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TECHNOLOGY,
THE EVOLUTION OF THE TRANSNATIONAL CORPORATION,
AND THE NATION-STATE: A Speculative Essay

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THE TRANSNATIONAL CORPORATION, AND THE NATION-STATE:

A Speculative Essay

by

Arthur Selwyn Miller
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ABOUT THE AUTHOR

Arthur Selwyn Miller is currently Professor of Law at the National Law Center of The George Washington University, Washington, D. C. He studied at Willamette University (A.B.), Stanford University Law School (LL.B.), and Yale University (J.S.D.). In 1957-58 Professor Miller was a Fellow of the John Simon Guggenheim Foundation, and in 1960-61 he was a Law Faculty Fellow of the Ford Foundation.

Professor Miller has written extensively in the areas of multinational corporate activities, of the corporation in American constitutional theory, and of the relationship of technology to constitutional institutions. These articles have appeared in numerous law journals and in periodicals such as Saturday Review, The Nation, Bulletin of the Atomic Scientists, and the New Republic. He is the author of a book, The Supreme Court and American Capitalism (Free Press, 1968), and is at work on a new book on the constitutional theory of the place of giant modern business corporations, both domestically and internationally.

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By Arthur Selwyn Miller*

In the Middle Ages, politicians had to pay heed to the Church. With the rise of the nation-state, all decisions became questions of power and national sovereignty. Now the scientists are saying that man will survive only if decisions are made in the light of certain scientific facts.

--London Observer, 11 June 1972,
p. 36 (discussing the United
Nation's environmental conference
at Stockholm).

We are on the edge of a new Renaissance: a new Business Age . . . and the corporation is the rolling force. . . . Business corporations probably will influence our lives more than government will.

--David Secunda, Vice President,
American Management Ass'n, quoted
in Industry Week, 4 January 1971,
p. 31.

I. INTRODUCTION

If, as Ernest Nagel has forcefully argued,¹ there is no simple and at the same time adequate explanation of any social phenomenon, one must approach the subject-matter of this essay with deliberate

*Professor of Law, the National Law Center, George Washington University.

¹E. Nagel, The Structure of Science: Problems in the Logic of Scientific Explanation (1961)

caution and a due wariness about coming to firm conclusions. For it deals with two exceedingly complex matters: first, the causal connection, if any, between technology and the rise of giant trans-national or multinational corporations, and second, the impact that that development is having on the political order called the nation-state. The paper builds on previous studies by the same author dealing with business gigantism and its implications for the socio-political order; those studies were mainly concerned with domestic corporations; the present essay moves the discussion to the world arena.²

In main thrust, it is suggested that modern technology permits but does not require multinational corporate gigantism, the units of which increasingly find the nation-state inadequate for their operations (perhaps irrelevant or a nuisance would be a better way of characterizing them), with the ever more obvious consequence of a marked and growing impact upon the nation-state. The economic sovereignty of the corporations, that is to say, is now challenging--and altering--political sovereignty. Or as Under-Secretary of State George Ball said in June 1967: ". . . the structure of the multinational corporation is a modern concept, designed to meet the requirements of the modern age; the nation-state is a very old-fashioned idea and badly adapted to serve the needs of our present

²Miller, Toward the "Techno-Corporate" State? An Essay in American Constitutionalism, 14 Vill. L. Rev. 1 (1968); Miller, Corporate Gigantism and "Technological Imperatives," 18 J. Pub. L. 256 (1969); Miller, Legal Foundations of the Corporate State, 6 J. Econ. Issues No. 1, at 59 (1972).

complex world."³ The tensions produced by the "old-fashioned idea" of the nation-state interrelating with the "modern concept" of the multinational corporation, set against the imperatives of technology, are the subject of this paper. In it, no attempt is made to distinguish between "transnational," "multinational," or "international" corporations; the terms are used synonymously, although it should be noted that to date an accepted taxonomy of the larger-than-national corporate entity has not been developed.⁴

Three assumptions underlie this speculative essay. First, the scientific-technological revolution, of which the industrial revolution was merely an early manifestation, is comparable to the agricultural revolution in its impact on human institutions and is the efficient cause of a wholly new societal factor--rapid, even cataclysmic, social change. We are, that is to say, well into a profound alteration of the human condition, from an essentially agriculturally based social structure to one that has science and technology as major, even controlling, factors (and that, to some, sees these impersonal forces in religious terms of a latter-day faith.)⁵ Second, constitutional forms of the political order are always in a state of evolution. They are never static, whether

³Ball, The Promise of the Multinational Corporation, 75 *Fortune* 80 (June 1967). See C. Kindleberger, American Business Abroad, (1969).

⁴See, for example, Note, The Multinational Corporation as a Challenge to the Nation-State, 23 *Vand. L. Rev.* 65 (1969); Perlmutter, The Tortuous Evolution of the Multinational Corporation, 4 *Colum. J. World Bus.* 9 (Jan.-Feb. 1969).

⁵Compare D. Schon, Technology and Change (1967) with E. Schwartz, Overkill (1972).

"written" or "unwritten." As Frederick Jackson Turner, the eminent historian, once said, "Behind institutions, behind constitutional forms and modifications, lie the vital forces that call these organs into life and shape them to meet changing conditions."⁶ (A basic inquiry of this essay is whether technology may be considered to be one of those "vital forces," and if so, the extent to which it is altering the "constitutional form" of the nation-state as a mode of political order.) Third, law and the legal system are also fluid; they are open-ended, always in a process of "becoming." Law, furthermore, is more than the "command of the sovereign"--the Austinian view--but also the "working rules of going concerns" that make up modern society--an Ehrlichian view; in other words, a valid conception of law in the modern era must see it not only as a set of interdictory rules existing in a more-or-less logically consistent edifice of principle and doctrine, but also instrumentally--as a means or technique of achieving desired ends. Furthermore, one must delve beneath the surface to determine, to the maximum extent possible, how humans order their affairs in fact as compared with the black-letter rules. Each assumption will take on added meaning as the ensuing discussion unfolds. I do not intend to "prove" them in the sense of producing empirical data to validate their accuracy; that would take, if indeed it is possible at all, more time and space than the present study allows. They are social phenomena, and as such display inherent complexity.

⁶F. Turner, The Frontier in American History, 2 (1920).

The focus below is essentially one in constitutional law and theory. As such, it encompasses, to the extent possible, relevant insights and data from the social and behavioral sciences. In so doing, choices of course have had to be made from among competing schools of thought in politics and economics, in history and sociology, in political theory and social psychology. There is no reason to justify why certain choices were made, other than to say that on balance each seems preferable.⁷ Finally, since this is a speculative essay, one that seeks to extrapolate from present evidence (often quite scanty in amount) a possible or probable shape of things to come, its conclusions should be considered to be tentative hypotheses rather than existing facts. The trends that are adumbrated possibly will take a presently unforeseeable abrupt turn in a different direction; whether they do depends on social and political imponderables that cannot be pinned down with precision at this time.⁸

Methodologically, this essay is an adaptation of the configurative jurisprudence of Myres S. McDougal, who, with Harold Lasswell, has done more than any other modern legal scholar to develop a new way of thinking

⁷Cf. Miller, The Myth of Neutrality in Legal Research and Writing, 18 Cath. U. L. Rev. 290 (1969) (on the need to disclose value premises from which one proceeds in legal discourse).

