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Arthur S. Miller

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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.

—Arthur Bentley[1]

Arthur Bentley wrote in 1908. Yet his insights lay fallow until Professor David Truman rediscovered them in 1951.[2] Since then the group basis of politics has been the accepted wisdom among students of the political process. Not so, however, with lawyers, who with invincible parochialism still insist that the corporation is a person because the Supreme Court said so in 1886,[3] and who consequently refuse to recognize that the corporation is a collectivity—a political organization—and should be dealt with as such.[4] Economists, too, have not produced a theory of conscious economic cooperation. Irrespective of each discipline's degree of oblivion to the realities of the world, questions of politics, law, and economics eventually or ultimately become questions of constitutional theory. The need to constitutionalize the corporation is the theme of this essay. Corporate governance, in brief, is a problem for the constitutional lawyer. Not solely, for the corpus of corporate law (including administrative law) merits continuing attention, but ulti-

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1. A. BENTLEY, THE PROCESS OF GOVERNMENT 268 (1908).

2. *See* D. TRUMAN, THE GOVERNMENTAL PROCESS (1951). Seventeen years earlier, Karl Llewellyn made a passing reference to Bentley's ideas. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 1 n.1 (1934).

3. Santa Clara County v. Southern Pac. R.R., 118 U.S. 394, 396 (1886). *See* B. TWISS, LAWYERS AND THE CONSTITUTION 94 (1942). Corporate personality is, of course, a legal fiction, but it is an enduring one that has had significant consequences. *See* C. STONE, WHERE THE LAW ENDS 2 (1975).

4. Few have done so. One who did early on was the late Alexander Pekelis. *See* A. PEKELIS, LAW AND SOCIAL ACTION 91-127 (M. Konvitz ed. 1950). For a more recent treatment, see A. MILLER, THE MODERN CORPORATE STATE 188-244 (1976).

mately the problem of the corporation and its place in the social order is one of the political economy of American constitutionalism.

As used in this essay, "constitutionalize" has two meanings. Although written one hundred and ninety years ago, the words of the Constitution must find definition and legitimacy in the contemporary world. Constitutional law has largely been concerned with adapting the Constitution to changing social, political, and economic realities and to our changing notions of justice. The changing *zeitgeist* is frequently reflected in the actions of the majoritarian branches of government. When the Supreme Court sanctions congressional and executive actions, the spirit of those governmental actions is constitutionalized, and it infuses the words of the Constitution with new life. The term is also used to signify imposing these evolving constitutional norms on organizations that have become de facto governments—the giant corporation being the principal, but by no means only, exemplar. This second meaning is the principal focus of this essay.

DEFINING THE CORPORATION

The Corporation as Person

Americans are ambivalent about corporations. They want the material benefits of corporate enterprises, but they have an inchoate fear of big business. This is one of the "biformities" of what Professor Michael Kammen calls our "contrapuntal civilization."[5] The biformity has produced a number of incongruities. First, the charade of the antitrust laws is permitted, laws whose control of business enterprise is more ostensible than real.[6] Next, business can call itself private, even though it has been known for decades that there is nothing except share ownership, but not control, that is truly private about the giant corporation. Third, the law defines corporations as constitutional persons,[7] which has meant that companies get the benefits of the Constitution without the concomitant duties. Finally, corporations are concentrations of economic power that are permitted to wield an inordinate amount of political

5. M. KAMMEN, PEOPLE OF PARADOX 116 (1972).

6. For an early discussion of this point, see T. ARNOLD, THE FOLKLORE OF CAPITALISM (1937). Nothing that has happened since Arnold wrote dilutes his incisive observations. The antitrust laws are more hortatory than interdictory. The current federal antitrust action against IBM is illustrative. United States v. International Business Machine, Inc., No. Civ. 69-200 (S.D.N.Y., filed Jan. 17, 1969).

7. *See* Santa Clara County v. Southern Pac. R.R., 118 U.S. 394, 396 (1886).

power internally within the corporate community and externally upon society at large.[8]

Chief Justice Marshall's well-known definition of a corporation provides a useful starting place for discussing the constitutional problems of corporate governance.

