Constitution is whole, it is complete, it is total, and I am not going to sit here and be an idle spectator to the diminution, the subversion of the Constitution."[129] That is a pure religious statement.

Whether defined as Americanism or patriotism or, in Lincoln's words, "reverence for the laws," there can be little question that the Document of 1787 is the principal artifact of the civil religion of the United States. As such, constitutionalism shares with organized religion the effort of Americans to bring coherence into a chaotic world. Were some means available to measure the relative importance of the two, there could be little doubt that civil religion is far more important than organized religion. Justice Felix Frankfurter perhaps stated the point when he said that even "one who has no ties with any formal religion . . . the feelings that underlie religious forms for me run into intensification of my feelings about American citizenship."[130] The sepa-

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126. Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1294 (1937).

127. *Id.* at 1294-95.

128. A. LINCOLN, *The Perpetuation of Our Political Institutions*, in THE POLITICAL THOUGHT OF ABRAHAM LINCOLN 16-17 (1961 ed.).

129. *Quoted in* Levinson, *The Specious Morality of the Law*, HARPER'S MAGAZINE, May 1977, at 35.

130. *Quoted in* Levinson, *"The Constitution" in American Civil Religion*, 1979 SUP. CT. REV. 123, 150-51. *See also* H. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER (1981); B. MUR-

ration between church and State in America, moreover, provided a way for the employment of many of the ideas and even the symbols of organized religion into politics. Professor Samuel P. Huntington maintains that the consequence

> was to give the nation many of the attributes and functions of a church. The United States is, indeed, as G.K. Chesterton said, "a nation with the soul of a church." Fifty years later another European observer could also observe, "You don't have a country over there, you have a huge church." The point is well taken. Just as Americanism as an ideology is a substitute for socialism, at the same time that it incorporates some socialist values, so Americanism as a creed constitutes a national civil religion. The United States, Chesterton said, "is founded on a creed" that "is set forth with dogmatic and theological lucidity in the Declaration of Independence." The Declaration and the Constitution constitute the holy scripture of the American civil religion. . . . Like other religions, the American civil religion has its hymns and its sacred ceremonies, its prophets and its martyrs. It also has its mission: to create "a city on a hill," "the last best hope of earth," and to bring about a "new heaven and new earth" through its "errand in the wilderness" of the world."[131]

In sum, the Constitution in the sense of the formal document drafted in 1787 and only twenty-six times amended is *the* true religion of the American people. The operational code of the United States thus comes close to making the nation a theocracy.

The eighteenth, and final, principle is that the institutions of the Political Constitution routinely interact with those of the Economic Constitution. That pair of institutions complement each other; they cooperate routinely—much more than they conflict. Since, however, that cooperation falls under the purview of the Economic Constitution, further discussion will be deferred to Section III of this article.

To conclude this section: Paraphrasing Brian Sedgemore in his comments about government in Great Britain, only two things can be said with certainty about representative democracy in the United States today. First, it is clear beyond peradventure of doubt that effective power does not reside in the people's representatives (those Perry calls "electorally accountable" officials). Secondly, there is little that is democratic about the exercise of that power. Expressed another way, political power under the operational code of the United States is far more important than that set forth in the myth system—the Document of 1787, as amended and construed. To understand "the" Constitution

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PHY, THE BRANDEIS/FRANKFURTER CONNECTION (1982); Levinson, *The Democratic Faith of Felix Frankfurter*, 25 STAN. L. REV. 430 (1973).

131. S. HUNTINGTON, AMERICAN POLITICS: THE PROMISE OF DISHARMONY 159 (1981) (footnote omitted).

one must first distinguish between those two systems; then go on to see that the Political Constitution has its parallel in the Economic Constitution; and finally perceive that the two are interlocked in the Corporatist Constitution.

III. THE ECONOMIC CONSTITUTION[132]

Prescient observers have for some time noted that a new constitutional structure of industry and government is emerging. Adolf Berle, building on the works of John P. Davis, was one of the first. Others include Alexander Pekelis, Max Lerner, Arthur Bentley, Leicester Webb, Walton Hamilton, Edward Mason, and Earl Latham.[133] Although written as a statement of economics only, John Kenneth Galbraith's *The New Industrial State*[134] is essentially a statement of the new constitutionalism. These writers, prominent as they are, have thus far largely been voices crying in a wilderness of orthodoxy. Furthermore, the new constitutional structure is not really novel. This section is devoted to what is perhaps the largest silence of the Document of 1787—the operations and institutions of the American economy. To most observers, the notion of an Economic Constitution will seem odd. Certainly it does not fit within the framework of thought of most constitutional lawyers. Constitutions deal with what is considered to be a purely political concept—power. Even though it has been known since John R. Commons published *Legal Foundations of Capitalism*[135] in 1924 that two types of power exist, physical (the State) and economic (property or business), the orthodoxy consigns power to public government only. Commons also suggested that a third type of power existed—moral power; but whether that is so may well be doubted.[136]

The Constitution says little about economics, probably because the economic order was taken for granted by those who controlled the 1787 convention. The federal government has the power to tax, spend, and regulate interstate commerce. Beyond that, only a few fiscal issues were

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132. This section draws heavily on Chapter 9 of A. MILLER, TOWARD INCREASED JUDICIAL ACTIVISM: THE POLITICAL ROLE OF THE SUPREME COURT (1982); a version of that chapter appears in Miller, *The American Economic Constitution*, THE CENTER MAG. July-Aug. 1982, at 17.

133. *See* A. BENTLEY, *supra* note 45; A. BERLE, POWER WITHOUT PROPERTY (1959); A. BERLE, THE 20TH-CENTURY CAPITALIST REVOLUTION (1954); J. DAVIS, CORPORATIONS (1897); W. HAMILTON, THE POLITICS OF INDUSTRY (1957); E. LATHAM, POLITICAL THEORIES ABOUT MONOPOLY POWER (1957); M. LERNER, AMERICA AS A CIVILIZATION (1957); E. MASON, THE CORPORATION IN MODERN SOCIETY (1959); A. PEKELIS, LAW AND SOCIAL ACTION 91-127 (M. Konvitz ed. 1950); L. WEBB, LEGAL PERSONALITY AND POLITICAL PLURALISM (1958). *See also* Miller, *The Corporation as a Private Government in the World Community*, 46 VA. L. REV. 1539 (1960).

134. J. GALBRAITH, THE NEW INDUSTRIAL STATE (1967).

135. J. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM (1924).

136. *Id.* at 47-64.

set forth, leaving the respective powers of the federal and state governments to gather content from experience. That experience, however, was not left to chance. An obligations-of-contracts clause was included in the document, and in 1791 a due process clause and an eminent domain provision were added—all protective of wealth and property. Since the beginnings, American policymakers have followed principles stated by Alexander Hamilton. Hamilton, the true father of the operative, and at times the formal Constitution, maintained there were no limits on Congress' power to spend. The Supreme Court has agreed. A consistent thread of policy has run through government-business relationships throughout American history: government aid to business. When President Calvin Coolidge observed that the business of the United States is business he was merely stating the commonplace—a part of the "given" of the American constitutional order.

The concept of the Economic Constitution is based upon the bedrock proposition that the American economy is, and always has been, a system of power. Power, a political concept, is fundamental to an understanding of American constitutionalism. It is a slippery term requiring definition. For present purposes, it will be taken to mean the ability or capacity to make decisions affecting the values of others, to impose deprivations or bestow rewards so as to control the behavior of others. The suggestion is not that one who exercises power need also be able to employ actual physical coercion over another. As Commons saw, the sanctions through which power is wielded can be, and usually are, much more subtle. They are economic or psychological, or both, and can be direct or indirect.

The Document of 1787 allocates *formal* power; the Bill of Rights, added in 1791, was an effort to limit that power. Informal, unofficial, private power relations are not mentioned (except for the thirteenth amendment's prohibition against involuntary servitude). The greatest and most eloquent silence of the Constitution is concerned with the organization and management of the economy into an informal system of power relations. That system consists of at least two coexistent economies: one, by far the larger quantitatively, made up of small business; and the other, smaller in number but qualitatively much more important, being the giant multistate, and increasingly multinational, corporations. Both segments are important, but our interest herein lies principally in the latter. These are the firms that set the tone for the entire political economy of the nation, the companies that have helped create a national common market—a single economic system superimposed on a decentralized political order, the super-corporations that have become major actors in the world economic order.

The Economic Constitution has two fundamental principles: con-

tract and property. Contract is the appropriate legal instrument for effectuating a private-enterprise economy. The protection of property, according to John Locke, the intellectual father of the Constitution, was the reason for the formation of governments.[137] Professor Charles E. Lindblom has observed that "property is a system of authority established by government."[138] If that is so, then private law is the legal system of the Economic Constitution. Private law is law, not because of any inherent qualities or natural order of things, but because the State recognizes it as such. It is, in other words, a form of delegation of power from the State to private individuals and the organizations they form.

My point is that the economy exists—capitalism exists—only because it is permitted by the State. Capitalism, itself a system of power, is derivative rather than autonomous or *a priori*. "The possession of capital is a legally and politically protected means to the creation and reproduction of de facto relations of domination between individuals belonging to different classes."[139] There is an apparent, but not actual, contradiction here: The State, which is the source of all power relations within the nation, guarantees power relations that emanate from the ownership of capital.

Private control over capital in the United States is possible only because it is permitted by the State, not because of any natural or inherent right to it. That means the power exercised by private capital is a tacit but very real delegation of governing power from the State. The State—not mentioned in the Document of 1787—is a legal abstraction consisting of a public and a private sector that operates as a machine whose parts mesh. "The State organization reaches deep into the personal existence of man, forms his being."[140] For example, as Max Weber has argued, it shares with religion the ability to impart meaning to death. "The warrior's death on the battlefield," Weber suggests, "is a consecrated one, a consummation vibrant with elevated feeling. Has not the nineteenth-century State appealed all too often all too successfully to such motifs in order to send young men willingly to die (and to kill)?"[141]

The private law of the Economic Constitution meshes with the public law of the Political Constitution. Public law gives direction for

137. *Quoted in* Gramm, *Industrial Capitalism and the Breakdown of the Liberal Rule of Law*, 7 J. ECON. ISSUES 577, 599 n.17 (1973).

138. C. LINDBLOM, POLITICS AND MARKETS: THE WORLD'S POLITICAL ECONOMIC SYSTEMS 8 (1977).

139. G. POGGI, *supra* note 27, at 94-95.

140. Hermann Heller, a German scholar, *quoted in id.* at 99.

141. *Id.* at 99-100.

the operation of the official organs of government, and private law establishes frameworks for the activities of persons, natural and artificial, pursuing their own interests. They are two parts of one legal system—that of the American version of the corporate State. Private interests are only apparently autonomous. They can be pursued only because they do not conflict with the interests of the State itself. Those private interests are manifested through the law of obligations (both contract and tort), of property, and of corporations. In this manner, the State provides a system of private agreements which establishes horizontal arrangements between constitutional persons, a system for the enforcement of liability for private wrongs, and a set of rules for the governance of private corporations. The State's law-enforcement apparatus is placed at the disposal of persons involved in any of those matters. Indeed, without the authority of the State behind it, private law could not exist.