⁸If, for example, the gloomy forecasts of the "Club of Rome" prove to be even partially accurate, then many of the assumptions, trends, and doctrines of the present-day political and legal orders will have to be recast. See D. Meadows et al., The Limits of Growth (1972); J. Forrester, World Dynamics (1971).

about law.⁹ In the latter part of the paper, particularly, McDougal's conceptual schema is employed, but in a form that I find more useful. The basic question asked there, set within the social context in which the problem appears, is this: Who makes what decisions, how, with what effects? Focus will be upon the important transnational decisions, who makes them, and their effects; the "how" is left dangling, as being beyond the scope of this inquiry.

II. TECHNOLOGY AND CORPORATE MULTINATIONALISM: IS THERE A CAUSAL CONNECTION?

To pose the question of whether there is a unilinear cause-and-effect relationship between corporate transnationalism and the scientific-technological revolution is to venture into the unruly sea of social causation. That there can be no such simplistic explanation of any social phenomenon should be so self-evident as not to require extended discussion. What can be fruitfully done is to analogize the growth of the multinational enterprise (the "MNE") to the way in which a relative handful of business corporations waxed large within the domestic American economy. One way of developing that analogy is to assess J. K. Galbraith's The New Industrial State,¹⁰ in which he asserts that it is the "imperatives of technology" which have been the most

⁹The McDougal-Lasswell methodology has been outlined in a number of places. See, for example, Lasswell and McDougal, Jurisprudence in Policy-Oriented Perspective, 19 U. Fla. L. Rev. 486 (1966).

¹⁰J. Galbraith, The New Industrial State (rev. ed. 1972).

important cause of business gigantism in the United States, and apply conclusions to the MNEs. Another approach could involve the development of two major trends in the 20th century--on the one hand, the proliferation of agreements between and among nations which evidences a trend toward cooperation¹¹ and, on the other hand, the burgeoning growth of a transnational infrastructure consisting of larger-than-national networks that operate both below and above the visible nation-state controls.¹² The most important, by far, of these actors in the international arena is the multinational business enterprise, of which at least eighty-five each have assets larger than some fifty members of the United Nations. Each inquiry has merit, but only the first will be discussed in this section. The net conclusion, stated now and amplified below, is that the MNEs are made possible by developments in communications and transportation technologies but that there is no inevitability about them. In short, a theory of technological determinism will not suffice to explain the rise of the MNE to prominence.

Galbraith Assessed

In Chapter II of The New Industrial State, which must be considered to be the most popular (even influential) economics text of the modern era, even though it has been severely criticized on several grounds, Professor Galbraith sets forth in mercifully readable prose his

¹¹See J. Hendry, Treaties and Federal Constitutions (1955).

¹²See R. Keohane and H. Nye (eds.), Transnational Relations and World Politics (1972).

explanation of why the supercorporations rose and flourished within the United States. His thesis is readily summarized. He begins by noting the development of the Mustang automobile by the Ford Motor Company, showing the time and cost involved, and comparing it to the beginnings of the company (and the Model-T Ford) in the early 20th century. In Galbraith's view, nearly "all of the effects of increased use of technology are revealed by these comparisons." Technology, he says, forces the division and subdivision of the application of scientific or other organized knowledge into its component parts. Just why this is so we are not told; his basic conclusion is stated flatly and without documentation:¹³ "Nearly all of the consequences of technology, and much of the shape of modern industry, derive from this need to bring knowledge to bear on these fractions and from the final need to combine the finished elements of the task into the finished product as a whole." He then lists six consequences as being of considerable significance: (1) the time separating the beginning from the completion of any task tends to increase; (2) an accompanying increase in the amount of capital devoted to production may be discerned; (3) time and money tend, in large industries, to be committed more and more inflexibly to the performance of a specific task; (4) specialized manpower is required, those with special skills within specific technical areas; (5) specialization

¹³It is worth noting that Galbraith's research, by his own admission, was cut off at about 1957, ten years before the first edition of his book and fifteen before the revised edition (which is substantially the same as the first edition). See Planning, Regulation and Competition, Hearings Before the Subcom. of the Senate Com. on Small Business, 90th Cong., 1st Sess. (1967).

inevitably means that "organization" must come, for the specialists must be coordinated; and (6) advance planning becomes a necessity, both for the enterprise and also for the economy which is dominated by the giant firms. In brief, Professor Galbraith believes in technological determinism as a meaningful explanation of business gigantism within the domestic American economy.

Galbraith's Olympian view has all the benefits of brevity and the shortcomings of oversimplification. Surely his theory of technological determinism may be faulted as being lacking in empirical verification. Certainly Professor Galbraith supplies no probative evidence to support it. In addition, he fails to consider alternative hypotheses that seem to have relevance to the question of a meaningful explanation of the rise of the supercorporations. And he makes only passing mention to the conglomerate corporation, which by no criterion can be attributed to technological imperatives; by definition, the conglomerates are not technically integrated. Finally, he neglects the phenomenon of corporate multinationalism. These are only the obvious shortcomings. His thesis is not aided by Dean Edward S. Mason's observation that "something like the modern corporation is the inevitable product of an industrializing society, whether that society follows a capitalist or a socialist trend of development. Lawyers love to describe the corporation as a creature of the law, but law in a major manifestation is simply a device for facilitating and registering the obvious and the inevitable. Given the technologically determined need for a large stack of capital, the managerial requirements set by the problem of administering the efforts of many men, and the area of discretion demanded for the effective

conduct of an entrepreneurial function, the corporation, or a reasonable facsimile thereof, is the only answer."¹⁴ Nor is Professor Galbraith helped by what he calls the "convergent tendencies of industrial societies". However different their basic ideology, he maintains that societies produce roughly similar industrial organizations.¹⁵ His models, of course, are the USA and the USSR.

But if the Galbraith thesis is questionable, what may be suggested as alternatives?¹⁶ Several other hypotheses may be advanced. These will be listed with little discussion, so as to conserve time and space. Before doing so, however, it is appropriate to note that Galbraith's formulation bears at least a superficial resemblance to Max Weber's well-known hypothesis about the interrelationship between the rise of Protestantism and of capitalism. Weber set forth his views as a tentative hypothesis, requiring further investigation of how the Protestant Ethic influenced the development of economic institutions.¹⁷ As stated by R. H. Tawney, "Weber thought that western Christianity as a whole, and in particular certain varieties of it, which acquired an independent life as a result of the Reformation, had been more favorable to the progress of capitalism than some other great creeds."¹⁸

¹⁴Mason, Introduction, in The Corporation in Modern Society 1 (E. Mason ed. 1960) (emphasis supplied).

¹⁵Galbraith, supra note 10, at 392.

¹⁶In this section of this essay, I am drawing heavily on my Journal of Public Law article, supra note 2.

¹⁷M. Weber, The Protestant Ethic and the Spirit of Capitalism (trans. 1930).

¹⁸R. Tawney, Religion and the Rise of Capitalism 5 (1926) (pagination from Mentor paperback edition).

Weber's two articles, published in 1904 and 1905, were attempts to test that generalization (made, it should be emphasized, in the form of an hypothesis, not the flat assertion of Professor Galbraith). In brief, Calvinism and English Puritanism were of preponderant importance in creating the moral and political conditions favorable to the growth of capitalist enterprise.