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and . . . individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies . . . of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being.[9]

When Chief Justice Marshall described that "mere creature of law" in 1819, the corporation was by modern standards a tiny, localized company. Relatively few corporations existed, and, as Chief Justice Marshall said, they did so to promote a "particular object." Sixteen decades later, corporations are the characteristic form of doing business. We live in a corporate society[10] where corporations have not only waxed so large and strong that they straddle

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8. The question of whether to call a corporation a constitutional person goes to the legitimacy of the corporate enterprise in a polity that calls itself democratic. Corporations are legitimate in the strictly legal sense, simply because the Supreme Court has accorded them that status. But there are other dimensions to legitimacy, as Professor Douglas Sturm has observed:

> Legitimation is first of all a strictly legal process; but more profoundly it is a political process of ascertaining the acceptance, criticism and direction of the people; and finally it is a religious and philosophical process of subjecting the economic association to the tests of some vision of the nature and destiny of man within the context of reality as a whole.

Sturm, *Corporations, Constitutions and Covenants*, 41 J. AM. ACADEMY RELIGION 331, 353 (1973).

9. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819).

10. Gossett, *Corporate Citizenship*, in 2 THE RANDOLPH TUCKER LECTURES 159, 177 (1957).

the globe, but with the death of the ultra vires doctrine,[11] they no longer are confined to particular objects. A new constitutional world has been created;[12] and the puerility of allowing the corporation to be a constitutional person without accompanying duties should be obvious even to lawyers.

Efforts to make the corporation a person, and therefore capable of triggering the due process and equal protection clauses of the fourteenth amendment, began within a few years of the amendment's ratification. Those first efforts were still-born,[13] but the Supreme Court suddenly reversed itself in *Santa Clara County v. Southern Pacific Railroad*[14] when it casually and without hearing argument held that a corporation was indeed a person within the terms of the first section of the fourteenth amendment.[15]

While the corporation has been a person under the Constitution for less than a century, personhood has meant much to that disembodied entity. Witness the 1978 decision of the Supreme Court in *First National Bank v. Bellotti*,[16] where the Court held that a corporation has a first amendment right to speak even if the issues do not materially affect its business.[17] This means that the enormous assets of corporations[18] can be employed anywhere in the political process on any issue, irrespective of the issue's relevance to the company's business. Thus, the limitations set out by Chief Justice Marshall in 1819 are no longer the law. To be sure, as Chief Justice Burger's concurrence in *Bellotti* points out, this merely gives all corporations the same first amendment rights as the media;[19] but it leaves unanswered, save in some conclusory assertions by Justice Powell,[20] the question of how to balance the enormous economic power of an artificial person with the comparatively meager resources of a natural person.[21] Even Justice

11. *See* D. VAGTS, BASIC CORPORATION LAW 169-70 (1973).

12. *See* A. MILLER, *supra* note 4, at 86-112.

13. *See* Munn v. Illinois, 94 U.S. 113 (1877); Slaughter-House Cases, 83 U.S. 36 (1873).

14. 118 U.S. 394 (1886).

15. *Id.* at 396. The Supreme Court moves in wondrous ways its miracles to perform. One of the most important decisions in its history was made outside the parameters of the adversary system.

16. 435 U.S. 765 (1978).

17. *Id.* at 783-84.

18. In 1979, AT&T had $100 billion in assets.

19. 435 U.S. at 796-802 (Burger, C.J., concurring).

20. *Id.* at 788-92.

21. Justice Powell, writing for the Court, pointed out that "corporate advertising may influence the outcome of [a] vote; this would be its purpose. But the fact

Rehnquist, not known for his aversion to business, could not stomach the majority's conclusions.[22] In his dissent he echoed[23] Justices Black[24] and Douglas,[25] who on separate occasions maintained that the 1886 bit of judicial lawmaking should be reexamined and overruled.