Under the liberal theory of the rule of law (which is predominant throughout the law schools), those horizontal transactions—promissory and otherwise—are governed by a neutral body of rules that are impartially administered. Although it has long been discredited, that theory lingers on. Sir Henry Maine asserted in 1861 that the movement of "progressive" societies was from status to contract.[142] However, that proposition was invalid when made. Necessitous men cannot be free men; the notion of arms-length bargaining in nineteenth-century contract law was more fantasy than fact. Under the labor contract, for example, an individual sold his time and energy in exchange for a wage. When business collectivized in the drive for incorporation, the bargaining power of the individual worker was by no means equal to that of the enterprise. Even so, the law assumed that it was—as it did in tort law, where during the nineteenth century the dreadful costs of industrial accidents fell in large part on those least able to pay: the workers. Judges obligingly invented rules of assumption of risk, contributory negligence, and the fellow-servant concept to insulate corporate enterprise from the human costs of industrialization.[143] This was the private-law counterpart to the Supreme Court's invalidation of legislation aimed at ameliorating conditions of the working class.[144]

Those laws were far from neutral. Judges and the law they promulgated were class-oriented, in favor of the moneyed and propertied. Oliver Wendell Holmes, before he became an Associate Justice,

142. H. MAINE, ANCIENT LAW (1861).

143. *Cf.* Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981).

144. *E.g.*, Lochner v. New York, 198 U.S. 45 (1905). *Lochner* is the best known of the so-called "economic due process" decisions.

recognized that fact. In 1873 he wrote that the idea the law was neutral, impartially imposed by judges, "presupposes an identity of interest between the different parts of a community which does not exist in fact."[145] Discussing prosecution of gas-stokers who went on strike in London, Holmes asserted that not only was there no unity in law as a whole, but there was a lack of unity at the social level that eventually was translated into law. That statement was almost completely unheeded. However, it struck a mortal blow to the liberal theory of the rule of law, with its assumptions of known general rules, applied impartially, which theoretically produce effects that benefit all. Holmes maintained that the decisions of courts represented the interests of the strongest in society.

> [W]hatever body may possess the supreme power for the moment is certain to have interests inconsistent with others which have competed unsuccessfully. The more powerful interests must be more or less reflected in legislation [and judicial decisions]; which, like every other device of man or beast, must tend in the long run to aid the survival of the fittest.[146]

That, to be sure, is a bleak and despairing jurisprudential universe. But, can it be said that he was wrong—or, indeed, that he was wrong when he wrote in 1881: "[t]he first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong"?[147]

Corporation law provides an illustration. Originally, corporations were franchised by government for limited purposes and set periods of time. As Henry Carter Adams said in 1886:

> 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 intervention. 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 private interests.[148]

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145. Comment, *The Gas-Stokers' Strike*, 7 AM. L. REV. 582, 583 (1873). *See* Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307 (1979).

146. Comment, *The Gas-Stokers' Strike*, *supra* note 145, at 583.

147. O. W. HOLMES, THE COMMON LAW 36 (1881), *quoted in* G. GILMORE, THE AGES OF AMERICAN LAW 49 (1977). Holmes did not define a "sound body of law." Whatever that term means, surely in constitutional, as well as other questions, there is a need to recognize standards of judgment external to both judges and "the community."

148. H. ADAMS, RELATION OF THE STATE TO INDUSTRIAL ACTION, AND ECONOMICS AND JURISPRUDENCE 145 (1954).

We have strayed far from that conception. Corporations still must be chartered, but their goal is single-minded: the pursuit of profit. Only by happenstance do their actions attain the public good. In other words, the State permits private greed, perhaps on the assumption that Adam Smith, whose *The Wealth of Nations*[149] was published in 1776 and was widely read in America, was correct in his benign view of the "invisible hand" that was supposed to transform personal greed into public good. The Document was written, however, when corporations were not the usual mode of doing business (only about 300 existed in all the United States as late as 1800). However, the silences of the Constitution provided ample room for capital to operate. The State helped in the accumulation of even more capital, resulting in a system of corporate capitalism. "Under capitalism the economy does not operate within the social sphere simply as 'one' factor among and coordinate with others; rather, it imperiously *sub*ordinates or otherwise reduces the independent significance of all other factors, including religion, the family, the status system, education, technology, science, and the arts."[150] In net, the economic system is a system of power—and that means that it should be considered in constitutive terms.

Corporate capitalism involves the domination by a capital-owning class over other social groups and, of course, over individual persons. That class also has managed to dominate large segments of government. It routinely interacts with and greatly influences the institutions of the Political Constitution. A class society is the inevitable consequence of corporate capitalism. To uphold it, the Supreme Court and other governmental organs managed for decades to exclude from the formal political process the claims and demands of groups which may have wanted to abolish capital ownership, modify the distribution of wealth, or interfere with the accumulation of profits. In other words, property was protected: it was, and still is, highest in the hierarchy of values guarded by the formal Constitution.

Other groups, economic and otherwise, were able to attain formal political power through the spread of the franchise and, more importantly, through the greatly increased productivity of labor. This process was accelerated by the Supreme Court's validation of New Deal measures, beginning with the *Jones & Laughlin*[151] decision in 1937. The labor unions and farmers' leagues became entities politicians had to reckon with. These changes occurred during America's true "golden age"—the time from 1945 to about 1970. As has been discussed previ-

149. A. SMITH, THE WEALTH OF NATIONS (Mod. Libr. ed. 1937).

150. G. POGGI, *supra* note 27, at 120-21.

151. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

ously, by the 1980's this development has resulted in the cruel paradox that political pluralism is a failure in the United States precisely because it has been so successful. With a diminishing economic pie, as more and more groups proliferate and make demands, the divergence of interests is proving to be unworkable.[152]

The point, however, is that when the public legal order recognized under the Political Constitution the right of capital to collectivize itself—and then equated the collective with a natural person—something new under the constitutional sun came into being. By now it has become utterly clear that the economy of the corporate behemoths is a system of power, made up of quasi-polities, each with a constitutional system of its own. Those supercorporations are at once economic entities, sociological communities, political orders, and legal persons. A new social order has been created in the past 100 years—a form of neo-feudalism. In many respects, the State is subordinate to the economic process. It is deeply involved in economic tasks, seeking to help business growth while simultaneously trying to ameliorate the excesses of corporate collectivism. The consequence is that the line between politics and economics has in fact, although not in theory, been all but erased. Politics and economy syzygetically exist, making up one overarching whole: the American form of corporatism.

That means that sovereignty in the United States lies, not in the people as the myth system would have it, but in the State. The "visible" sovereign is "the" United States, which in turn is a triad of legislative, executive, and judicial powers; and the "invisible" sovereign lies in the system of private governments that exist as "worms in the entrayles" of the body politic. Since sovereignty, defined as ultimate power, is itself indivisible, that means the two types of American sovereignty are conjoined into what was termed by Otto Gierke as a "supergroup-person."[153]

What, then, are the characteristics of the Economic Constitution? My thesis comes from Adam Smith: "Civil government, so far as it is instituted for the security of property, is in reality instituted for the defense of the rich against the poor, or of those who have some property against those who have none at all."[154] The putative "father" of the American Constitution, John Locke, said that "government has no

152. *Compare* T. LOWI, THE END OF LIBERALISM (2d ed. 1979) *with* L. THUROW, THE ZERO-SUM SOCIETY (1980) and R. DAHL, DILEMMAS OF PLURALIST DEMOCRACY (1982). *See also* Beer, *The Idea of the Nation*, NEW REPUBLIC, July 19 & 26, 1982, at 23.

153. O. GIERKE, NATURAL LAW AND THE THEORY OF SOCIETY, 1500-1800 (E. Barker trans. 1933).

154. A. SMITH, *supra* note 149, at 674.

other end but the preservation of property."[155] James Madison restated that thought in *Federalist No. 10*. There can be little question that the Founding Fathers believed in Smith and Locke, whose views have, indeed, prevailed since the beginnings.

The first principle of the Economic Constitution has already been stated and discussed: *The economy in the United States is a system of power* which has significant political consequences for the American people.

The second principle is that governing power was delegated from the State to the owners of property (the capitalists). Rather than being explicit, this delegation was left to inference and to subsequent legislation and judicial decisions. Although the economic order, as Karl Polanyi has shown,[156] was entirely isolated from the jurisdiction of the formal Constitution, protection of private property was so high in the hierarchy of values that it can be viewed as a part of the fundamental law.

The delegation of power to organizations is to be inferred from the Document itself. (It remains true that *formal* political power cannot be transferred from the legislature to private parties. We speak now of the exercise of *informal* power, in the operational code of the American Constitution.) What was *not* said in the 1787 instrument is as important as what *was* said. For centuries the State has succeeded in asserting that it is the sole source of all power relations—all *licit* power relations, that is—within the nation. Nothing can exist without its permission, express or tacit. The Founding Fathers cleverly created an elitist document, in which the State is preeminent under the Political Constitution, while simultaneously making implicit provision for a "self-regulating market economy." Such a system, according to Polanyi, is "nothing less than the institutional separation of society into an economic and political sphere."[157] Therefore, "human society" in a market economy is an "accessory of the economic system." The tail wags the dog.

It is important to realize that the market economy and its political counterpart, liberal representative democracy, was the consequence of *the* major new social force that developed in the Western world—the enormous wealth pouring into Europe following the great discoveries. In *The Great Frontier*,[158] Walter Prescott Webb has shown the immense impact that new wealth and new land had upon old institutions.

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155. *Quoted in* Gramm, *supra* note 137, at 599 n.17.
156. K. POLANYI, THE GREAT TRANSFORMATION 225-26 (1944).
157. *Id.* at 71.
158. W. WEBB, THE GREAT FRONTIER (1952).

It is also important to realize that the "400-year boom" produced by those discoveries has now run its course; and that, accordingly, humankind in the Western world, not excluding the United States, is back in the ecological trap that characterized the pre-modern world. The portents of that development are the realities of today. Humankind finds itself not in a crisis, but in the "crisis of crises"—in a climacteric, a sea change in the way in which *Homo sapiens* confronts the environment. Perceptive observers have long known this, as evidenced in the following statement:

> The consumption of energy from fossil fuels . . . is a "pip" [on a graph] rising sharply from zero to maximum, and almost as sharply declining, representing but a moment of human history. . . . The release of this energy is a unidirectional and irreversible process. It can only happen once, and the historical events associated with this release are necessarily without precedent, and are incapable of repetition.[159]

The Document of 1787 came at a propitious time. It could not have failed: the environment was favorable. "The extraordinary affluence of the United States has been produced by a set of fortuitous, nonreplicable, and nonsustainable factors."[160] The consequences for American constitutionalism are enormous.

The American economy has always operated as a privilege from the State, and thus as a tacit delegation of power. "[T]he courts," Robert L. Hale observed in 1935, "have been blind to the fact that much of private power over others is in fact delegated by the state, and that all of it is 'sanctioned' in the sense of being permitted."[161] This power permeates the entire economic system. Those who wrote the Document of 1787 were by and large the rich and well-born who dominated government:

> Their power was born of place, position, and fortune. They were located at or near the seats of government and they were in direct contact with legislatures and government officers. They influenced and often dominated the local newspapers which voiced the ideas and interests of commerce and identified them with the good of the whole people, the state, and the nation. The published writing of the leaders of the period are almost without exception those of merchants, of their lawyers, or of politicians sympathetic with them.[162]

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159. Hubert, *Energy From Fossil Fuels*, 109 SCIENCE 103, 108 (1949).

160. R. MILES, AWAKENING FROM THE AMERICAN DREAM: THE SOCIAL AND POLITICAL LIMITS TO GROWTH 224 (1976).

161. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149, 199 (1935).

162. M. JENSEN, THE NEW NATION 178 (1950).

Those men wanted and got a free hand in commerce, accompanied by the repression of attempts by the poor and disadvantaged to better themselves. They knew a strong national government would be the best protector of their interests, and drafted the Constitution accordingly. Targeting Congress and the judiciary, and employing the principle of federal supremacy written into Article VI, they made the United States a "united State." The Document settled a revolution. "What was at stake for Hamilton, Livingston, and their opponents, was more than speculative windfalls in securities; it was the question, what kind of society would emerge from revolution when the dust had settled, and on which class the political center of gravity would come to rest."[163] By the twenty-twenty vision of hindsight, we know society was to be business dominated, and the moneyed and propertied class would control the levers of political power. That makes the Constitution of 1787 a counterrevolutionary instrument—elitist rather than populist.