There has been much uncritical acceptance of the Weberian hypothesis. Among more serious students it has been the subject of intense debate. In the main, objections to the thesis take one or more of the following lines: (1) Weber reversed the sequence; it was not Protestantism that promoted capitalism but rather hard-driving businessmen who wished for moral sanction for their way of life and found it in the Protestant Ethic; (2) religion does not explain the superior performance of Protestant business communities as much as the status of members of those communities as persecuted minorities; not permitted to enter many universities or to pursue professional careers, they turned to business, where they worked harder than their competitors; and (3) there is no empirical causal connection between business and the rise of Protestantism.¹⁹ These objections, to be sure, neither prove nor disprove the Weberian thesis. They are mentioned to indicate the type of analysis that is necessary to provide a meaningful explanation of the growth of the giant corporations. Weber failed to separate from the chaff of history some of the relevant and important kernels that would bear upon his

¹⁹See, for insightful discussion, D. Landes, The Unbound Prometheus: Technological Change and Industrial Development in Western Europe from 1750 to the Present 21-3 (1969).

thesis--for example, how the "capitalist spirit" flourished in Venice and Florence, as well as Bavaria and Flanders, all at least nominally Catholic. Further, he did not address himself to an even more basic question: Why the Protestant Reformation? How can it be explained?

If Weber's hypothesis remains unproven, so too--and even more so--is Galbraith's. His is an attempted explanation of a contemporary phenomenon by extracting from history what he considers to be the one crucial factor or cause. Historical explanations, however, at best tend to be "probabilistic," to use Nagel's terminology.²⁰ The distinctive feature of probabilistic argumentation (and thus of historical generalization) is that conclusions derived therefrom are not logically required consequences of their premises. The actions (or events) that historians try to explain could not have been predicted (that is, deduced) from the information contained in the premises by anyone who had access only to the information of the premises prior to those happenings. "In point of fact," Nagel maintains, "historians are rarely if ever in a position to state the sufficient conditions for the occurrence of the events they investigate. Most if not all historical explanations, like explanations of human conduct in general--and indeed, like many explanations of concrete events in the natural sciences--mention only some of the indispensable (or, as is commonly also said, necessary) conditions for these occurrences."²¹ To take Professor Galbraith's example of the Mustang, produced by the Ford Motor Company,

²⁰Nagel, supra note 1.

²¹Id., at 559.

there was no way in which people could have foreseen the coming of Ford and General Motors and Chrysler, dominating the automobile industry, at the time of the invention of the automobile or even at the time of the invention of the method of production-line assembly of automobiles.²² Galbraith's six "imperatives of technology" do not make an oligopolistic industry inevitable nor is huge size a requirement.

There is one additional major difficulty with the Galbraithian hypothesis: To accept it means that ipso facto one must accept giant business.²³ That is an attitude of fatalism that greatly limits the range of policy options a given nation-state might have in effectively dealing with the supercorporations. This will have direct bearing upon the relationship of the transnational corporations to the nation-states, discussed below.

That brief critique of Galbraith will serve, it is hoped, as a means of suggesting alternative hypotheses, one or all of which may have some bearing upon the question. They include the following; each is set out briefly, without discussion:

1. Law and the legal system. Lawyers, with invincible parochialism, tend to view law as being far more important than in fact it has been and is. Some attribute a high degree of power (in a political sense) to the Supreme Court of the United States. But law (and courts) do not have

²²Cf. J. Galbraith, "Was Ford a Fraud?", in The Liberal Hour 130 (1960) (pagination from Penguin 1963 paperback edition).

²³In much the same way that Adolf Berle and David Lilienthal counselled acceptance of the bigness of enterprise. See A. Berle, The 20th-Century Capitalist Revolution (1954); D. Lilienthal, Big Business: A New Era (1952).

an independent force of their own; they tend to reflect, however imperfectly, the power interests of the nation, often but not necessarily always economically based. That, to speak sententiously, is as true of private law as it is of public law. One may suggest the following hypothesis: Law was used to help create a favorable societal environment that permitted the growth of corporate enterprise; not only constitutional law, but also the private law of torts and contracts, were employed to further business (i.e., corporate) growth.²⁴

2. Government promotion of corporate gigantism. But technology and the law do not, alone, explain the supercorporations. A third possible hypothesis is this: Business gigantism is a consequence of affirmative governmental promotion of monopoly (the term here is used, as do Adams and Gray as well as Baran and Sweezy, as being synonymous with oligopoly).²⁵ If one views the history and nature of public utility regulation, tax and expenditure policies, defense procurement policies, disposal of surplus property, the antitrust laws, and such specialized areas as the atomic energy industry, the conclusion is unavoidable that government, despite protestations to the contrary, has in fact encouraged the growth of large business.²⁶

3. The governing-class hypothesis. However, neither the law nor

²⁴See A. Miller, The Supreme Court and American Capitalism (1968). But see Posner, A Theory of Negligence, 1 J. Legal Studies 29 (1972).

²⁵See W. Adams and H. Gray, Monopoly in America (1955); P. Baran and P. Sweezy, Monopoly Capital (1966)

²⁶See P. Jones, The Consumer Society: A History of American Capitalism (1965).

governmental policies, as hypotheses, pose the more basic question of who makes and enforces the law as well as the question of how were public policies promoting gigantism influenced and promulgated. That gap is at least partially filled by the third hypothesis: that the super-corporations are a resultant of a drive for economic power by the American "governing class," with that power base being highly influential, even dominant, in the making and enforcing of law and public policy.²⁷

4. The teleological hypothesis. Historian David M. Potter has argued that the main determinant of American institutional development--including social, economic, political, and cultural--has been the search for and enjoyment of material abundance.²⁸ Put in the form of an hypothesis, one may suggest, then, that the giant firm is the resultant of the need for mass production and for a higher degree of general economic welfare. In other words, a given community tends to create the institutions necessary to fulfill its assumed goals within (this is an important limitation) its capabilities or means. Said another way, the character of society determines its economic institutions within

²⁷See C. Mills, The Power Elite (1956); G. Domhoff, Who Rules America? (1967); G. Domhoff, The Higher Circles (1971). But see A. Rose, The Power Structure (1967).

²⁸D. Potter, People of Plenty: Economic Abundance and the American Character (1954). Compare the statement of Roger M. Blough, Chairman of the Board, United States Steel Corporation: ". . . if we look at the facts realistically, we are bound to conclude . . . that even some of the biggest corporations are rapidly getting too small to do all of the things that are expected of them." Quoted in E. Penrose, The Theory of the Growth of the Firm 264 n.1 (1959).

the limits of its resources. Within the United States, the trend toward social equality has produced drives that move toward mass production and corporate gigantism.

5. The "world-frontier" hypothesis. If one ponders the implications of an important but neglected book, Walter Prescott Webb's The Great Frontier,²⁹ it can then be hypothesized that the rather unique social and environmental conditions that existed in the United States during the latter part of the 19th and early part of the 20th centuries were a special "mix" that permitted, even encouraged, the growth of the supercorporations. Webb's thesis is that there is a direct relationship between the colonial expansion following the discovery of the New World and the nature of social development in the nations of the North Atlantic littoral. It has been suggested that had there been no overseas expansion of the European nation-states, there would have been no Industrial Revolution. Whether that is valid or not--it cannot be proved or disproved--the "great-frontier" hypothesis is in large part Turner's American-frontier hypothesis writ large. Super-corporations, in short, are the institutions appropriate to the "great frontier."