Such aberrant views are not likely to be followed, however, and the corporation will probably remain a constitutional person.[26] Therefore, while depersonalizing the corporation may be desirable, the law must move in other directions if it is going to deal in a meaningful way with the problems posed by large corporations. If the corporation is a person, then it must shoulder burdens analogous to those borne by natural persons. The ultimate duty the State can impose upon a natural person is to make him defend and fight, and perhaps die, for the corporate entity called the nation.[27] But there is more. Despite the seeming absolutes of the thirteenth amendment and the due process clauses, a natural person can not only be drafted into military service,[28] he or she can also be required to work on public roads without compensation[29] and forced to serve on juries.[30] In addition, contracts of seamen, which fall under the scope of "services which have from time immemorial been treated as exceptional," may be enforced even though they require the surrender of a certain amount of personal liberty.[31] These duties reached their zenith—or rather their nadir—when Justice Black held in *Korematsu v. United States*[32] that citizenship involved duties as well as rights.[33] Therefore, native-born Ameri-

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that advocacy may persuade the electorate is hardly a reason to suppress it . . . ." *Id.* at 790. Justice Powell believed that a corporation's ability to influence a vote is offset by the electorate's ability to judge a viewpoint by identifying its source and weighing its credibility. *Id.* at 791-92.

22. *Id.* at 828 (Rehnquist, J., dissenting).

23. 435 U.S. at 822 (Rehnquist, J., dissenting). The Court is exploring business' right to free speech this term. *See* Central Hudson Gas & Elec. Corp. v. New York Pub. Serv. Comm'n, No. 79-565 (U.S., filed Oct. 5, 1979); Consolidated Edison Co. v. New York Pub. Serv. Comm'n, No. 79-134 (U.S., filed July 27, 1979).

24. Connecticut Gen'l Life Ins. Co. v. Johnson, 303 U.S. 77, 87 (1937) (Black, J., dissenting).

25. Wheeling Steel Corp. v. Glander, 337 U.S. 562, 576-81 (1949) (Douglas, J., dissenting).

26. But not a citizen, except in diversity cases.

27. *See generally* United States v. O'Brien, 391 U.S. 367 (1968).

28. *See* Selective Draft Law Cases, 245 U.S. 366, 390 (1918).

29. *See* Butler v. Perry, 240 U.S. 328, 332-33 (1916).

30. *See* 28 U.S.C. § 1861 (1976).

31. *See* Robertson v. Baldwin, 165 U.S. 275, 282 (1897).

32. 323 U.S. 214 (1944).

33. *Id.* at 219.

can citizens of Japanese descent were not protected from government efforts to place them in concentration camps, even though their only "crime" was having Japanese ancestors.

Since the Constitution does not impose any such duties on corporations, the artificial person, as Orwell might have said,[34] is more equal than the natural person. Whatever limitations corporations suffer come from statutes and the regulatory process. Moreover, despite plaintive cries from the business community and its minions in academia, even these limitations are more ostensible than real. The enormous influence and control that corporations have over the political process is one of the truisms of the day, and it has debilitated the pluralism of our political order.[35] How can a nominally democratic political system tolerate an obviously despotic economic system? Corporations are incompatible with "democratic theory and vision":[36] They are not private phenomena, and it can no longer be argued that they do not have a decisive impact on the entire nation. Corporations, therefore, pose constitutional problems of the first magnitude.

The Corporation as Community

Far from being a "thing" or an "it," the corporation is more nearly a method or process. It is a type of private collectivism, a congery of disparate groups cooperatively banded together.[37] At times, the cooperation is antagonistic, at least outwardly so, as when union officers confront corporate managers at the bargaining table. But cooperation it is; and it is, accordingly, fruitful to discuss at least giant firms, if not all companies, as communities. They are, as Peter Drucker maintained in 1953, the local self-governments of modern society; "the logical successor to manor, village and town."[38] Corporations are a new form of social order; loyalties and rewards, the very stuff of citizenship, derive as much from the enterprise as from the nation-state. Law and other disciplines have all but ignored these phenomena, but as corporations grow larger there can be little doubt that they will indeed take over more of the sovereign's role. A major transfer of power is occurring similar

34. *See* G. ORWELL, ANIMAL FARM 112 (1946).

35. *See, e.g.*, H. KARIEL, THE DECLINE OF AMERICAN PLURALISM 30-31 (1961); T. LOWI, THE END OF LIBERALISM 55 (1969).

36. C. LINDBLOM, POLITICS AND MARKETS 356 (1977).

37. *See* A. MILLER, *supra* note 4, at 154-61.