The third principle is that the State established mechanisms of law without which the propertied class could not rule.

The fourth principle is that public power, the power of the Political Constitution, was and is employed to further the ends of the beneficiaries of the Economic Constitution.

The fifth principle is that society, as distinguished from both the state and government, was and is made up of classes.

The sixth principle is that the law, as enunciated by courts, is far from neutral; it has a class bias, toward those with property.

Since these principles overlap, they will be discussed together. Under the third principle, the private law of contracts and torts, of property and of corporations was, in the nineteenth century and to a large extent still is, the means by which the poor and economically disadvantaged are kept "in their places." This paralleled the Supreme Court's protection of money and property under both the obligations-of-contracts and due process clauses. The power of the State, operating through its apparatus, the government, was placed at the disposal of the moneyed class. Robert L. Hale stated the consequences:

> [I]t is so seldom recognized that when the state is enforcing contract and property rights at common law it is using its compulsory powers to effectuate the wills of private persons, and doing so in a manner which forces other private persons to forego the exercise of liberties which the state could not constitutionally deny them in furtherance of any legislative policy of its own. . . .[164]

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163. S. LYND, CLASS CONFLICT, SLAVERY AND THE UNITED STATES CONSTITUTION 113 (1967).

164. Hale, *Our Equivocal Constitutional Guaranties*, 39 COLUM. L. REV. 563, 576 (1939).

Similarly, the judge-made rules of tort law forced the workers—those least able to do so—to bear the brunt of the costs of industrialization. And so also with contracts of adhesion, which are far from arms-length transactions. Those contracts, which generally emanate from the corporate behemoths, are another tacit delegation of power to those firms to legislate the terms of promissory obligations. Those who enter into such agreements exemplify a remark of Justice Holmes:

> In order to enter into most of the relations of life people have to give up some of their constitutional rights. If a man makes a contract he gives up the Constitutional right that previously he had to be free from the hamper that he puts upon himself. Some rights, no doubt, a person is not allowed to renounce, but very many he may. . . . Every contract is the acceptance of some inequality.[165]

Although corporations are constitutional persons—in the eyes of the law, the same as natural persons—the sheer economic strength of corporate giants enables them to issue standardized contracts on a take-it-or-leave-it basis. (When one leaves it, he usually learns that he must deal on roughly the same terms with some other private government.)

Corporations as constitutional persons have contributed greatly to the thin fiction that the firms—particularly the giants—are "private." It is quite obvious they are not private, save that their shares are often owned by natural persons. They are collectives; as such, they have governing power: "[a] corporation is government through and through. . . . Certain technical methods which political government uses, as, for instance, hanging, are not used by corporations, generally speaking, but that is a detail."[166] Arthur Bentley wrote that in 1908, yet three-quarters of a century later the lawyer-judges on the Supreme Court still stoutly refuse to acknowledge what all but the willfully blind can see.

As for the fourth principle, the Economic Constitution, illustrating Hamiltonian principles, permitted—perhaps commanded—massive public aid to private business. The United States has always been a welfare State for the affluent. The federal government, now and in the past, may be likened to a great recumbent sow, with dozens of teats to each one of which is attached some recipient of largesse from the national treasury. Billions of dollars are disbursed each year in the form of grants, direct subsidies, or otherwise. Even the Queen of England has received $68,000 for not producing anything on her plantation in

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See also Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

165. Power Mfg. Co. v. Saunders, 274 U.S. 490, 497-98 (1927).

166. A. BENTLEY, *supra* note 45, at 268.

Mississippi![167]

As Matthew Josephson noted in 1934:

> [T]his benevolent government handed over to its friends or to the astute first comers . . . all those treasures of coal and oil, of copper and gold and iron, the land grants, the terminal sites, the perpetual rights of way—an act of largesse which is still one of the wonders of history. To the new railroad enterprises in addition, great money subsidies totaling many hundreds of millions were given. The Tariff Act of 1864 was in itself a sheltering wall of subsidies; and to aid further the new heavy industries and manufactures, an Immigration Act allowing contract labor to be imported freely was quickly enacted; a national banking system was perfected. . . . Having conferred these vast rights and controls, the . . . government would preserve them . . . so as to "curb the many who would do to the few as they would not have the few do to them."[168]

The close connection between government and private enterprise is not noted in constitutional law books, perhaps because it was never litigated. The largesse Josephson mentioned came from statutory action, by both Congress and state legislatures, and thus is not constitutional law in the eyes of most lawyers. Surely, however, it is a part of the constitutive process of the United States, particularly since the institutions of the Economic Constitution have widely and deeply affected the organs of the Political Constitution. For example, the regulatory movement so often attributed to populism and the program of progressives early in this century was in fact a successful effort by the business community to help stave off the destructive effects of too much competition.[169] The myth is to the contrary, to be sure, but it is just that, a myth.

Those who wrote the Document of 1787 got the type of government they desired. Chief Justice John Marshall and colleagues saw to that. Congress, too, was the quite willing ally of the propertied class, a class that simply did not like democracy as such. As Alexander Hamilton said in the 1787 convention:

> All communities divide themselves into the few and the many. The first are the rich and the well-born, the other the mass of the people. The voice of the people has been said to be the voice of God; and however generally this maxim has been quoted and believed, it is not true in fact. The people are turbulent and changing; they seldom judge or determine right. Give therefore to the first class a distinct, permanent share in government. They will check the unsteadiness of the second, and as they

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167. N.Y. Times, July 11, 1973, at 17, col. 1. *See* M. PARENTI, DEMOCRACY FOR THE FEW 77 (3d ed. 1977).

168. M. JOSEPHSON, THE ROBBER BARONS 52 (1934) (footnote omitted).

169. *See* G. KOLKO, THE TRIUMPH OF CONSERVATISM (1967).

> cannot receive any advantage by a change, they therefore will ever maintain good government.[170]

The Constitution of 1787 did just that: it did not permit the propertyless majority to act in concert against the established social order.

Socialism for the affluent has always characterized American government, but has seldom been controversial. Those Hamilton called "the rich and well-born" have always been able to suckle at the teats of the recumbent sow, the federal treasury. Only when welfareism is aimed at alleviating some of the distresses of the poor and the disadvantaged do the programs become controversial. That is so even though such programs are neither income nor wealth distributive. The same small percentage of people control the same large amount of wealth today as in the past. True, more people were able to sup at the groaning table of opulence during the post-World War II period, but that was because of rising levels of productivity accompanied by the realization that mass discontent could be diverted and distracted, and even mollified, by welfare programs.

The meaning is clear: the United States has always been a class society, the myth to the contrary notwithstanding. That is the fifth principle of the Economic Constitution. Certainly, classes are not mandated by law; and the American ethos and myth structure militate against them. Nonetheless, they exist, and are protected by the State as a derivation from the disproportionate wealth between the few and the many. The drafters of the Constitution were quite aware of the stratified nature of American society, and they produced an instrument that helped to perpetuate it. Of course, social mobility has always occurred, and still does, in some degree. Some were and are able to bootstrap their way to become a part of the rich. They may not have been "well-born," but being rich meant that their children are.

Furthermore, through a subtle legitimation process the dominant class is able to assert that it is representative and an advocate of all the people. The governing class rules by identifying with the people—with the myths and legends of democracy and popular sovereignty. The people generally are convinced, by one means or another, that their interests and those of the ruling class are identical. One of the functions of the American mass media is to persuade the people to accept our system as it is defined by the elite. Max Weber knew this when he observed that privileged groups have the ability "to have their social and economic positions 'legitimized'." Weber said: "They wish to see their positions transformed from a purely factual power relation into a cos-

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170. 1 RECORDS OF THE FEDERAL CONVENTION (M. Ferrand ed. 1927), *quoted in* M. PARENTI, *supra* note 167, at 44.

mos of acquired rights, and to know that they are thus sanctified."[171] The man of position and fortune is seldom satisfied with merely being fortunate; he knows that if his property is to be secure it must have legitimacy in society. That is, the man of fortune

> needs to know that he has a *right* to his good fortune. He wants to be convinced that he 'deserves' it, and above all, that he deserves it in comparison with others. He wishes to be allowed the belief that the less fortunate also merely experience his due. Good fortune thus wants to be 'legitimate' fortune.[172]

And further: "Strata in solid possession of social honor and power usually tend to fashion their status-legend in such a way as to claim a special and intrinsic quality of their own, usually a quality of blood."[173] A status-legend is a myth that both soothes the consciences of the rich and serves to sanctify their dominance in a class-ridden and unequal society. One way that status-legends are perpetuated (and perpetrated) is through the basic myth of the American legal system—the rule of law, impartially created and administered.

That suggests the sixth principle—that the law is distinctly not a neutral force in society. I have already mentioned Holmes' challenging comment in 1873 about the nonneutrality of the law, a comment that has never been satisfactorily answered. The tough-minded Holmes saw that all participants in legal affairs are struggling to win their self-interests. One may hope that compassion will temper self-interest, but "[a]ll that can be expected from modern improvements is that legislation should easily and quickly, yet not too quickly, modify itself in accordance with the will of the *de facto* supreme power in the community."[174] Surely Holmes was correct, which means the liberal theory of the rule of law is completely discredited. Under that theory, the assumption is that *general* rules, applied *impartially*, will produce effects beneficial to all of society. Professor Mark Tushnet has maintained that "law in a class society [such as the United States] is one form of the incomplete hegemony of the ruling class."[175] Or, in Holmes' words, law is "a means by which a body, having the power, puts burdens which are disagreeable to them on the shoulders of somebody else."[176] And Professor Jerold Auerbach in his brilliant book *Unequal Justice*[177] has

171. M. WEBER, *The Meaning of Discipline*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 262 (H. Gerth & C. Mills eds. 1958).
172. *Id.* at 271.
173. *Id.* at 276.
174. Comment, *The Gas-Stokers' Strike*, *supra* note 145, at 583.
175. Tushnet, *supra* note 145, at 1346.
176. Comment, *The Gas-Stokers' Strike*, *supra* note 145, at 584.
177. J. AUERBACH, UNEQUAL JUSTICE (1976).

maintained—persuasively, in my view—that the criminal law is a means by which the poor and disadvantaged are controlled.

It will not do to shrug off such comments and proceed on ancient but faulty assumptions about the neutrality of law and the legal process. The hegemony of the ruling class may be incomplete, but that should not be taken to mean that the ultimate beneficiaries of the legal system are not Hamilton's "rich and well-born."

The seventh principle is that *the State intervenes when necessary to correct imperfections in the market economy.* That means institutions of the Economic Constitution, corporations and others (such as farmers), can draw upon organs of the Political Constitution for assistance. The consequence is one we have already adumbrated: the merger of the two constitutions into one over-arching entity, the super-group-person called the Corporate State.

The measures taken to combat the Great Depression clearly show that State intervention in the economy is not only necessary but welcome. President Franklin D. Roosevelt's New Deal, despite fervent beliefs to the contrary, was a means of preserving the system of corporate capitalism at minimum cost to those with wealth. It was not so much the misery of millions that motivated and brought government aid as it was the threat of social and political turmoil. Roosevelt's administration was primarily dedicated to business recovery rather than social reform. Although the rhetoric was otherwise, the reality of the New Deal was its service to corporate capitalism. Social discontent was defused by a series of programs aimed at alleviating the worst aspects of poverty. The New Deal is now commonly recognized as a failure. Barton J. Bernstein, writing of the conservative achievements of liberal reform, concluded:

> The New Deal failed to solve the problem of depression, it failed to raise the impoverished, it failed to redistribute income, it failed to extend equality and generally countenanced racial discrimination and segregation. It failed generally to make business more responsible to the social welfare or to threaten business's pre-eminent political power. In this sense, the New Deal, despite the shifts in tone and spirit from the earlier decade, was profoundly conservative and continuous with the 1920s.[178]

Only the coming of a war economy enabled the nation to pull itself out of the swamp of economic misery afflicting so many Americans.