6. The "new transportation-communications technologies" hypothesis. Albert Chandler has suggested that the growth of the giant corporations was "a response to the growth of a national and increasingly urban market that was created by the building of a national railroad network--

²⁹W. Webb, The Great Frontier (1952). Cf. D. North, The Economic Growth of the United States, 1790-1860 (1961).

the dynamic force in the economy in the quarter century after 1880. . . . In the twentieth century electricity, the internal combustion engine, and systematic, institutionalized research took the place of the national urban market as the dynamic factor in the American industrial economy."³⁰ The implication of that is that new transportation and communications technologies were the driving forces behind the growth of the giant firms.

Critique and Extrapolation

The net conclusion to be derived from the foregoing is that there is complexity--multiple causation--in the development of the corporate giant. Each of the hypotheses may lend some partial insight, but is not by itself adequate. Taken together, however, they tend to overlap and to complement each other. Accordingly, it seems valid to state that the domestic supercorporation is the consequence of the coalescence of at least the following factors: technological imperatives; law and political institutions; affirmative governmental policy; the interests and actions of the "governing class"; a quest for equality and for a larger share of material well-being; the social milieu in which the firms were formed and grew; and new developments enormously improving the speed of communications and transportation.

But these theses do not necessarily explain the growth of the transnational enterprises, although, again, each may have some bearing.

³⁰ Chandler, The Beginnings of "Big Business" in American History, in Two Pivotal Interpretations of American History 107 (C. Degler ed. 1966).

For Marxists, the need for new markets and also for raw materials are sufficient to explain the coming of the MNEs.³¹ There may be something to that view, but taken alone, it is not a sufficient explanation. What can be said, and all that should be said with any degree of certitude, is that the new technologies of communication and transportation make it possible for enterprises to be directed and managed day by day pursuant to plans which link the assets, wherever located, of traditional international investment to others all over the globe.³² These new technologies have created, in current parlance, a "global village" or "spaceship earth." They permit changes in organization and values because they create new possibilities for human action and thereby alter the mix of options available to men.³³ Although as Lynn White has said, "a new device merely opens a door; it does not compel one to enter,"³⁴ that door certainly is a clear invitation to enter. Thus it is that, to take only one example, a major multinational company, Tradex, can operate in Geneva on a world-wide basis, with links to plants and outlets the world over and with instantaneous communication with the parent company, Cargill, in Minneapolis. Without telephones and teletypewriters, to say nothing of

³¹ See, for example, H. Magdoff, The Age of Imperialism: The Economics of U.S. Foreign Policy (1969); Baran and Sweezy, supra note 25.

³² See R. Vernon, Multinational Enterprise and National Security (Adelphi Paper No. 74, Institute for Strategic Studies, London, Jan. 1971).

³³ See Mesthene, How Technology Will Shape the Future, 161 Science 3837 (1968).

³⁴ L. White, Jr., Medieval Technology and Social Change 28 (1966) (paperback ed.).

airmail, without airplanes to enable key personnel to trouble-shoot around the world, and without vastly improved cargo ships, such an enterprise simply could not exist.

There is, on the other hand, no inexorable compulsion for it to exist, in the sense of "technological" or other "imperatives." But it may be taken as typical, although it is little known, of the major MNEs. Corporate managers and owners in the United States have found the techniques by which an enterprise can at once have centralized management and decentralized operations. A conglomerate like ITT is similar. Tight control can be retained over major policies, running down even into relatively routine operational details, through a managerial hierarchy that sees the world "as its oyster" and that considers it to be an economic unit. Organizational techniques enable hierarchical controls to be placed upon decentralized units of ITT--say, Avis Rent-A-Car in western Europe.

In all of this, the nation-states--the political order--is often found to be a nuisance the laws and regulations of which must be avoided, if at all possible, or minimally lived with, if not. The techniques of incorporation, particularly that most useful of inventions--that allowing one corporation to form another or even a series of others--enables the parent company and its managers (which, despite the conventional wisdom of Berle and Means, quite often is controlled by its legal owners)³⁵ to establish and maintain such a bewildering and

³⁵ The Berle-Means thesis is disputed in, for example, R. Miliband, The State in Capitalist Society (1969).

intricate variety of interlocking corporations that effective regulation has a tendency of being minimized. The point becomes even more apparent when one views the operations of the Delawares of the planet-- Panama, Honduras, Liberia, Liechtenstein, etc.--which readily charter corporations or subsidiaries of other corporations as devices partially to insulate the parent, the ultimate owner, from the nation-state, say the United States, in which it was established.³⁶ The "flags of convenience" device of the merchant marine is merely illustrative of a larger picture.³⁷

III. THE CORPORATION AND THE NATION-STATE: CHALLENGE AND COOPERATION

So much for prologue: Enough has been said to indicate the inherent complexity of the question of how new technologies contribute to the growth of multinational business. In this section, a recent statement by Professors Joseph S. Nye and Robert O. Keohane is used as a bridge and a point of departure to a venture into the problem of the political consequences of the coming of the giant MNEs: ". . . transnational organizations whose principal goals are social and economic have increased in importance. By far the most important of these organizations is the multinational business enterprise. Multinational enterprises existed at the beginning of this century but on a smaller scale and with

³⁶See Dunning, The Multinational Enterprise: The Background in The Multinational Enterprise 15 (J. Dunning ed. 1971).

³⁷See, for example, McDougal, Burke and Vlasic, The Maintenance of Public Order at Sea and the Nationality of Ships, 54 Am. J. Int'l L. 25 (1960).

much less important effects. Modern communications technology has greatly increased the feasibility of imposing a central strategy on widely scattered subsidiaries and consequently has increased the challenge that enterprises present to state sovereignty."³⁸ What, in other words, are the political consequences of economic power? Three may be mentioned, as illustrative of what is occurring: (a) the gradual but steady erosion of the sovereignty of the nation-states in increasingly important areas; (b) the concept of "dual citizenship" between state and enterprise; and (c) the high degree of cooperation between enterprise and state, or, in other words, the growing fusion of economic and political power. Each will be discussed.

Sovereignty Divided

In many striking respects, the tensions between the political order of a plurality of the nation-states and the economic order of the MNEs resemble the development of giant domestic corporations within the United States and the consequent strains placed upon the traditional notion of federalism. In both situations, the economic units span over--transcend--decentralized political units. And in each case, historical attributes of sovereignty (as exclusive power) have been and are diminishing. The analogy is not exact, for the several states of the Federal Union were never sovereign in a strict Bodinian sense, but it is sufficiently close to provide an insight into what is occurring.

American business, small and local in 1800, became multi-state in

³⁸Keohane and Nye, supra note 12.

the late 19th and early 20th centuries. The history of our constitutional law can, as Felix Frankfurter once opined, be constructed around the way in which finance capitalism has developed;³⁹ in no small part, changes in federalism and in the separation of national governmental powers can be traced to reactions to the growth of the giant corporations.⁴⁰ In recent years that growth has accelerated. The result is "the new industrial state," to use Galbraith's label, a peculiarly American form of corporativism that has so altered the "mix" between public and private as to create a new constitutional order. Unheralded and for the most part unchronicled, it may well be the most significant constitutional change in American history. That it came without amendment, but by political actions at times given judicial approbation, at once shows the flexibility of the Constitution and the fact that it can change by non-formal means.