38. Drucker, *The Meaning of Mass Production*, 57 COMMONWEAL 547, 549 (1953).

to the rise of the nation-state itself out of the ruins of feudalism. A new feudalism has arisen consisting of the "supercorporations." The feudal barons are not the owners of the corporations, since ownership was separated from control long ago,[39] but the corporate managers. Government, including the Federal Government, does not really control the corporate manager; rather, governmental officers cooperate with them. The two groups—corporate manager and governmental officer—are in a symbiotic relationship, a condition of syzygy. The name for this is the "corporate State, American style."[40]

Only inferentially does American constitutional law recognize this development. Although it is true that a native form of corporatism was enacted in the National Industrial Recovery Act of 1933,[41] it was soon invalidated by a Supreme Court that found no warrant for it in the Constitution.[42] Soon thereafter, however, first Congress[43] and then the Court, by sanctioning the legislative action, constitutionalized private collectivism and in effect incorporated it into the governing structure. The key case is *NLRB v. Jones & Laughlin Steel Corp.*,[44] which rewrote the commerce clause to accommodate the National Labor Relations Act of 1935.[45] In political-economy terms, the meaning is clear: A system of political pluralism was read into the Constitution, and labor unions could operate as a countervailing force to the power of the corporations. The assumption was that the bargains between unions and corporations would inure to the public good, a type of Adam Smith's "invisible hand" theory writ large. As is now becoming evident, this assumption is valid only during periods of sustained economic growth—precisely what occurred in the post-1937 period and, equally precisely, what is *not* happening today.

What does, or what should, the Constitution say about corporations and other so-called private groups within the nation, such as labor unions? My proposal, labelled "modest" because it could

39. *See generally* A. BERLE & G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

40. *See* A. MILLER, *supra* note 4, *passim*.

41. National Industrial Recovery Act of 1933, Pub. L. No. 73-67, 48 Stat. 195.

42. Not because it established a corporate state, but on delegation of powers grounds. *See* Schechter Poultry Corp. v. United States, 295 U.S. 495, 539 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 414-15 (1935).

43. National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified at 29 U.S.C. §§ 151-169 (1976)).

44. 301 U.S. 1 (1937).

45. Pub. L. No. 74-198, 49 Stat. 449 (codified at 29 U.S.C. §§ 151-169 (1976)).

go much further, is to make the corporation amenable to the constitutional commands of legally concretized decency that are the essence of the due process and equal protection clauses.

INTERNAL GOVERNANCE

Turning first to the problem of the internal governance of the corporate community, the question is how the enormous power of corporate concentrates can be made more tolerable and decent insofar as it touches small satellite corporations and natural persons affected by its behavior.

The threshold problem, in orthodox constitutional terms, is how to bring the corporation within the ambit of state action under the fourteenth amendment. Since the *Civil Rights Cases*[46] it has been popular wisdom that the terms of that amendment run against governments only. But what is a government? The Supreme Court has included within the concept of state action those private organizations that have a "symbiotic relationship" with government as well as those that have assumed governmental functions. In the *White Primary Cases*,[47] the Court held that the Democratic Party is sufficiently like a government to have the Constitution brought to bear against it.[48] In *Burton v. Wilmington Parking Authority*,[49] the Court established the "symbiotic relationship" test in holding that a private restaurant's refusal to serve a black man was state action since the restaurant was located in a state facility.[50] While some of the "sit-in" cases[51] came close to eliminating the state action requirement entirely, all of those cases should be read in light of the special civil rights circumstances in which they arose.

Holodnak v. AVCO Corp.[52] is an extreme example of the growing interrelationship between "private" industry and government. Holodnak was fired from his job because he published an article critical of labor-management relations at AVCO.[53] The case first went to arbitration, where the arbitrator found just cause for the discharge.[54] Holodnak then brought suit in federal court,

46. 109 U.S. 3 (1883).
47. Smith v. Allwright, 321 U.S. 649 (1944).
48. *Id.* at 664-65.
49. 365 U.S. 715 (1961).
50. *Id.* at 724.
51. *E.g.*, Bell v. Maryland, 378 U.S. 226 (1964).
52. 514 F.2d 285 (2d Cir. 1975).
53. 381 F. Supp. 191, 195 (D. Conn. 1974), *aff'd*, 514 F.2d 285 (2d Cir. 1975).
54. *Id.* at 197.