After the Second World War, however, the United States entered into its true golden age. It was a time when all things seemed possible and, indeed, many were. It was a time of economic abundance; a time

178. Bernstein, *The New Deal: The Conservative Achievements of Liberal Reform*, in TOWARDS A NEW PAST 264-65 (B. Bernstein ed. 1968).

of enhancement of civil rights and liberties. The connection between economic growth—the age of abundance—and furtherance of human rights has been little noted and never analyzed. Surely it can be said, nonetheless, that there is *some* causal connection—and *some* causal connection between today's diminution of rights, as seen through Supreme Court eyes, and the end of America's golden age. The Nixon Court knows this, at least intuitively, and is once more placing property rights first, this time under the leadership of Justice William Rehnquist.[179]

The seventh principle of the Economic Constitution may also be seen historically, in the way the Army was used to quell labor disputes and other civil disorders which threatened the corporate class. Jerry M. Cooper has concluded that military leaders tried to exploit civilian fears of a disorderly working class to further the Army's interests. Troops were used to police labor troubles.

> Conflicts over the rights of property in contrast with the needs of individuals, inevitably . . . engendered social turmoil. The advocates of property and the new values [of corporate capitalism] . . . controlled the agencies of government and hence the institutions of social control. Police, the National Guard, and the Army were committed to maintaining existing power relationships in the name of law and order.[180]

Cooper's focus was upon the nineteenth century; surely, however, the same pattern may be seen in this century.

The Pullman strike during the 1890's classically illustrates how corporate capitalists were able to call upon both the courts and the Executive for assistance. The President broke the strike through use of federal troops. And the Supreme Court went along: *In re Debs*[181] is a prime example of the judiciary in effect becoming an arm of the business class. (The law the Justices created in *Debs* was tailored to the circumstances, as the Senate Watergate Committee learned in its abortive effort to obtain the infamous White House "tapes.")[182]

International economic matters reveal a similar pattern. Corporate managers have long been able to define the axiomatic in American foreign economic policy. For example, it is axiomatic that force be used to help American business abroad. Witness a statement by General Smed-

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179. See Fiss & Krauthammer, *The Rehnquist Court*, NEW REPUBLIC, Mar. 10, 1982, at 14, 21; Miller, *Divisive Rancor on the Supreme Court*, Miami Herald, July 4, 1982, at 4E; Van Alstyne, *The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Burger Court*, LAW & CONTEMP. PROBS., Summer 1980, at 66.

180. J. COOPER, THE ARMY AND CIVIL DISORDER xiv-xv (1980).

181. 158 U.S. 564 (1895).

182. Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 55 n.5 (D.D.C. 1973).

ley D. Butler, former commander of the Marines:

> I spent thirty-three years and four months in active service as a member of our country's most agile military force—the Marine Corps. . . . And during that period I spent most of my time being a high-class muscle man for Big Business, for Wall Street, and for the bankers. In short, I was a racketeer for capitalism. . . . Thus I helped make Mexico and especially Tampico safe for American oil interests in 1914. I helped make Haiti and Cuba a decent place for the National City Bank boys to collect revenues . . . . I helped purify Nicaragua for the international banking house of Brown Brothers in 1909-1912. I brought light to the Dominican Republic for American sugar interests in 1916. I helped make Honduras right for American fruit companies in 1903. In China in 1927 I helped see to it that Standard Oil went its way unmolested.[183]

The pattern still continues. For example, whether the lives of American hostages in Iran were the first priority of government has been doubted. The decision to freeze Iranian assets "was not a desire to punish Iran for taking the hostages, but fear that a sudden withdrawal of those assets might set off a major currency and banking crisis for the United States." Private banks, such as Citibank and Chase, "stood to lose a lot of money if Iran repudiated its debt."[184]

Control over the levers of political power is aided by the eighth principle: *The mass media of communication are privately owned and are the principal instruments of propaganda in the United States.* "Not the gun but the word is the symbol of authority."[185] To gain public acceptance, those with wealth and property must be able to control or greatly influence the flow of information to the people.

The American mass media—the three television networks, the major news magazines, the handful of important newspapers—all have similar functions: in essence, making a profit for the owners, helping to sell consumer goods through advertising, and helping to socialize the people by a flow of news and opinions that supports corporate capitalism and the "American way." Other publications of course exist, but they have small circulations and little impact on public opinion. Furthermore, despite the seemingly absolute language of the first amendment, publications considered to be dangerous to the State's interests have been and are suppressed by one means or another.[186]

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183. *Quoted in* S. LENS, THE FORGING OF THE AMERICAN EMPIRE 270-71 (1971).

184. Lissakers, *Money and Manipulation*, FOREIGN POLICY, Fall 1981, at 107, 114. *See also* A. SAMPSON, THE MONEY LENDERS (1981).

185. C. LINDBLOM, POLITICS AND MARKETS 52 (1977).

186. Several well-known first amendment cases evidence this. *See* Haig v. Agee, 453 U.S. 280 (1981); Snepp v. United States, 444 U.S. 507 (1980); Dennis v. United States, 341 U.S. 494

The net result is a virtual monopoly of effective or influential expression in the United States, held by those who are themselves part of the Establishment and thus oriented toward preservation of the system of corporate capitalism. Far from being in an adversarial relationship, government (public or private) and the media are in fact close allies.[187] Almost no serious criticism of much of the public or private government of the nation appears in the mass media. There are exceptions, of course, but they tend to be rare rather than routine. Despite belief to the contrary, the *Washington Post* did not bring down President Nixon; it was only one of at least three, perhaps, four important actors in Watergate. For example, had the Senate Committee not discovered the existence of the Nixon tapes, he would doubtless have stayed in office. Since Watergate, the media have been anything but zealous in their relationship with government. Being part of the Establishment themselves, media personnel generally share the assumptions, ethos, expectations, and aspirations of the dominant group in society.

The ninth principle is that the institutions of the Economic Constitution operate with a high degree of secrecy. Professor Samuel P. Huntington maintains that "[t]he coexistence in America of the anti-power ethic with inequality in power gives rise to what may be termed the 'power paradox': effective power is unnoticed power; power observed is power devalued."[188] There is no Freedom of Information Act for corporations. Nor do the media deal with more than the occasional: the media managers resolutely eschew viewing corporations as centers of economic power. That means in the United States, and elsewhere, there is a lot of "democratic make-believe."[189]

The tenth principle is that the institutions of the Economic Constitution are not subject to the limitations of the Political Constitution. The Economic Constitution, as the Political Constitution, is an expression of a system of powers rather than limitations. The only difference between the two fundamental laws is that public officials are purportedly limited by the Constitution, while officers of the private governments are not. As we have seen in Section II, politics rather than

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(1951); Gitlow v. New York, 268 U.S. 652 (1925); Schenck v. United States, 249 U.S. 47 (1919); United States v. The Progressive, Inc., 467 F. Supp. 990 (W.D. Wis.), *appeal dismissed*, 610 F.2d 819 (7th Cir. 1979).

187. *See* R. CIRINO, DON'T BLAME THE PEOPLE (1972); J. HERBERS, NO THANK YOU, MR. PRESIDENT (1976); P. KNIGHTLEY, THE FIRST CASUALTY (1975); P. LAZARSFELD & R. MERTON, MASS COMMUNICATIONS, POPULAR TASTE, AND ORGANIZED SOCIAL ACTION, *cited in* N. CHOMSKY, FOR REASONS OF STATE 205 (1973). *But cf.* J. BARRON, PUBLIC RIGHTS AND THE PRIVATE PRESS (1981).

188. S. HUNTINGTON, *supra* note 131, at 75.

189. Bay, *Access to Human Knowledge as a Human Right*, in GOVERNMENT SECRECY IN DEMOCRACIES 22 (I. Galnoor ed. 1977).

interdictory law tends to be the controlling influence over public officials. A difference may be seen, no doubt, between those at the highest and those at the lowest levels of office, with discretion within political limits characterizing the former much more than the latter. R.M. Hartwell of Oxford University has said it well:

> If individualism was the motivating spirit of the Renaissance, rationalism the guiding principle of the Enlightenment, and laissez-faire that of the industrial revolution, politicization is the prevailing characteristic of our age. *Politicization*, however, is a relatively new word in the vocabulary of politics. Politicization can be defined as that now pervasive tendency for making all questions political questions, all issues political issues, all values political values, and all decisions political decisions. As Julien Benda observed as early as 1927: "The present age is essentially the age of politics." Half a century later almost all social phenomena have become politicized, and almost all social problems are assumed to have only political solutions.[190]

In sum, "the" Constitution of the United States has been politicized. Whether we like it or not—and I do not—the power of the State is all-pervasive, with the State being a super-group-person consisting of the joinder of political and economic power.

To be sure, under the Political Constitution there is at least nominal attention accorded constitutional limitations. But under the Economic Constitution, corporate managers are self-appointed oligarchs responsible to no one but themselves. No Bill of Rights or fourteenth amendment applies to them, the Supreme Court being unwilling to recognize what should be plain to all: the social power of corporate managers. It would be quite easy for the Justices to define the state-action concept to include private governments; but, other than an occasional decision such as *Marsh v. Alabama*,[191] they have not done so. John F. Davis said in 1897 that Americans are "governed more by corporations than by the State" and that corporations "are the major part of the mechanism of government under which they live."[192] That knowledge has not yet penetrated the Marble Palace.

Inequality in the economic sphere is largely taken for granted, as compared with the efforts, thus far largely futile, to further equality in the political sphere. The reason for this, according to Robert F. Hale, is that "[e]quality before the law . . . is not consistent with unequal property rights."[193] And further:

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190. Hartwell, *Introduction* in THE POLITICIZATION OF SOCIETY 7, 14 (K. Templeton, Jr., ed. 1979) (emphasis in original).

191. 326 U.S. 501 (1946).

192. J. DAVIS, CORPORATIONS 268 (1897) (1961 paperback ed.).

193. Hale, *Economics and Law*, in THE SOCIAL SCIENCES AND THEIR INTERPRETATION 131

> The premise of legal equality . . . [is] in fact fallacious, for legal rights, privileges, and duties depend on property rights and these depend on the law. Each person has a legal duty not to infringe any other person's property rights, a privilege to use what he himself owns and a right to exclude everyone else therefrom except on his own terms. These statements, however, are empty abstractions until it is specified to what particular objects the property rights of each attach; when it is so specified, the specious equality disappears. . . . The respective legal rights of A and B are equal only in the most formal and empty sense. . . . The ultimate economic position of each person is not so rigidly predetermined at birth as in the feudal system, but the law still imposes vastly unequal handicaps.[194]

Formal equality under the Political Constitution, insofar as it has been attained, is largely meaningless because of the manifest inequalities permitted under the Economic Constitution.

The consequence is that the institutions of the Economic Constitution are profoundly undemocratic. However one defines the word "democracy," by no criterion are corporations and other economic entities democratic. They are authoritarian, exemplifying Michels' "iron law of oligarchy."[195] The further consequence is that the authoritarianism of the Economic Constitution—which is a part of the operational code of "the" American Constitution—tends to influence the behavior of the institutions of the Political Constitution.

The eleventh principle is that of citizenship. Two points merit mention. First is the way in which corporations, particularly the giants, appear to owe allegiance to no nation-state. This becomes of special significance because so many of the supercorporations have become international.[196] Second is the fact that the allegiance of corporate managers seems to run more to the enterprise than to the nation-state. The identifications and loyalties—the bundle of rights and duties subsumed under the concept of citizenship—attach in the first place to the firm. Corporate managers and others operate under a theory of *raison de groupe,* similar to the way that officers of the Political Constitution operate under a theory of *raison d'état.* The welfare of the firm is the *summum bonum,* with the executives often acting on pure Machiavellian principles.[197]

The final principle is that the governing institutions of the Eco-

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(W. Ogburn & A. Goldenweiser eds. 1927).