The development of multistate business enterprise is merely a prologue to the multinational or global firm. If one takes 1800 as a point of departure, the trend is clearly toward larger size in business units and toward expansion of the activities of those companies to planetary dimensions. "The emergence of the multinational private corporation as a powerful agent of world social and economic change has been a signal development of the postwar era."⁴¹ One need not subscribe

³⁹ F. Frankfurter, The Commerce Clause Under Marshall, Taney and Waite (1937).

⁴⁰ The growth of multistate business meant that no one state could effectively regulate a corporate giant; hence, if they were to be regulated at all, it would have to be by the federal government. See A. Miller, supra note 24.

⁴¹ Jacoby, The Multinational Corporation, The Center Magazine, May 1970, at 37 (reprinted in The Multinational Enterprise in Transition 21 A. Kapoor and P. Grub eds. 1972).

to J.-J. Servan-Schreiber's thesis, propounded in his best-seller The American Challenge,⁴² of the relative desuetude of the European economy and the rise of American business in Europe as the "third most important power in the world" to believe that the growth of multinationalism in business is one of the most significant developments both economically and politically (and thus constitutionally) in modern times. Richard J. Barber put the movement in effective focus in his 1970 volume, The American Corporation:⁴³

The opportunities presented by the booming world economy have been clearly recognized by American and foreign business interests. Partly through trade but primarily through multinational investment and operations, corporations are becoming genuine economic citizens of the world. This fact, with its obvious economic implications, presents even more critical political problems for it draws into serious question both the sufficiency and the relevance of existing legal arrangements to control, and service, corporations which have severed their ties with any single nation.

No longer is it accurate to think of most of our large corporations as "American." The oil companies, the big auto, drug, and chemical producers, and the makers of computers and electrical equipment, among many others, are so heavily committed to foreign markets that they have in fact lost their U.S. identity and assumed a multinational character. Just as regulation of business corporations by the states became outmoded sixty or so years ago as an integrated U.S. economy supplanted the local and regional markets which had characterized the nation in its first

⁴² J.-J. Servan-Schreiber, The American Challenge (1969). The "American Challenge," as Sidney Rolfe has pointed out, is really the challenge of the multinational enterprise, the majority but far from all of which are of U.S. origin. See S. Rolfe, The International Corporation (1969).

⁴³ R. Barber, The American Corporation (1970); see also M. Mintz and J. Cohen, America, Inc.: Who Owns and Operates the United States (1971).

century, today the global scope of commercial activity by major U.S. and foreign companies is rendering national regulation obsolete.

With firms like Standard Oil of New Jersey, Mobil Oil, Woolworth, National Cash Register, Burroughs, Colgate-Palmolive, Standard Oil of California, and Singer deriving more than half their income or earnings from "foreign" sales, and with a long list of others, including such familiar giants as Eastman Kodak, Pfizer, Caterpillar Tractor, International Harvester, Corn Products, and Minnesota Mining (MMM) making from 30 to 50 percent of their sales abroad, even those once-American companies are beginning to acknowledge openly--indeed with occasional enthusiasm and a frequent boast--their new supranational status. In explaining why it changed its corporate name and trademark to Uniroyal, U.S. Rubber proclaimed that "it is now meeting the research and manufacturing needs of the whole polyglot world."

That statement by a former law professor and sometime counsel to the Senate Antitrust Subcommittee points up two hypotheses we now advance. Business--the business of the "first economy" of the corporate giants--⁴⁴ is indeed achieving a "new supranational status." This can lead to one of two ends (or a combination of both), when it is viewed in conjunction with the role of the political order (the nation-states); those possible consequences are essentially constitutional in nature. "Inevitably," says Professor Sidney E. Rolfe, ". . . the political consequences of the internationalization of production must be faced. This is an undefined region whose exploration is bound to be a thankless task." To probe that terra incognita one must attempt to extrapolate

⁴⁴There are at least two economies in the United States--those of the giant corporations, on the one hand, and of small business, on the other. See Holton, Business and Government, in The American Business Corporation: New Perspectives on Profit and Purpose 17 (E. Golston, H. Morton and G. Tyland eds. 1972); M. Harrington, Toward a Democratic Left (1968).

⁴⁵Rolfe, supra note 42, at 119.

from present conditions through the use of trend analysis to postulate possible alternative futures. One is well advised to tread lightly and to be intellectually circumspect in that effort. Accordingly, the following alternative hypotheses are tentatively advanced as being the most probable; the suggestion is that one or the other--or what may be more likely, a combination of both--will eventuate.

Hypothesis No. 1: Movement of American business abroad provides a basis in the living law (to adapt Eugen Ehrlich's⁴⁶ term) for multinational constitutionalism. As a necessary corollary, the suggestion is that the nation-state is becoming obsolescent as a form of social order, and that the trend is toward political integration on regional, and perhaps ideological, bases. The essential thought here is that supranationalism in giant business will eventually have the same effect in breaking down national boundaries as did suprastate (i.e., multi-state) business for American federalism.

Hypothesis No. 2: The multinational corporation will itself become a principal instrument of governance; it will, if that be valid, challenge the nation-state for dominance. To analogize: Just as the territorial nation-state successfully challenged the church (in the western world) some three or four centuries ago, and thereby became the characteristic type of social order in the world community, so today the giant company may well emerge victorious over the political entity.

I do not suggest that these alternatives exhaust all possibilities

⁴⁶See E. Ehrlich, The Fundamental Principles of the Sociology of Law (W. Moll trans. 1936) (first published in 1912).

of the emergent constitutional order.⁴⁷ However, it does seem probable that one of them will eventuate or that a combination of the two will emerge (some sort of supra- or multinational corporate state). One would be rash indeed to be confident in this regard. What form the future will take is at best problematical. The forces that mold constitutional forms and mechanisms are not necessarily within man's capacity to control. Science and technology, as yet unharnessed, seem likely to be more influential than other factors in shaping the future. Compare, in this regard, two statements, the first by Dean Don K. Price, the second by physicist Ralph Lapp: Says Price: "The main lines of our [public] policy, over the long run, are likely to be determined by scientific developments that we cannot foresee, rather than by political doctrines that we can now state";⁴⁸ says Lapp: "No one-- not even the most brilliant scientist alive today--really knows where science is taking us. We are aboard a train which is gathering speed, racing down a track on which there are an unknown number of switches leading to unknown destinations. No single scientist is in the engine cab and there may be demons at the switch. Most of society is in the caboose looking backward."⁴⁹ The confident assertions of some

⁴⁷ It should always be remembered that constitutions are as Woodrow Wilson said, "Darwinian" rather than "Newtonian"; they are, in other words, constantly in a process of becoming. See W. Wilson, Constitutional Government in the United States (1908).

⁴⁸ D. Price, The Scientific Estate 186 (1965).