alleging that the discharge violated his first and fourteenth amendment rights of free speech and due process. He won in both the district court[55] and the court of appeals.[56] The Second Circuit based its finding of state action on the existence of a symbiotic relationship between AVCO and the federal government. The federal government owned the company's land, buildings, and machinery; and AVCO was not required to pay any rent. Moreover, "by far the large proportion of the work done at the plant at the time of Holodnak's discharge was performed under contract to the Department of Defense."[57] The federal government, therefore, had gone beyond "mere regulation of private conduct" and had become "in effect a partner or joint venturer in the enterprise."[58]

Increasingly, groups have found it useful to merge their power with the state's in an interlocking series of relationships that allow groups not only to retain their economic sovereignty, but also to call upon the political sovereign for aid and assistance when needed.[59] The corporation and the state work in harmony in more instances than they conflict. Each needs and uses the other.[60] Thus a growing symbiotic relationship is emerging between private organizations and government, and it takes only a small jump for a court to move from *Burton* and *Holodnak* to the supercorporations and other pluralistic social groups of our corporate society. As Chief Justice Vinson remarked in *American Communication Association v. Douds*,[61] "[P]ower is never without responsibility. And when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes *closely akin, in some respects, to its exercise by Government itself*."[62]

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55. *Id.* at 207.

56. 514 F.2d at 293.

57. *Id.* at 289.

58. *Id.* at 288 (distinguishing Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974)).

59. A. MILLER, *supra* note 4, at 160. Witness the Chrysler Corporation's recent success in securing federal financial assistance. Chrysler Corporation Loan Guarantee Act of 1979, Pub. L. No. 96-185, 93 Stat. 1324 (to be codified in 15 U.S.C. §§ 1861-1901).

60. A. MILLER, *supra* note 4, at 161.

61. 339 U.S. 382 (1950).

62. Id. at 401 (emphasis added). Although the Court has recently restricted the public-function test, *see, e.g.*, Hudgens v. NLRB, 424 U.S. 507 (1976); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352-54 (1974); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972), there are no solid reasons for not making the supercorporations accountable to the Constitution.

The problem is one of accountability, of having to answer in another place and to give reasons for one's actions.[63] People who work for corporations and those who deal with them as either suppliers or dealers—in sum, all members of the "corporate community"[64]—should be able to trigger the Constitution and make the internal political order of the corporation as accountable as the political order of public government. Once the actual governing power of corporations is acknowledged, the jump can be made without difficulty.

When that development is made, or, more accurately if made, it will subject corporations to a type of private regulation. This has definite benefits. First, it can be accomplished by using present-day judicial machinery. No new bureaucracy would have to be established, as would be necessary should federal chartering become a reality. Second, because judges have life tenure they are far less likely than administrative agencies to become captives of the regulated, even though these judges are almost invariably drawn from the establishment. Third, the true nature of our constitutional order—that of a corporate State—could have its basic theory worked out in a series of decisions. Since the Supreme Court acts as an authoritative faculty of political theory, particularly in its constitutional decisions, it is—barring an unlikely constitutional convention—the only official body that can through time develop the politico-legal theory of corporatism.[65] And finally, as Professor Leicester Webb has pointed out,

> [s]ince there is as yet no comprehensive and accepted theory of group-State relationships to guide legislators and since the association, individual and State are in constantly changing equilibrium, it may be that the harmonizing of these three elements, which Acton regards as "the true aim of politics," is best carried out through the flexible processes of a widely-competent judiciary; and it is partly for this reason that the pluralistic character of the State appears more securely established in America than in any other country.[66]

In sum, a major segment of corporate governance involves the application of constitutional norms to business. In suggesting this I recognize that political government itself is far from pristine insofar

63. *See generally* M. MINTZ & J. COHEN, AMERICA, INC. (1971).

64. *See* A. MILLER, *supra* note 4, at 27-29. *See also* Gossett, *supra* note 10.

65. My book now in progress, tentatively entitled "Oracle in the Marble Palace: Politics and the Supreme Court," develops this idea in detail.

66. L. WEBB, LEGAL PERSONALITY AND POLITICAL PLURALISM 194 (1958).

as arbitrariness is concerned. The recent civil rights explosion in constitutional litigation is impressive testimony that the Augean Stables of governmental indecency are far from clean. That long overdue movement should be neither slowed nor halted. My proposal is that it should be expanded to private government, the other and equally important segment of the social order.