194. Hale, *Labor Law, Anglo-American,* 8 ENCY. SOC. SCI. 669 (1932).

195. Michels' famous "iron law" may be found in R. MICHELS, POLITICAL PARTIES (1915).

196. *See, e.g.,* Miller, *The Multinational Corporation and the Nation-State,* 7 J. WORLD TRADE L. 267 (1973).

197. A. MILLER, DEMOCRATIC DICTATORSHIP: THE EMERGENT CONSTITUTION OF CONTROL 99-103 (1981).

nomic Constitution are markedly similar to those of the Political Constitution. The corporation is a political order, both in its internal operations and in its relationships with other economic entities and with public government. Supercorporations should be studied as political institutions as well as commercial or economic enterprises. They are also sociological communities.

Consider, for example, the widespread use of private judiciaries. Labor arbitration is a clear example, as is the employment of arbitrators in international economic affairs. Most disputes concerning multinational corporations are settled by private courts. Consider, too, the increasing use of private police forces—security forces—which can be likened to private armies. In addition, there is frequent use of intelligence forces, particularly in the area of industrial espionage. The supercorporations also have their own constitutions, either in the corporate charter and by-laws or in the collective bargaining agreement with a labor union.

To conclude this section: If we want to think critically and intelligently about "the" Constitution, we must include the dimension of the Economic Constitution. Like it or not, the economy *is* a system of power—and thus constitutive in nature. John P. Davis pointed out that during the sixteenth century a change took place that has had great influence on the way corporations are perceived.

> The standpoint from which all institutions were viewed was shifted from society as a whole to the individual. Social forces were conceived as moving from below and not from above. The destruction of tradition and the elevation of reason was one phase of the change. To be sure, the view was not to find full expression in philosophy until the eighteenth century, but the Reformation was a practical application of it. Private contract largely superseded status in the determination of social relations. Corporations were viewed not so much as divisions of society as associations of individuals. They were now enlarged individuals, not reduced societies.[198]

A major task of constitutional scholars today, and thus of the Supreme Court, is to recognize in formal constitutional theory that corporations, the dominant institution of the Economic Constitution, are more divisions of society than associations of individuals. They are a substantial part of the operational code of "the" Constitution.

IV. The Constitution of the Third "Ism": Corporatism

And so I end where I began. Perry is correct, but only as far as he goes—which is not nearly far enough. We will never have an adequate theory of judicial review until there is a full understanding of what is

198. J. Davis, *supra* note 192, at 246.

meant by "the" Constitution. That means the theory must be one of the third "ism"—not capitalism and not socialism, but corporatism. Recall: "The twentieth century will be the century of corporatism just as the nineteenth was the century of liberalism."[199] Constitutional commentators have not yet confronted that, either to refute it or to analyze it or even to note it.[200] In this concluding section, some general observations about American corporatism are proffered. My theme comes from an important article by Phillippe C. Schmitter:

> Societal corporatism is found imbedded in political systems with relatively autonomous, multilayered territorial units; open, competitive electoral processes and party systems; ideologically varied, coalitionally based executive authorities—even with highly "layered" or "pillared" subcultures . . . . Societal corporatism appears to be the concomitant, if not ineluctable, component of the postliberal, advanced capitalist, organized democratic welfare state. . . . [201]

Schmitter distinguishes societal corporatism from State corporatism, which he defines as polities

> associated with political systems in which territorial subunits are tightly subordinated to central bureaucratic power; elections are nonexistent or plebiscitary; party systems are dominated or monopolized by a weak single party; executive authorities are ideologically exclusive and more narrowly recruited and are such that political subcultures based on class, ethnicity, language, or regionalism are suppressed.[202]

My suggestion is that the United States has traveled well down the road toward societal corporatism, and that at times it has overtones of State corporatism. Pluralism is in decay as the operative ideology of American politics and political scientists, and with it much of the theory of liberal democracy.[203] John Maynard Keynes, with uncanny prescience, foresaw in 1925 that "the government will have to take on many more duties which it has avoided in the past." The goal, he said, was to exercise "directive intelligence . . . over the many intricacies of private business, yet . . . leave private initiative and enterprise unhindered."[204] Specifically, he noted the need for control over currency and credit, widespread dissemination of data relating to business, and

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199. Schmitter, *supra* note 83, at 85.

200. *But see* A. MILLER, THE MODERN CORPORATE STATE: PRIVATE GOVERNMENTS AND THE AMERICAN CONSTITUTION (1976).

201. Schmitter, *supra* note 83, at 105.

202. *Id.*

203. *See, e.g.*, R. DAHL, DILEMMAS OF PLURALIST DEMOCRACY (1982); H. KARIEL, THE DECLINE OF AMERICAN PLURALISM (1961).

204. Keynes, *Am I A Liberal?*, in ESSAYS IN PERSUASION 331 (1931) (reprint of speech delivered in 1925).

judgments as to the scale on which the community should save, the scale on which the savings should go abroad, and rationalization of investment markets. In sum, he advocated societal corporatism—precisely what has come about in the United States and some Western nations:

> I believe that in many cases the ideal size for the unit of control and organization lies somewhere between the individual and the modern state. I suggest, therefore, that progress lies in the growth and recognition of semi-autonomous bodies within the state—bodies whose criterion of action . . . is solely the public good as they understand it, and from whose deliberations motives of private advantage are excluded, though some place it may still be necessary to leave, until the ambit of man's altruism grows wider, to the separate advantage of particular groups, classes, or faculties—bodies which in their ordinary course of affairs are mainly autonomous within their prescribed limitations, but are subject in the last resort to the sovereignty of democracy expressed through Parliament. I propose a return, it may be said, towards medieval conceptions of separate autonomies.[205]

What Keynes did not see was that "the sovereignty of democracy expressed through parliament" (or Congress) has become, not "the last resort" but often the prisoner of those "semi-autonomous bodies within the state."

The modern State and modern interest groups—corporations, unions, farmers leagues, veterans legions, and the like—seek each other out. Andrew Shonfield has shown in his magisterial *Modern Capitalism*[206] that the State seeks to foster maximum employment, promote economic growth, curb inflation, smooth out business cycles, regulate conditions of work, help alleviate individual economic and social risks, and resolve labor disputes. This, Shonfield calls corporatist: "[t]he major interest groups are brought together and encouraged to conclude a series of bargains about their future behaviour, which will have the effect of moving economic events along the desired path."[207] (How far that can be done in fact is by no means certain. It may be, as David Ehrenfeld maintains, "the arrogance of humanism" for humans to think that they can rationally guide and control their affairs.)[208]

Time and space permit only an adumbration of the idea of American corporatism. In a longer essay published in 1976, I ventured a pre-

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205. *Id.* at 313-14.

206. A. SHONFIELD, MODERN CAPITALISM: THE CHANGING BALANCE OF PUBLIC AND PRIVATE POWER 231 (1965).

207. *Id. See* Schmitter, *supra* note 83, at 112-15.

208. D. EHRENFELD, THE ARROGANCE OF HUMANISM (1978).

liminary definition of the "corporate State, American style."[209] There is little reason to vary that evaluation today; if anything, events since 1976 have produced additional evidence that Americans are moving toward, and in significant respects have already reached, the third great "ism." This was and is being done when liberal democracy and normative constitutionalism are still the operative belief-systems of most constitutional commentators—and to the extent the Justices have a discernible philosophy, of the Supreme Court also.

Professor Howard J. Wiarda has suggested in an important essay that much of the debate about capitalism and socialism, or between liberals and their critics, is irrelevant and misses the point. To him, the issue in last analysis is what form American corporatism will take:

> [I]t is time for Americans . . . to begin putting away their narrow and ethnocentric biases, to terminate the literature and thinking that sees the United States as superior and more 'developed' not only in the economic sense (also now questionable in a way it wasn't a decade ago) but politically, socially, and morally as well, and to begin comprehending our own conditions in the light not of some ancient and now largely imaginary or mythical liberal model but from a truly comparative perspective and in the light of the European-Iberic-Latin corporatist model which socially and politically we now also approximate.[210]

The "liberal model" Wiarda mentions is of classical liberalism—that of John Stuart Mill and others—epitomized, for example, in the Supreme Court's marketplace-of-truth theory of the first amendment. It is part of the inarticulated assumptions of much, perhaps most, constitutional commentary, including Professor Perry. Perry illustrates a modern version of Holmes' comment in 1899: "I sometimes tell law students that the law schools pursue an inspirational combined with a logical method, that is, the postulates are taken for granted upon authority without inquiry into their worth, and then logic is used as the only tool to develop the results."[211] Eighty-three years later, that statement remains sound. What is important in constitutional commentary are the postulates—the premises—that are taken for granted. Professor Perry seems to adhere to these postulates: (a) the United States is a representative democracy; (b) whatever was done in the past, particularly by the Supreme Court, has a special significance, so that it carries with it the presumption that it should be repeated today; (c) those who drafted

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209. A. MILLER, *supra* note 200.

210. Wiarda, *The Latin Americanization of the United States*, 7 NEW SCHOLAR 51, 84-85 (1979). Wiarda also says: "The issue is no longer liberalism or something else but rather what form corporatism will take." *Id.* at 84.

211. O. W. HOLMES, *Law In Science and Science In Law*, in COLLECTED LEGAL PAPERS 238 (1920).

the Document of 1787 had a special wisdom and a rare prescience: they acted not only for themselves but for generations yet unborn; (d) lawyers are uniquely qualified to discern and articulate the meaning of the words written in 1787; (e) national uniformity in policy is a "good"; (f) in America, process is what counts: "deliberation is about means and presupposes that the problem of ends has been settled";[212] (g) man is capable through the exercise of reason of moving steadily toward perfecting the good life; (h) there is no problem, however novel or complex, that cannot be handled within the confines of the Document of 1787—even though most constitutional decisions, says Perry, are "noninterpretive" in nature; and (i) there is such a thing as a pure legal problem, separate and apart from the political economy of the nation.

Other postulates may exist, but those will suffice to show the pattern. Professor Perry's exposition is valid to the extent the postulates are valid. I believe that most, perhaps all, of them are faulty, at least in part. One is singled out for discussion here—the last one listed.

A. The Socioeconomic Context

Any perusal of the writings on constitutionalism, constitutional law, and the Supreme Court soon makes one fact stand out clearly: most disquisitions are exercises in intellectual abstraction, without reference to the political economy and other relevant data. Such preoccupation with what judges—a few hundred middle-aged or elderly men, plus a few women—have had to say about constitutionalism is a form of legal reductionism.[213] Without adequate contextual analyses, most commentary is fatally flawed (including Professor Perry's). For most commentators, history seems to have begun with the "immaculate conception" of the Constitution of 1787 and the government formed under it in 1789. Little of constitutional importance is thought to have happened before that time. On occasion some reference is made to the colonial experiences and even to smidgens of English history, but those references are at best mere simulacra. Not even the Articles of Confederation receive adequate attention. The result is a mountain of commentaries that exemplify legalism. We have a plethora of doctrinal exegeses of nebulous constitutional language, resembling medieval Scholastics arguing endlessly over Aristotle and other ancients and modern divines interpreting the sacred texts of the Bible, the Talmud, and the Koran. The time has come—indeed, it is long past—when

212. Y. SIMON, PHILOSOPHY OF DEMOCRATIC GOVERNMENT 123 (1951).

213. *See* Miller, *Reductionism in the Law Schools, or, Why the Blather About the Motivation of Legislators?*, 16 SAN DIEGO L. REV. 891 (1979).

modern-day Scholasticism should be replaced by studies that view constitutions and judicial review in the total socioeconomic context.