⁴⁹ R. Lapp, The New Priesthood: The Scientific Elite and the Use of Power 29 (1965).

commentators that man can "invent the future" should be taken as statements of a rather touching, pious faith, somewhat akin to President Nixon's flat, unqualified comment in his 1969 inaugural address that "we have learned to manage the economy." We have not; and indeed the invention of the future may be a technocrat's pipe-dream. Even so, even if the future is and will remain obscure, on the basis of present evidence the nation-states and the corporations will vie for dominance. To speak rashly: that contest will result in compromises being struck, in, that is to say, a coalescence or fusion of the political power of the territorial states and the economic power of the giant companies into a global type of corporativism. Put another way, by the year 2000 or, say, 2020 (fifty years hence) a new form of social order will have emerged, one that renders obsolescent the traditional nation-state.⁵⁰ In that process, the rise of multinationalism in business affairs will be a major contributing factor. The nation-state, such as the U.S.A., is in a marasmic condition--or rapidly approaching it--and the Constitution of 1787 has now become an obvious anachronism (in all save its protections of human liberties).

If present trends continue, Professor Sidney E. Rolfe asserted recently, the last part of the 20th century will likely be called by future economic historians the age of transition from an international--i.e., nationally-based--to a global economy.⁵¹ The image that many,

⁵⁰Cf. Perlmutter, The Multinational Firm and the Future, 403 *Annals* 139 (Sept. 1972); Perlmutter, Super-Giant Firms in the Future, *Wharton Q*tly, (Winter 1968).

⁵¹S. Rolfe, The Multinational Corporation (Foreign Policy Ass'n Headline Series No. 199, 1970).

perhaps most, people still hold of economic affairs is that of Adam Smith and David Ricardo: The world consists of several dozen nation-states, among which products--manufactured or primary--move relatively freely, but with the "factors of production" (labor, capital, management) moving only with great difficulty and perhaps not at all. That, in Galbraith's mordant label, is the conventional wisdom. The same sort of belief-patterns hold for the political order: The nation-state is considered to be the most appropriate method of organizing economic activity; one of its main functions today is to regulate, manipulate, stimulate, and even own its industry. A final tenet in the conventional wisdom is that the chief purpose of the nation-state in "its" economic activities is to attain and maintain a favorable balance (a surplus) in international payments, so as to enable it to acquire or to hold gold (or, more recently, "paper gold"--special drawing rights (SDRs) within the framework of the International Monetary Fund). (Just how all nations can maintain favorable balances of payments is never explained.)

The trouble with that model is that it simply does not accord with reality. Production of goods no longer is a purely national matter. This is the age of international production, the instrument for which is the multinational corporation. That it is as yet an imperfect institution does not belie the fact that for at least a half century, and with increasing speed in recent years, a trend toward the internationalization of production has been visible. Goods move between nations, to be sure, but trade as such has diminished in importance; the factors of production also move between nations. International investment is here, apparently to stay, despite rumblings of discontent

in some sectors.⁵² A new breed of corporate executive is appearing-- the multinational manager, he who really has no home because the whole world is his home. He is based, for short or long periods, in one place (say, Geneva); and he still doubtless retains his political citizenship (say, that of the United States); but he is as truly an international citizen--Arnold Toynbee once opined that they would be international "civil servants"⁵³--as are, for example, the Eurocrats who man the offices of the European Economic Community in Brussels. Quite possibly, the multinational manager is more truly a "citizen" of the corporation he serves than of any nation-state.

If international production is indeed here to stay, says Rolfe, "it becomes a matter of central importance for every person concerned with the future of his nation's or the world's economy to understand what is involved."⁵⁴ That type of production, despite Servan-Schreiber's best-seller, is not so much "the American challenge" as it is that of corporations which had their beginnings in a number of industrialized nations, principally Japan, Great Britain, France, Italy, Canada, Switzerland, and Holland, in addition to the United States. What concerns Europeans about America, however, is that U.S. corporate investment is concentrated in the high-technology sectors of European economies; the most advanced industries, technologically speaking, tend to be American

⁵²For example, in France under Charles de Gaulle.

⁵³Toynbee, How Did We Get This Way--And Where Are We Going?, in Management's Mission in a New Society 16 (D. Fenn ed. 1959).

⁵⁴Rolfe, supra note 51.

(exemplifying the "technology gap" that exists across the Atlantic).

However, as Neil H. Jacoby has recently said, American business abroad is by far the greatest single "national " enterprise. Says Jacoby:⁵⁵

When taken globally, it has been estimated [by Judd Polk, director of program and studies for the U.S. Council of the International Chamber of Commerce] that the value of the output of all foreign affiliates of U.S. corporations was a staggering one hundred and thirty billion dollars during 1968. This was four times U.S. exports of thirty-three billion in that year, showing that the preponderant linkage of the United States to other markets is foreign production rather than foreign trade. Foreign affiliates accounted for fifteen percent of the total production of nine hundred billion dollars in the non-communist world outside the United States. Thus United States industry abroad had become the third largest economy in the world, outranked only by those of the domestic United States and the Soviet Union. Moreover, foreign production had grown about ten percent a year, twice as fast as domestic economies. Multinational corporations are rapidly increasing their shares of the world's business.

But as noted, multinational firms come from nations other than the United States. Historically, that was true, as with the East India Company, which conquered and ruled India in Britain's name for centuries. For that matter, many of the original colonies that became states were formed by profit-seeking, joint-stock companies; Virginia, for instance, was settled in that way. Contemporaneously, one need look only to such giants as Italy's National Hydrocarbon Agency (ENI), Britain's Unilever, British Petroleum, and Philips of Eindhoven (The Netherlands) to realize that multinationalism is not a uniquely American phenomenon. For that matter, the United States itself is now the target of multinational investment by firms from other countries--British

⁵⁵Jacoby supra note 41.

Petroleum and Olivetti, to name but two.

The political (constitutional) consequences of the internationalization of production may be summed up as the challenge that the corporate giant, which exercises economic sovereignty in the world community, poses to the nation-state, the repository of political sovereignty. The tensions, the inevitable clashes, and the compromises struck between the two types of sovereignty will create much, perhaps most, of the international law in the future. The "one world" of the supercorporations confronts the splintered world of the nation-states. Something has to give--and something will give. That "something" will be orthodox notions of political sovereignty.

This may be put in another way: There is a built-in dynamic in the corporate enterprise of industrialized nations to continue expanding, exemplifying Gunnar Myrdal's sociological "Principle of Cumulative Causation."⁵⁶ According to Myrdal, social affairs are never in equilibrium; a given institution is always in a spiral upward or downward vis-a-vis other institutions. For the Third World, that spiral appears to be downward with respect to the nations of the "rich man's club" along the North Atlantic littoral, W. W. Rostow's theory of economic development, propounded in The Stages of Economic Growth,⁵⁷ being more fancy than fact. For corporations, on the other hand, success begets success; in the old frontier slogan, "them as has, gits"--at least,

⁵⁶Set out, for example, in G. Myrdal, An American Dilemma (1944); G. Myrdal, The International Economy (1956).