EXTERNAL MATTERS

The powerlessness of the individual in the age of public and private bureaucracy requires no documentation. It is a theme that runs through both scholarly literature[67] and contemporary fiction.[68] Leicester Webb's suggestion that a widely competent judiciary could harmonize the relationships between individual, group, and State[69] has thus far only managed to harmonize the relationship of group to State. The individual remains submerged in a congery of groups. It was suggested above that one way to alleviate this rapidly worsening situation would be to make the corporation subject to constitutional norms. That is not a panacea, however; it is merely one step among many that could be taken.

When one moves to questions about a corporation's relations with those outside the corporate community, the corporate governance problems are vastly greater. In the final analysis, the corporation's external affairs are a problem in political, and therefore constitutional, theory: How can the pluralistic social groups once extolled as a highly desirable counter to the rise of the State be controlled so that they take the public or national interest into consideration when making important decisions? The hope of pluralism has been well expressed by Professor Frank Tannenbaum:

> The true well-being of a society . . . lies in diversity rather than in identity of interests. The greater the variety of groups, the richer is the community and the more certain of continuous harmony. The harmony best suited to a society is one which comes from many-sided inner tensions, strains, conflicts, and disagreements. Where disagreement is universal, men can agree only on particulars, and where men can really quarrel only about particulars they have too many things in common to tear the community apart. Divergence of interests within the community . . . is the condition of healthy controversy and social peace.[70]

67. *E.g.*, Gramm, *Industrial Capitalism and the Breakdown of the Liberal Rule of Law*, 7 J. ECON. ISSUES 577 (1973).

68. *E.g.*, J. HELLER, CATCH-22 (1955); F. KAFKA, DER PROZESS (1937).

69. *See* text accompanying note 66 *supra*.

70. F. TANNENBAUM, THE BALANCE OF POWER IN SOCIETY 25 (1969).

Well and good, except that the hope has not been realized in practice. Groups abound and there are conflicts, but what emerges out of those tussles in the political arena tend to be either the dominance of one group[71] or watered-down compromises that represent the common denominator among affected interest groups. Public policy—statutes, administrative rules, and some court decisions —generally tends to reflect those compromises. In net: "Groups become virtuous; they must be accommodated, not regulated."[72] The essential problem is not the consensus of compromise, but the failure of those who control pluralistic social groups, including corporations, to take into account the overarching public or national interest. Pluralism fails precisely because the oligarchs of the groups do not do this.[73]

Is there a way out? Surely it is not by the nation-state ceding authority and power to the corporation, as Tannenbaum,[74] Berle,[75] and others have suggested. Those who control corporations work for the good of the enterprise and have little interest in or regard for the general good. The same may be said for other ostensibly "private" groups, as Professor Grant McConnell has shown.[76] Not even the President can do much more than bargain with interest groups and their surrogates in Congress and the bureaucracy, even though as the sole officer elected by all of the people he theoretically has the power to transcend the lowest common denominator. Those bargains work tolerably well during periods of sustained economic growth or all-out national emergency. Those social conditions, however, do not now exist. The bargains the President strikes only fortuitously coincide with an overarching public interest.[77] It is only by equating the public interest with a procedural concept, and saying that whatever government does is by definition in the public interest, can it be maintained that pluralism works.[78]

Obviously, something more is needed if what Sir Henry

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71. One example is the "seven sisters" that dominate the oil industry. *See* A. SAMPSON, THE SEVEN SISTERS (1975).

72. T. LOWI, *supra* note 35, at 48.

73. All groups are eventually run by oligarchs, falling prey to Robert Michels' "iron law of oligarchy." *See* R. MICHELS, POLITICAL PARTIES 342 (1st ed. 1911).

74. F. TANNENBAUM, *supra* note 70, at 63.

75. A. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION 175 (1954).

76. G. MCCONNELL, PRIVATE POWER AND AMERICAN DEMOCRACY (1966).

77. *See generally* T. CRONIN, THE STATE OF THE PRESIDENCY (1975). *But see* R. PIOUS, THE AMERICAN PRESIDENCY (1979).