At this time I do not intend to do more than mention a major factor that seems to be indispensable in analyzing the nature and direction of American constitutionalism today. What follows immediately below is based upon one bedrock proposition: that normative constitutionalism and its institutions—the private enterprise system, liberal democracy, attention to limitations on government—are derived from the Great Discoveries of the sixteenth and seventeenth centuries and the consequent wealth that poured into Western Europe and its colonies, including the United States. As a corollary, the unique socioeconomic conditions following the Great Discoveries have now vanished. If that be so—and I do not think it can be gainsaid—then the assumptions of orthodox constitutional commentary listed above are demonstrably faulty. The task, therefore, of constitutional scholarship is to develop a theory and policy appropriate for the modern age and the foreseeable future.

It is futile beyond measure to argue "interpretivism" versus "noninterpretivism."[214] To answer Thomas Grey: of course we have an unwritten Constitution. To answer Munzer and Nickel: of course the Constitution means something different today from what it meant in the past.[215] The Constitution has always been relative to circumstances. To be sure, the words remain the same but their content changes through time. Even a number of silences have been filled by governmental action. It could not be otherwise. Government is not a static system: it is organic; a process, Darwinian and Einsteinian rather than Newtonian.[216] All governments are Darwinian, whether or not they have written fundamental laws and whether they are democratic or authoritarian. Molded by their environments, their decisions are reflections of social conditions.

What, then, are the relevant circumstances to which the Constitution must adapt? During the past 300 years many institutions that Americans consider to be the natural order of human affairs were born: representative democracy, capitalism, individualism. Were one to ask

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214. Professor Philip Kurland calls them "pedantic expressions," and I agree. *See* Kurland, *Curia Regis: Some Comments on the Divine Right of Kings and Courts "To Say What the Law Is," 23* ARIZ. L. REV. 581, 586 (1981). My point, however, is different: The Supreme Court has always been "noninterpretivist"; those who dislike such activism are making "should" or "ought" statements. My position is set forth in Miller, *In Defense of Judicial Activism*, in SUPREME COURT ACTIVISM AND RESTRAINT 167 (S. Halpern & C. Lamb eds. 1982).

215. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975). Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029 (1977).

216. *See* W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES (1908).

why they appeared at roughly the same time and in a quite limited geographical area, what answer would be forthcoming? Even if we accept, as surely we should, that there is no simple and complete explanation of any social phenomenon,[217] let alone a set of them, history does provide a principal determinant. It is emphatically not an example of *post hoc, ergo propter hoc* reasoning to maintain that the Great Discoveries were the prime mover in normative constitutionalism and its institutions. Wealth in untold amounts poured into the "Metropolis"—Western Europe—and seemingly endless land became available to the hard-pressed peoples of Europe. They were able to escape the "ecological trap," with its concomitant authoritarian institutions, that had imprisoned them in a rigid caste system since time immemorial.

With the Great Discoveries, a static society gave way to one of permanent revolution. The ancient and the medieval worlds were closed. Space, rather than being infinite, was considered to be a solid sphere in which the stars were embedded. Time, too, was finite: To medieval man the world was about 4000 years old and was to end in a short time. Learning was limited: people believed the final truth of all subjects had already been written by the ancients—Aristotle, Plato, Euclid, and others. The Bible as Holy Writ was the ultimate truth for religion and for cosmology. Those who thought and wrote did so within a closed body of knowledge; they were confined to refining already known concepts. The universe was anthropocentric: earth was its center and man was the special creature of an all-knowing and all-wise God. It was an authoritarian age—in economics, in politics, in religion.

Then came the Great Discoveries, which opened space and time and eventually the mind of man. Massive social changes began to appear, slowly at first, but accelerating with the advent of the scientific-technological revolution (of which the industrial revolution was the first part). "Revolution"—social revolution—as Romano Guardini has said, has become "a perpetual institution."[218] The underlying assumptions, the metaphysic, of society were fundamentally altered. Human life on earth, rather than being thought of as a prelude to heaven or hell, became an end in itself. The idea of progress flowered. In Charles Beard's words, it became possible "to think of an immense future for mortal mankind, of the conquest of the material world in human interest, of providing the conditions for a good life on this planet without reference to any possible hereafter."[219] Rather than living in the final age, hu-

217. *See* E. NAGEL, THE STRUCTURE OF SCIENCE: PROBLEMS IN THE LOGIC OF SCIENTIFIC EXPLANATION (1961).

218. R. GUARDINI, THE END OF THE MODERN WORLD: A SEARCH FOR ORIENTATION 44 (1956).

219. Beard, *Introduction*, in J. BURY, THE IDEA OF PROGRESS: AN INQUIRY INTO ITS ORI-

mankind saw itself as participating in a process of progressive improvement of the human lot. People became optimistic, rather than having a "sombre melancholy." Humans, through the application of reason, were believed to be able to know and to solve all problems. Faith in an all-wise and benevolent God was eventually subtly transferred to faith in scientists and technologists, who were (and are) considered to be able to create technological "fixes" that would ameliorate the harshness of life. Politics changed; the nation-state became the characteristic form of political order. Economics went from mercantilism—a statist economy—to laissez-faire (private enterprise capitalism)—although the State was still important as a protector of and simulant to business. The individual human being was perceived as the basic unit of society, a belief that crept into the dominated law and legal institutions. The Constitution of 1787 reflected the new views about life. In short, the "modern age" was born. Allen Wheelis observes:

> The vision of the Modern Age is a Promethean leap in pride. While it does not usurp God's role, does not yet claim omnipotence for man, it makes a point of recognizing no limits. It alleges that the universe moves by forces which are blind, that man, therefore, possesses mind at the summit. No intelligence, no planning, no consciousness operates above him, and nothing, therefore, can set a priori limits to what he may think, accomplish, understand. The universe is vast, mysterious, hazardous, but as it is a machine, functions by law, man may aspire to know it and control it.[220]

That age no longer exists.

My point is not that a direct causal connection existed between all of the developments listed above and the Great Discoveries; but, rather, that it was only after those Discoveries that the new institutions and beliefs came into being. An environment was provided in which new ideas and concepts could flourish. Adam Smith, writing in 1776, saw a connection:

> The general advantages which Europe, considered as a great country, has derived from the discovery and colonization of America, consist, first, in the increase of its enjoyments; and secondly, in the augmentation of its industry.
>
> The surplus produce of America, imported into Europe, furnishes the inhabitants of the great continent with a variety of commodities which they could not otherwise have possessed. . . .
>
> The discovery and colonization of America . . . have contributed to augment the industry, first, of all the countries which trade to it directly

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GIN AND GROWTH (1955), *quoted in* A. WHEELIS, THE END OF THE MODERN AGE 15 (1971).

220. A. WHEELIS, THE END OF THE MODERN AGE 6-7 (1971).

> . . . and, secondly, of all those which, without trading to it directly, send, through the medium of other countries, goods to it of their own produce.[221]

Without the wealth of the Great Discoveries, modern capitalism could not have flourished; its political counterpart, liberal democracy, would never have come into existence; and normative constitutionalism would have been at best a wistful dream. What had been abnormal before the Discoveries became normal—but only for a small segment of the planet. To repeat: normative constitutionalism is limited in time and space—in time to the past 300-plus years, and in space to Western Europe and some of its former colonies (particularly the United States).

There is no need to buttress the uniqueness of the modern era. Walter Prescott Webb in one of the most important, albeit little noticed, books of this century has provided ample data to show the modern age is "an abnormal age, and not a progressive orderly development which mankind was destined to make anyway."[222] In *The Great Frontier,* Webb perceived that frontier as "one of the primary factors in modern history. . . . [T]he sudden acquisition of land and other forms of wealth by the people of Europe precipitated a boom on Western civilization. . . . [T]hat . . . boom lasted as long as the frontier was open, a period of four centuries."[223] The Great Frontier closed during the first part of this century. The bulk of public lands had disappeared. An enormous increase in population has made the density per square mile, both in Europe and in the new world, "on average greater than the density was in Europe in 1500."[224]

Webb's analysis and conclusions seem to be irrefutable. Some questions which they present include: (a) do institutions which matured during the 400-year boom, which reflected and were adapted to those conditions, require alteration now that the frontier has closed? and (b) is there somewhere, somehow, a modern substitute for that boom? The short answers to those questions may be simply stated: (a) yes, those institutions—economic, political and philosophical—must be thoroughly examined anew to determine how they should be changed to fit a radically different social milieu; and (b) no new frontier of comparable significance is in the offing. Outer space—whether within or without the solar system—cannot, under any reasonably foreseeable set of

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221. A. SMITH, THE WEALTH OF NATIONS 92 (E. Cannan ed. 1904).

222. W. WEBB, *supra* note 158, at 14.

223. *Id.* at 413.

224. *Id. See* D. POTTER, PEOPLE OF PLENTY: ECONOMIC ABUNDANCE AND THE AMERICAN CHARACTER (1954).

circumstances, become a substitute for the Great Discoveries. On the contrary, rather than providing new resources and new lands, space exploration and settlement (even if theoretically possible) will be an enormous drain on planetary resources. Some consider science to be an endless frontier, and to the extent new scientific discoveries and technological "fixes" can help develop an environment comparable to that of the 400-year boom, there is validity in that idea. But science, too, is resource-draining, and even some thoughtful scientists concede that technological "fixes" will not do the necessary job.[225] Furthermore, science cannot create matter; it cannot make something out of nothing. And we have learned in recent years that entropy is a universal law that cannot be repealed.[226]

In sum, then, what has seemed to be normal during all of American history—economic growth, relative peace, seemingly inexhaustible resources, the idea of progress and of the perfectability of man—has in dour fact actually been abnormal. Abnormal, that is, in the sense of how people lived prior to the Great Discoveries, and how people lived outside of Europe and a few other nations since those Discoveries. The Golden Age for Western Man started about 1600 and lasted until about 1970, when institutions honored by time began to become unraveled. Immense strains created by burgeoning population and rapid depletion of resources have set man back in the man-land ratio worse than where it was in 1650. In the West, population density in 1500 was about 26.7 people per square mile. By 1940 that figure had become 34.8 per square mile.[227] Only technological growth enabled humans to have a relatively abundant economy (and then often at the expense of the poverty-rows of the Third World). The question is whether that can continue. My answer is that it cannot. The ecological trap is once more closing.[228]

The pity is that constitutional commentators, including Professor Perry, simply ignore the historical socioeconomic context in which the ideas of normative constitutionalism arose. If, however, one accepts, at least as a working hypothesis, that American history was in fact aberrational—a unique set of fortuitous and nonreplicable circumstances—then it becomes somewhat easier to view American constitutionalism in a more accurate perspective. I have suggested above that

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225. *See* Weinberg, *Social Institutions and Nuclear Energy*, 177 SCIENCE 27 (1972). *See generally* McDermott, *Technology: The Opiate of the Intellectuals*, in TECHNOLOGY AS A SOCIAL AND POLITICAL PHENOMENON 78 (P. Bereano ed. 1976).

226. *See* J. RIFKIN, THE EMERGING ORDER: GOD IN THE AGE OF SCARCITY (1979).

227. W. WEBB, *supra* note 158, at 13-28.

228. *See generally* P. EHRLICH, A. EHRLICH & J. HOLDREN, ECO-SCIENCE: POPULATION, RESOURCES, ENVIRONMENT (rev. ed. 1977).

"the" Constitution has become corporatist in some degree, and that this trend will continue. To the extent that is valid, much current constitutional commentary is irrelevant; it badly—sadly—misses the point of the nature of the Constitution today. Constitutions are concerned with *power*—who has it, who exercises it, for whose benefit, in what circumstances. What follows states with little discussion some of the principal aspects of the American version of corporatism.