⁵⁷W. Rostow, The Stages of Economic Growth (1960).

for many of them. "The way to achieve and retain [business] greatness," Osborn Elliott has said in Men at the Top, "is always to be striving for something more."⁵⁸ That "something more" is now making the planet a single economic unit for a number of transnational supercorporations. Once having made a breakthrough, certain firms become giants through a process of upward causation. National boundaries do not confine them, and the nation-states tend to be important only because they at times provide some protection to them and because of largely ineffectual attempts to regulate them. "Yet," Judd Polk commented recently, "we find ourselves trapped in such anomalies as balance-of-payments accounting that tends to force world operations into national perspectives. There is a lack of intergovernmental machinery to assure suitable money and credit conditions. The international legal structure is far from coherent--uncertainties and conflicts of laws are a constant embarrassment to international producers. Furthermore, conditions affecting the operation of international companies differ--to a large extent arbitrarily--from country to country."⁵⁹

Some Basic Problems of the New Social Order

It is not too difficult to describe the nature of the modern nation-state system and the rise of the multinational corporations. Even though both institutions pursue secrecy policies, so that data about their

⁵⁸O. Elliott, Men at the Top 40 (1959).

⁵⁹Polk, The Rise of World Corporations, Saturday Review, Nov. 22, 1969, p. 32.

operations are often not obtainable, enough is known that the contours at least, if not all of the details, can be stated. That perimeter may be briefly sketched, with the main theme being the essential similarity between the two characteristic entities of the day, followed by a discussion of two of the fundamental problems of the new social order.

The peoples of the planet are governed by two overlapping, interacting institutions: (a) the public instrument of governance, the nation-state, plus the alliances, regional organizations, and world-wide groupings into which nations enter; and (b) the private instrument, the voluntary association of which the supercorporations are the most important, which also enter into supra-corporate groupings (cartels, shipping conferences, trade associations, etc.). They have strikingly similar characteristics and functions. Save for the employment of violence, the corporation is as much a government as is the nation. It allocates resources, affects the values of hundreds of millions of human beings, enters into alliances with other corporations and with public government (as in concession contracts for development of extractive industries), has an intelligence function, sets prices, carves up markets, and is in its internal operations a political order."⁶⁰ A. A. Berle maintained in The 20th-Century Capitalist Revolution that the international corporation does a better job governing its part of world affairs than does the nation-state.⁶¹ (In that, Berle may have been correct, but

⁶⁰ See Timberg, The Corporation as a Technique of International Administration, 19 U. Chi. L. Rev. 739 (1952); Miller, The Corporation as a Private Government in the World Community, 46 Va. L. Rev. 1539 (1960).

⁶¹A. Berle, The 20th-Century Capitalist Revolution (1954).

one surely is entitled to ask: Better for whom? and by what criteria?)

The basic difference between state and corporation is that the former is limited geographically, whereas the latter knows few terrestrial bounds. Both are hierarchically structured and bureaucratically managed, with the managers being technocrats (or members of a meritocracy). Common principles of organizational behavior govern the public and private bureaucracies. Both have an elite sitting atop each bureaucracy. (That dual elite system, in American domestic affairs at least, is interlocking; a flow of personnel routinely takes place between the two organizational structures, corporate officials being a main source of manpower for high-level governmental positions.) Almost two decades ago Sigmund Timberg described the situation well, in an article discussing the corporation as a technique of international administration.⁶²

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

⁶²Timberg, supra note 60, at 742-43. See also Timberg, International Combines and National Sovereigns, 95 U. Pa. L. Rev. 575 (1947).

which in a pre-Industrial Revolution era had been the primary responsibility of the State. It has been said of international cartels that some of the more powerful of them "are little empires in themselves, and their decisions are often more important than those of 'sovereign political' entities like Holland, Denmark or Portugal." The same could be said even more forcefully of the political strength of that more cohesive unit, the international combine; the notion that international combines and cartels are strong political entities is no longer a monopoly of the intuitively minded economist or political scientist. Judges have described international cartels as instruments of "private regulation," and have called an American subsidiary the "commercial legation" of its British parent. Even the counsel involved in drafting international cartel agreements speak of a trade area as so-called neutral territory, or to put it another way as "spoils" belonging to the British and ourselves as allies in the late war. Such a consistent use of political terms is more than a mere metaphor; it is a recognition of an underlying reality.

That is the political dimension. The economic sphere is equally impressive. In terms of totality of assets, the largest corporations overshadow most of the nation-states of the planet. Such a concentration of economic wealth is unknown in history; it makes the supercorporation an institution that is sui generis, one that cannot fail to have important political--read constitutional--implications. In order to put those implications in perspective, a brief delineation of some of the theoretical problems brought by the rise of the supercorporations is in order. Those problems are many, but our attention here will be directed toward two of the more fundamental: legitimacy and accountability.

Legitimacy: If the multinational corporation does exercise power in the political sense, then the question of the legitimacy of that power is immediately presented. Power, to be legitimate under the Constitution, must ultimately be responsible and accountable and must be derived from the consent of the governed. In English history,

corporate legitimacy came from recognition by the sovereign; but the corporate charter, freely granted by complaisant states within the United States and by the Delawares of the world community--for example, Panama, the Bahamas, Honduras, Liberia--is hardly a substitute. The ruler in the American political order achieves legitimacy because he has been voted into office, a condition that hardly obtains for domestic supercorporations. Those firms are controlled by oligarchs, whether they are public or whether they are, as in a few instances, family-held; those in control are self-appointed and self-perpetuating. Like boards of trustees for universities, they are responsible only to themselves. The divorce of control from ownership, long ago postulated by Berle and Means,⁶³ has not yet been effectively refuted; the rise of the institutional investor may, however, work some change--but if it does, it will merely mean changing one set of oligarchs for another. Dean Edward S. Mason asked in 1960: "Who selected these men, if not to rule over us, at least to exercise vast authority, and to whom are they responsible?" He answered the first question by stating that it is clear that "they selected themselves," and said that the answer to the second "is, at best, nebulous."⁶⁴ That, in essence, "constitutes the problem of legitimacy." It is a problem not easily solved; it presents a challenge to constitutional theorists, a challenge that has been little recognized or faced.

⁶³A. Berle and G. Means, The Modern Corporation and Private Property (1932).

⁶⁴Mason, "Introduction", in The Corporation in Modern Society 5 (E. Mason ed. 1960).

Dean Mason was mainly discussing the domestic corporation. For the multinational firm, the problem of legitimacy is even more difficult. Professor Kenneth F. Boulding has put the matter well: "The international corporation faces a peculiarly difficult problem in establishing its universal legitimacy. Within a nation, the corporation achieves a certain legitimacy simply from the fact that it is incorporated by some public body. . . . The international corporations do not even have this shred of legitimacy, simply because there is no international body that can charter them. The international corporation, that is, operates in a kind of governmental vacuum, and it has to depend for its survival on legitimacies which are derived from special skill, from bargaining power, or from the prestige of the national government with which it is most closely associated."⁶⁵ In other words, the multinational corporation attains legitimacy by custom and usage--by merely being--hardly an adequate formulation for the right or title to rule. This is not to say that the position of business, both within the United States and in the world community, is not solidly entrenched. It is, but its acceptance is no longer without question. And that is so even though as recently as 1966 Robert Heilbroner, in The Limits of American Capitalism,⁶⁶ could say that for "perhaps the first time in American history there is no longer any substantial intellectual opposition to the system of business nor any serious questioning of

⁶⁵ Quoted in Martyn, Multinational Corporations in a Nationalistic World, Challenge, Nov.-Dec. 1965, p. 5.