78. *See* A. MILLER, SOCIAL CHANGE AND FUNDAMENTAL LAW 90-95, 92 & n.161 (1979).

Maine called "the necessary and natural duties" of government are to be accomplished in any reasonably adequate manner.[79] How can those hard decisions that cut against the interests of important interest groups be made? How can divergent parochial interests be translated into the national interest? Would further constitutionalization of the corporation aid in that preeminent goal?

In answering these questions some recent proposals by Professor Christopher Stone merit serious attention.[80] Writing in 1976, he summarily—and rightly in my judgment—dismissed the notion of federal incorporation as little more than substituting a bureaucrat in Washington for one in Wilmington.[81] Stone's sweeping proposals are aimed at locating "the critical points of organizational breakdown" and reaching "into the company's inner world to demand the necessary changes directly."[82] Included are:[83] Establishment of minimum qualifications for holding corporate office, creation of new corporate offices, definition of role functions, creation of "limited public directors," imposition of "socially desirable configurations" of information flow within the organization, and requirements that companies "make and publish 'findings' prior to action that may have a significant impact on the environment, worker safety, or public health." Stone maintains that these can be done by innovative judges within the existing corpus of corporation law.[84]

Of particular importance is his final suggestion about the need for "findings." For me, this is a call for corporate managers to publish social impact statements before important decisions are made. Environmental impact statements are already mandated by federal law.[85] Stone is saying that the EIS should become the SIS. Indeed it should. And indeed it could be, given the necessary push by lawyers and a concomitant wisdom by judges.

One way to do that would be to constitutionalize the corporation. It is possible to find an emerging notion of constitutional duty in recent constitutional law decisions.[86] If this nascent develop-

79. H. MAINE, POPULAR GOVERNMENT 60-61 (1885).

80. Stone, *Stalking the Wild Corporation*, WORKING PAPERS FOR A NEW SOCIETY, Spring 1976, at 17.

81. *Id.* at 20.

82. *Id.* at 87.

83. *Id.* at 87-89.

84. *Id.* at 92.

85. National Environmental Policy Act of 1969, § 102, 42 U.S.C. § 4332 (1976).

86. *See* A. MILLER, *supra* note 78, at 95-178. The latest manifestation of this development came on July 2, 1979, when the Supreme Court upheld mandatory

ment is expanded to include private governments, one can easily see how judges could at times not only say what corporations can or cannot do, but also what they *must* do. If Stone is correct, as I think he is, then the requirement of published findings prior to significant corporate action could well move the corporation and other social groups toward taking the public or national interest into account.

As Eugen Ehrlich has asserted, the view of any statutory construction or rule of law as a closed book "never was anything but purely theoretical pedantry. Juristic science has never been able to offer prolonged resistance to great and justifiable social or economic needs . . . ."[87] So it is with constitutions and the development of constitutional law: Law is an open-ended process, not a closed body of logically consistent concepts. The development of American constitutional law must keep abreast of fast-moving socio-economic changes. One of those changes is the rise of the corporation. Constitutional law has not yet developed to meet the needs created by this new condition. When it does so, as it must, it will constitutionalize the corporation—both in its internal order and its external importance.

In Brief Summation

The problem of governance is two-fold: The urgent tasks of government must be performed, but at the least possible social cost. A generation ago Professor Howard Bowen called for social audits of business enterprise[88]—a call that has thus far gone unheeded. My point in this brief essay is to suggest that such an audit could be the product of a case-by-case application of constitutional norms to the business enterprise. We may then achieve the goal Alfred North Whitehead once called for: "A great society is a society in which its men of business think greatly of their functions."[89] The United States is a business-oriented society—a corporate society. The time has come for the Supreme Court to help businessmen "think greatly of their functions."

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busing to achieve racial integration in public schools. *See* Dayton Bd. of Educ. v. Brinkman, 99 S. Ct. 2971 (1979); Columbus Bd. of Educ. v. Penick, 99 S. Ct. 2941 (1979).

87. E. Ehrlich, Fundamental Principles of the Sociology of Law 430 (Moll trans. 1936).

88. H. Bowen, Social Responsibilities of the Businessman 155 (1953).

89. Whitehead, *Introduction* to W. Donham, Business Adrift at xxvii (1931).