B. Societal Corporatism

However one characterizes the socioeconomic environment in which constitutional mechanisms operate, it is indubitably clear that abstract discussions of constitutionalism do not suffice. Little truly useful comes from the verbal battles of academics today. Contrary to Professor Perry, I agree with Paul Brest in his claim that "the controversy over the legitimacy of judicial review in a democratic polity—the historic obsession of normative constitutional law scholarship—is essentially incoherent and unresolvable."[229] The war of words among constitutional theorists consists mainly of assertions and counter-assertions unrelated to either historical or contemporaneous context. That simply is not enough.

I do not suggest, of course, that there is general agreement on the history or the contemporary "climacteric" of humankind. There are those who think that all will be well, that the species will be able to muddle through the present time of troubles. Herman Kahn and Julian Simon are prominent examples of that mind-set.[230] Simon believes that increased and increasing population, rather than being a disaster as Paul Ehrlich and others think, is "the ultimate resource."[231] Kahn's roseate views of the future are well known. E.J. Mishan and Eric Ashby, among others, disagree; Harrison Brown and Lester Brown add to the gloom.[232] Only the future will reveal who is correct—the cautious optimists, such as Kahn, or the despairing pessimists. My own view is that Kahn and Simon are dead wrong.

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229. M. PERRY, *supra* note 1, at x. Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981) (footnote omitted).

230. H. KAHN, THE COMING BOOM (1982); H. KAHN, W. BROWN & L. MARTEL, THE NEXT TWO HUNDRED YEARS: A SCENARIO FOR AMERICA AND THE WORLD (1976); J. SIMON, THE ULTIMATE RESOURCE (1981).

231. To Simon, increasing population is an unmitigated good. For Ehrlich's views, see the detailed study cited *supra* note 228.

232. E. ASHBY, RECONCILING MAN WITH THE ENVIRONMENT (1978); H. BROWN, THE HUMAN FUTURE REVISITED (1978); L. BROWN, THE TWENTY-NINTH DAY (1978); E. MISHAN, THE ECONOMIC GROWTH DEBATE: AN ASSESSMENT (1977). *See also* W. OPHULS, ECOLOGY AND THE POLITICS OF SCARCITY: PROLOGUE TO A POLITICAL THEORY OF THE STEADY STATE (1977).

That, however, is not my present point—which is that disputations about constitutions and judicial review are valueless absent continuing careful attention to the environment in which those human institutions operate. In that sense, the greatest barrier to more meaningful discussions of constitutionalism is the gaggle of the professorial elite who have a vested interest in present ways—those who author the standard coursebooks used in law and political science classes. I am not saying those books and articles serve no useful purpose; of course, they do—but only within a severely constricted framework. That frame of reference is the adversary system, whereby the problems of *meum* and *tuum* are presented to the Supreme Court, which then transmutes them into general norms. That, however, is pure vocationalism, a process in which keen minds are sharply honed to "think like lawyers."[233] My contention is that attention to the minute details of constitutions and judicial review does little to further understanding of either institution. Our goal should be increased *understanding* of the Constitution and Court, rather than the limited task of being better able to *predict* the course of judicial decision (although greater understanding will doubtless lead to more accurate predictions). As Lon Fuller wrote in 1966:

> There may be said to exist two philosophies of science. The one sees the aim of science as *understanding*; the other as *prediction*. The first regards prediction as a by-product of understanding; we acquire the ability to predict events as our minds penetrate into the causes that underlie the happenings of nature. The adherents of the opposed theory see "understanding" as an illusory, metaphysical trapping superfluously tacked on the essential goal of acquiring predictive knowledge.[234]

There is a pressing need for an accurate perception of the nature of the Constitution and Court as politico-legal institutions in a broad social matrix before predictions of what the Court will do or assertions about what it should do can be made. Neither law nor legal institutions are homeless, wandering ghosts; they are significant aspects of human endeavor, serving identifiable purposes and furthering the causes of equally identifiable people.

To understand modern constitutionalism requires at the outset the recognition that it ever increasingly exemplifies the third great "ism": corporatism. What, then, are the characteristics of corporatism? Several may be suggested. The following do not exhaust all of the aspects

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233. *Cf.* Levinson, *Taking Law Seriously: Reflections on "Thinking Like a Lawyer,"* 30 STAN. L. REV. 1071 (1978). In my own, perhaps jaundiced view, legal education is a form of brain damage; and "thinking like a lawyer" is often a disaster.

234. Fuller, *An Afterword: Science and the Judicial Process*, 79 HARV. L. REV. 1604, 1623-24 (1966) (emphasis in original).

of the emergent form of American corporatism, but they will suffice to show its general outlines.

The first principle is that there is a fusion of political and economic power in society. This is occurring in two ways. First, the supercorporations and other decentralized organizations in the pluralistic order are themselves political in nature. They are private governments for the corporate communities—for corporations, the stockholders, the employees (management and blue collar), those who buy from it, those who supply it and lend to it, and those whose lives are affected by its actions.[235] Second, political and economic power merge in the formulation of public policies, through the operation of the "subgovernments" or the "iron triangles" of Washington. The terms refer to the symbiotic relationships between congressional committee, administrative agency, and affected interest group. In sum, the institutions of the Political Constitution are meeting and merging with those of the Economic Constitution.

The second principle is that the group is the basic unit of society. Although the Document of 1787 recognizes only two entities—the natural person and government—the "organizational revolution"[236] has produced a society in which the group is dominant. Both in politics and in economics, the lone individual counts for little. Even in the Supreme Court's constitutional decisions, a person is important only because the Court is not a self-starter; it cannot reach out and seize policy issues for decisions, but must await the accident of litigation. Once the process starts, and particularly once a given case is accepted for decision on the merits, the litigant becomes insignificant. Those 150 plus Supreme Court decisions made each term are for development of "the law," or, in other words, for larger legislative purposes. One example will suffice: Clarence Gideon was important to law not as a person who had been treated shabbily by the State of Florida, but because his situation exemplified a large category of persons throughout the nation. *Gideon's Case,*[237] accordingly, was a *de facto* class action, although not brought as such.

The third principle is that the State is a metaphysical entity—a "super-group-person"—larger than the arithmetical sum of its parts (public and private governance). As has been previously suggested, the State is sovereign in the United States, and is recognized as such by

235. *See* W. GOSSETT, CORPORATE CITIZENSHIP (1957); W. HARMAN, THE WORLD PROBLEMATIQUE: THE CHANGING ROLES OF BUSINESS (Woodlands Occasional Paper No. 1, 1981).

236. K. BOULDING, THE ORGANIZATIONAL REVOLUTION (1953).

237. Gideon v. Wainwright, 372 U.S. 335 (1963). *See* A. LEWIS, GIDEON'S TRUMPET (1964).

the Supreme Court. And the State is to be distinguished from both its apparatus, government, and those who are ruled, society. The State as "group-person" is a conception based on Otto von Gierke's analysis of society. To him, "groups were real persons—real 'unitary' persons, existing over and above the multiple individual persons of which they were composed."[238] Just as corporations are constitutional persons by Supreme Court fiat, so too with the State: It is, as Ernest Barker said, "a sort of higher reality, of a transcendental order, which stands out as something distinct from, and something superior to, the separate reality of the individual"[239]—and, one might add, the separate realities of government and social groups. Barker goes on to point out the dangers of such a view:

> 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 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.[240]

Even a cursory survey of American policy in recent decades will quickly reveal that the State does indeed "carry the day," and that, accordingly, it is preeminent. Any number of Supreme Court decisions of recent as well as ancient vintage will show that the Justices are willing allies in that development.[241] We may not like that—I do not—but it would be puerility compounded to deny it.

The fourth principle is that the Supreme Court is an arm of the State. This principle follows from the third, and need not be expanded.[242]

The fifth principle is that "communitarianism" has replaced individualism. I take the term *communitarianism* from Professor George Lodge's recent book, *The New American Ideology*.[243] "America,"

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238. O. GIERKE, NATURAL LAW AND THE THEORY OF SOCIETY, 1500-1800, at xxix (E. Barker trans. 1933).

239. *Id.* at xxxi.

240. *Id.* at lxxxv.

241. One example should suffice, although there are divers others: Dennis v. United States, 341 U.S. 494 (1951) (legitimized thought control).

242. *Compare* J. GRIFFITH, THE POLITICS OF THE JUDICIARY (1977) *with* M. SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981).

243. G. LODGE, THE NEW AMERICAN IDEOLOGY (1975).

Lodge maintains, "now appears to be heading into a return to the communal norms of both ancient and medieval worlds," noting that "our atomistic, individualistic ideology constitutes a fundamental aberration from the historically typical norm."[244] Lockean individualism, the ideology that permeates much of constitutional commentary, is being replaced—whether we like it or not—by the new ideology. In many respects, Lodge's ponderous label of communitarianism is synonymous with the more familiar word, "corporatism." In any event, the individualistic basis of law, both private and public, is rapidly vanishing. Individualism as such is simply not possible in a society dominated by huge public and private bureaucracies. (The occasional hermit merely proves the rule.)

The sixth principle is that corporatism is mercantilist. Mercantilism was the economic theory appropriate for the medieval period, the time of feudalism and the first beginnings of nationalism, the period of roughly the fifteenth to the eighteenth centuries. It had five primary characteristics: It was nationalistic; it saw in gold and other precious metals an important economic force; it promoted exports over imports; it limited imports by tariffs and nontariff barriers to trade; it was both an economic and a political policy. The economic objective was a favorable balance of trade, or at least a balance of trade, whereas the political goal was a balance of power. Mercantilism gave way to classical economics and the notion of a natural equilibrium.

It takes no special insight to perceive parallels between mercantilism and the economic system of today. Other than the fact that major currencies have been cast adrift from gold as a standard, the modern age may accurately be termed neo-mercantilistic in nature. Certainly the other characteristics of the older version are plainly evident in American public policies. I do not say this is an abrupt shift from past policy: quite the contrary. The mercantilist tendencies, however, have been accentuated in recent years.

The seventh principle is that society is bureaucratized. This principle is, to be sure, one of the commonplaces of the day. Bureaucracy exists, and is dominant, yet learned constitutional scholars still write and speak in terms of individualism (which is giving way to communitarianism). Max Weber is the seminal thinker in this area. More than sixty years ago he observed:

> The bureaucratization of society will, according to all available knowledge, some day triumph over capitalism, in our civilization just as in

244. *Id.* at ch. 6. It will not do to shrug off such a view, for Lodge, himself a pillar of the "Northeastern Establishment" is on the faculty of that central organ of the business establishment, the Harvard Business School.

> ancient civilizations. In our civilization also the 'anarchy of production' will be supplanted in due course by an economic and social system similar to that typical of the Late Roman Empire, and even more so of the 'New Kingdom' in Egypt or the sway of the Ptolemies.[245]

Once rapid capitalist expansion had halted, the dynamism of capitalist competition gave way to bureaucratic techniques of regulating the economy. Weber may have been overly pessimistic at the time he wrote (*circa* 1920), but who can say that he did not presciently envisage the shape of things to come. Even though he maintained that charismatic leadership could be a creative revolutionary force that would help alleviate the problems he saw, Weber nevertheless maintained that in the long run "the seemingly irresistible advance of routinization, rationalization and bureaucratization"[246] would be dominant. As of 1983—and for the future insofar as it can be foreseen—that domination is becoming ever increasingly obvious.

In modern times, Jacques Ellul takes Weber a giant step further. Focusing on what he calls "technique," he notes, "the transition from the individualist to the collectivist society."[247] Ellul defines *technique* as more than machines, technology, or procedures for attaining an end. "In our technological society, technique is the *totality of methods rationally arrived at and having absolute efficiency* (for a given stage of development) in *every* field of human activity. Its characteristics are new; the technique of the present has no common measure with that of the past."[248] Technique imposes centralism upon the economy. In politics, the technocrat perceives the State as an enterprise providing services that must function *efficiently*. And efficiency requires administration (bureaucracy).

The eighth principle is that a growing social stratification characterizes the Corporate State. Society in America is ever increasingly one of a managerial elite structure at the top, those who have expert knowledge, with a larger and larger underclass.[249]

The ninth principle is that universities, rather than being centers of independent knowledge, are "service stations" for the institutions of corporatism.[250]

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245. W. MOMMSEN, THE AGE OF BUREAUCRACY: PERSPECTIVES ON THE POLITICAL SOCIOLOGY OF MAX WEBER 99 (1974).

246. *Id.* at 103.

247. J. ELLUL, THE TECHNOLOGICAL SOCIETY 305 (J. Wilkinson trans. 1964) (paperback ed.).

248. *Id.* at xxv.

249. *See* J. BURNHAM, THE MANAGERIAL REVOLUTION (1941); M. PARENTI, DEMOCRACY FOR THE FEW (3d ed. 1980); M. PARENTI, POWER AND THE POWERLESS (1978).

250. *See, e.g.*, M. BARITZ, THE SERVANTS OF POWER: A HISTORY OF THE USE OF SOCIAL SCIENCE IN AMERICAN INDUSTRY (1960); J. RIDGEWAY, THE CLOSED CORPORATION: AMERICAN

The tenth principle is that the distinction between law and politics is disappearing.[251]

The last three principles of corporatism will be discussed together. The eighth and tenth principles have been discussed previously. There is little need to do more than suggest that a permanent underclass is being produced in the United States and that the storied Rule of Law—which, it seems to me, is the shorthand label for Perry's "principled decisions"—is in fact the Rule of Politics. The underclass are the consequence of the scientific-technological revolution, which has managed to create a terminal sense of the loss of work among increasing numbers of people,[252] and which, through improved health measures, keeps more people alive longer than ever before in history. What Veblen foresaw[253] about the turn of the century and what Huxley put in his classic novel, *Brave New World,*[254] is fast becoming reality. The demand is for brain power—for technicians (who are not philosophers or humanists). Only a relative few are needed, and fewer will be needed tomorrow. A technological elite sits on top of the technological society, one dominated by Ellul's *technique;* while at the bottom are growing masses of people to do the menial tasks of society that have not yet been mechanized. There are far too many for even those jobs. The consequence is the creation of a *de facto* class of Huxleyan "proles." The stratified society does not have castes imposed by law, but the accident of birth (including skin color) is making the United States a caste society in fact.

As for the Rule of Politics, little more need be added to what has already been said. Some do not like the notion. For example, Professor Owen Fiss claims to perceive what he calls "a new nihilism, one that doubts the legitimacy of adjudication."[255] He thinks that too many legal scholars are turning their backs on adjudication and beginning "a romance with politics." That is an interesting sentiment, particularly since Fiss maintains that there is such a thing as a "commitment to the rule of law"; and further that what he calls nihilism "threatens our

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UNIVERSITIES IN CRISIS (1968).

251. *See* J. ELLUL, *supra* note 247, at 291-300; A. MILLER, TOWARD INCREASED JUDICIAL ACTIVISM: THE POLITICAL ROLE OF THE SUPREME COURT (1982); M. SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981); Griffith, *The Political Constitution,* 42 MOD. L. REV. 1 (1979).

252. *Cf.* G. MERRITT, WORLD OUT OF WORK (1982); Seabrook, *Unemployment Now and in the 1930s,* 52 POL. Q. 7 (1981). *See also* Lodge & Glass, *The Desperate Plight of the Underclass,* HARV. BUS. REV., July-Aug. 1982, at 60.

253. T. VEBLEN, THE ENGINEERS AND THE PRICE SYSTEM (1921).

254. A. HUXLEY, BRAVE NEW WORLD (1932). *See* A. HUXLEY, BRAVE NEW WORLD REVISITED (1958).

255. Fiss, *Objectivity and Interpretation,* 34 STAN. L. REV. 739, 740 (1982).

social existence and the nature of public life in America; and it demeans our lives."[256] That is some charge. Were it accurate and valid, it would deal a telling, even mortal, blow to much of what I have said in this essay. But it is neither accurate nor valid: Fiss is simply wrong. His is a variation on the theme struck by Professor Wechsler's call for "neutral principles."[257] Fiss thinks that adjudication is "interpretation" and that interpretation is neither wholly discretionary nor wholly mechanical. "Viewing adjudication as interpretation helps to stop the slide toward nihilism. It makes law possible."[258] Stopping the new nihilism, he thinks, will help to preserve the fundamental public values of our society. Fiss doesn't like Justice William O. Douglas, but thinks that Chief Justice Earl Warren was a "great judge."[259]

What is one to make of such statements? First, Professor Fiss seems to have a rather odd conception of politics. Second, he seems to deny, but does not actually do so expressly, that the Supreme Court is a political body. This is not the place to discuss his views further; they are mentioned only to indicate that a learned professor at an elite law school (Yale) thinks that exorcism of the devil of "politics" will usher in a terrestrial Nirvana, at least insofar as his ideal of "adjudication" is the sovereign talisman for entry into that state of affairs. Perhaps it would take a Voltaire or a Swift or possibly a Mencken to show the absurdity of Fissian jurisprudence. My talents are only up to the assertion, which surely cannot be gainsaid, that it is one thing to describe the "is"—which I have sought to do in this essay, and quite another to project the "ought"—which Professor Fiss attempts to do. Fiss, of course, has a full first amendment right to publish anything he pleases; but he ought to remember that the amendment merely protects expression and does not require that it be accurate. His is not, as Paul Brest has pointed out.[260]

My final point about societal corporatism is that education generally, and universities particularly, are not only public (governmental)

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256. *Id.* at 763.

257. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

258. Fiss, *supra* note 255, at 750.

259. *Id.* at 758. Fiss's definition of a "great judge" seems to be a warmed-over version of Wechsler's verbally muddled formulation. It is a striking example of the poverty of adequate intellectual activity about judicial review that Wechsler's demand can have such currency.

260. Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982). *See also* Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981). Brest notes that "[i]t is time for those of us who do constitutional law to move on." *Id.* at 142.

A contrary view, badly mistaken in my judgment, is Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 WAYNE L. REV. 1 (1981), although Professor Grano does admit that the future should be permitted "to govern itself." *Id.* at 75.

functions but are closely tied in with the groups of society, particularly the corporations. Rather than being disinterested centers of learning, universities all too often exemplify what Julien Benda called, in his classic *La Trahison des Clercs*—"The Treason of the Intellectuals."[261] The word *treason* does not, in Benda's book, mean subversion against the State. Quite the contrary, he laments the adherence of intellectuals ("les clercs") to the ideas of nationalism and to the centers of power generally. "Brain power," says D. N. Chorafas, "is the key to the future."[262] And so it is.

Today's intellectuals are apolitical only in the sense that lawyers are: They will, and do, readily sell their talents to the highest bidder. In recent decades, Peter F. Drucker tells us, knowledge "has become the central capital, the cost center, and the crucial resource of the economy."[263] A knowledge explosion is indeed taking place. However, the holders of knowledge, far from being dispassionate observers dedicated to the pursuit of truth, generally are beholden to those who exercise real power in the nation. Says Professor Victor C. Ferkiss: "The class system of the industrial era remains dominant. The fundamental fact is that legal and political considerations ensure that the technical elite remains secondary to the business elite."[264] It should not be forgotten that, in his famous farewell address warning about the dangers of the "military-industrial complex," President Dwight D. Eisenhower coupled intellectuals into that complex. The classic example of *la trahison des clercs* in modern times is the way in which brilliant scientists and engineers bent their talents to producing not only an atomic bomb but also a thermonuclear bomb.[265] The process continues: "Many industrial social scientists have put themselves on auction. The power elites of America, especially the industrial elite, have bought their services."[266] And it was "the best and the brightest," to use David Halberstam's mordant label,[267] who were largely responsible for getting the United States mired down in the Indo-Chinese "war"—and keeping the nation there long after any possible reason for remaining had vanished. We like to think that universities are centers for the disinterested pursuit of truth. But that is not so: They are service stations for the institutions of American corporatism.

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261. J. BENDA, THE TREASON OF THE INTELLECTUALS (1927) (R. Adlington trans. 1969).

262. D. CHORAFAS, THE KNOWLEDGE REVOLUTION 13 (1968).

263. P. DRUCKER, THE AGE OF DISCONTINUITY xi (1969).

264. V. FERKISS, TECHNOLOGICAL MAN: THE MYTH AND THE REALITY 140 (1969) (footnote omitted).

265. *See* J. SCHELL, THE FATE OF THE EARTH (1982); S. ZUCKERMAN, NUCLEAR ILLUSION AND REALITY (1982).

266. M. BARITZ, *supra* note 250, at 209.

267. D. HALBERSTAM, THE BEST AND THE BRIGHTEST (1972).

V. CONCLUSION

There is little to be added to what has been said above. I have tried to indicate that analysis and criticism of judicial review should focus upon all who wield significant power within the American polity, as well as what the Supreme Court has done. Perhaps the late Professor Robert McCloskey had something like that in mind when he maintained:

> American constitutional history has been in large part a spasmodic running debate over the behavior of the Supreme Court, but in a hundred seventy years we have made curiously little progress toward establishing the terms of this war of words, much less toward achieving concord. . . . [T]hese recurring constitutional debates resemble an endless series of rematches between two club-boxers who have long since stopped developing their crafts autonomously and have nothing further to learn from each other. The same generalizations are launched from either side, to be met by the same evasions and parries. Familiar old ambiguities fog the controversy, and the contestants flounder among them for a while until history calls a close and it is time to retire from the arena and await the next installment. In the exchange of assertions and counter-assertions no one can be said to have won a decision on the merits, for small attempt has been made to arrive at an understanding of what the merits are.[268]

It will be difficult to shift the nature of the "spasmodic running debate." There is little evidence that McCloskey's counsel is being followed. At a time when the central institutions of normative constitutionalism are under severe and sustained attack, the response, thus far at least, is not up to the mark. Professor Mark Tushnet asserts that legal scholarship has "an intellectual marginality" brought on by "the pressures of professional education."[269] Whether Tushnet is accurate in that assertion I do not say. Surely, however, there is a need for looking at more than the Supreme Court and its opinions when one considers "the" Constitution of the United States.[270]

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268. M. PERRY, *supra* note 1, at 8 (quoting R. MCCLOSKEY, THE MODERN SUPREME COURT 290-91 (1972) (footnote omitted).

269. Tushnet, *Legal Scholarship: Its Cause and Cure*, 90 YALE L.J. 1205, 1205-06 (1981).

270. I realize that I have larded this preliminary foray into a definition of "the" Constitution with far too many (some might say: too few) footnotes. For that, I apologize. My excuses, such as they are, include: (a) in many respects, this is a work in synthesis, and a decent respect for the tolerance of readers leads me to list the references I have consulted; (b) law review editors seem to like lots of footnotes, perhaps on the theory that there is a correlation between footnotes in plethoric quantity and "sound" scholarship or profundity. That there is no such correlation is self evident. Numerous footnotes may also be an indication of a lack of assurance or confidence in one's idea. In that connection, it is instructive to compare today's scholarly output with such writers as Locke, Hume, Hobbes, Burke, Machiavelli, Plato, Aristotle, among those long dead,

and Isaiah Berlin, among the living; all of those listed are relevant to constitutionalism in America. Law reviews have become examples of an inability to discard much research. That, in itself, is not so bad; after all, one can skim over the text of what is published there, and simply refuse to read the footnotes. But since judges now routinely select law review editors as clerks, and since the judges either want to make their opinions appear to be "scholarly" or kindly include, in their opinions, chunks of the memoranda clerks grind out, or both, then those who do constitutional law—and, indeed, law itself—must face a blizzard of footnotes larding judicial opinions. That, I suggest, is simply too much. It is high time that what is considered to be scholarship be re-examined. I hasten to add that I do not expect that to be done.