⁶⁶ R. Heilbroner, The Limits of American Capitalism (1966).

its economic privileges and benefits." By 1970, publications doing just that had begun to appear; and such activities as "Project-GM"⁶⁷, under which an attempt was made to make General Motors more responsible to the public interest, herald a modern doubt about the sheer economic power of the corporate giants. Ever increasingly, corporate executives consider it necessary to justify both the existence and many of the activities of the giant firms.⁶⁸ Witness, in this regard, the severe criticisms of Dow Chemical Company, the producer of napalm for the Vietnam "war"; witness also the statements by Henry Ford II that the Ford Motor Company would take the lead in alleviating pollution.

Legitimacy, then, is a problem, both domestically and internationally, of the corporate behemoth.

Accountability: To ask the legitimacy question is to ask: By what right do you--the corporate executive--rule? Justify yourself, in other words, on a theoretical, even abstract plane. Accountability is much more concrete. It is the need "to answer in another place" for decisions and actions: that is, the business officer is asked to justify specific decisions. The power of corporate managers "is arbitrary," says John F. A. Taylor, "quite independently of the motives which guide them in their performances. Nothing is gained by supposing the modern captain of industry wicked or malevolent. Unread in the arts of Machiavelli, he could school philosophers and

⁶⁷See Schwartz, Towards New Corporate Goals: Co-existence With Society, 60 Geo. L. J. (1971).

⁶⁸See R. Bauer and D. Fenn, The Corporate Social Audit (1972).

princes in the real conditioning of power."⁶⁹ Under the American Constitution, arbitrary power cannot be justified. Not only due process of law, but the entire sweep of constitutional limitations, is a commitment to circumscribing political power. The problem of corporate accountability is that neither law (municipal or international) nor the market of the classical economists are adequate to check abuses of power.

The need is for socially desirable behavior of the multinational corporations, a proposition easy to state but difficult to define or to explicate. No consensus exists on social desirability--not on a planetary scale and not even on a national basis. Within the United States, for example, there is an ambivalent attitude toward concentration of economic (and political) power. On the one hand, the antitrust laws are a commitment to competition and small business units; but the way in which they are administered, as well as affirmative governmental programs in other areas, seems at least to permit and even encourage bigness, a sentiment approved by the Supreme Court. In Big Business in a Competitive System, A. D. H. Kaplan maintains that there is a schizophrenia in American public opinion, the people wanting the results of both competition and monopoly.⁷⁰ Berle went so far as to say that "few of the major segments in a community really

⁶⁹Taylor, Is the Corporation Above the Law?, Harv. Bus. Rev., Mar.-Apr. 1965, p. 128.

⁷⁰A. Kaplan, Big Business in a Competitive System (1954). Cf. W. Withers, Freedom Through Power (1965).

want a regime of unlimited competition."⁷¹

A persistent, even wilful failure to recognize the immense economic power of the supercorporations complicates the problem of accountability. People insist on seeing the form or the facade, not the reality; because the collectivities called corporations are for the most part privately owned, they are said to be private. The result is that, save in a few scattered instances when the Supreme Court cut through the corporate veil and looked not to the legal theory of corporate personality but to the social reality of collective capitalism, there has been no effort to "constitutionalize" the supercorporations (either domestically or transnationally).⁷² True it is that Congress has legislated some degree of accountability, principally in labor laws such as the Wagner Act; the so-called "prerogatives" of management were curtailed to the extent that corporate managers were forced to recognize collective labor organization and to deal with the unions.

Some movement in law may thus be seen to impose norms on corporate behavior through the medium of public law. How successful this movement has been, or will be, cannot be gauged at this time, but surely accountability via law presents at best a spotted picture. The unions are not necessarily antagonistic to the companies; at worst, they exist in tandem in a position of antagonistic cooperation. Government, as a consequence, is forced to deal with the corporate entity as a

⁷¹A. Berle, The 20th Century Capitalist Revolution 51 (1965).

⁷²See Miller, The Constitutional Law of the "Security State," 10 Stan. L. Rev. 620 (1958).

"group person," to use von Gierke's term,⁷³ with management and labor being only ostensibly at odds. Accountability by law is complicated by a hidden affair between management and labor.

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

Such a simplistic model of politico-economic behavior is no longer adequate. Likely it never was, except in the published lucubrations of economists who sat secure in their ivory aeries taking an Olympian and magisterial view of human affairs. The classical market is dead, replaced by corporate planning. Consumer sovereignty is a myth:⁷⁴ Wants are created by mass advertising and

⁷³O. von Gierke, Natural Law and the Theory of the State, 1500 to 1800 (E. Barker trans. 1934). See also Latham, Anthropomorphic Corporations, Elites, and Monopoly Power, 57 *Am. Econ. Rev.* 303 (1957).

⁷⁴See R. Glasser, The New High Priesthood (1967); J. Galbraith, The New Industrial State (1967).

by manipulation of human desire and by a socially acceptable rate of obsolescence in consumer goods. The entrepreneur of classical economics has largely disappeared, the Lings and Geneens of the conglomerate corporations being only vestigial remnants of the Goulds and Vanderbilts and Fricks and Rockefellers and the other robber barons of the 19th century.

Socially desirable behavior of corporations concerns both those who have an immediate and direct interest in "the" corporation--the stockholders, the managers, the workers (both white- and blue-collar), union leaders, suppliers, and franchise dealers--and the overall public interest. For the former, some variation on the constitutional theme of due process of law may well be a means, together with legislation, to impose accountability norms.⁷⁵ That, in fact, is the direction in which public law is edging, nudged along by Congress, the Chief Executive, and the Supreme Court. But for the latter, the problem is much more difficult. No doubt it is valid to assert, as did Professor Grant McConnell in his 1966 volume Private Power and American Democracy,⁷⁶ that a considerable part of the governing power in the United States is influenced or controlled by "narrowly based and largely autonomous elites." By that, McConnell meant that the voluntary associations of America had co-opted the official governing structure and were able--usually, at least--to have their way (or certainly to delay undesirable,

⁷⁵ Discussed at greater length in Miller, Toward the "Techno-Corporate" State? An Essay in American Constitutionalism, 14 Vill. L. Rev. 1 (1958).

⁷⁶ G. McConnell, Private Power and American Democracy (1966).

to them, policies for a long period). The consequence is that those elites pursue their own special concerns and have little or no interest in the large issues of governance. In terms of political (and constitutional) theory this means that the pluralism of social groupings does not redound ipso facto to the general good, Madison's warnings against the rise of "faction," stated in Federalist No. 10, now having become only too true.

The public interest, as President Kennedy stated in 1962, is something more than the arithmetical sum of the private interests of the nation.⁷⁷ But how to enforce it, particularly with respect to the immense economic power of the supercorporations? There is no easy answer to that question. That suggested here is that an international version of the corporate state is being created, one in which the public interest is merged into a new conception. The 20th Century is one of corporativism--domestically, ever more obviously, and with the rise of the transnational companies, internationally also. The public interest is the resultant of the interactions between the important interest groups and between them and the state. The state is at once a broker among interest groups, a participant in the group struggle, and the target of pluralistic groups (which seek

⁷⁷Said President Kennedy: ". . . the public interest is the sum of the private interests and perhaps it's even sometimes a little more. In fact, it is a little more." N.Y. Times, Mar. 8, 1972, p. 14. In a somewhat similar statement, President Nixon, when speaking of the "new economic plan," said on Oct. 7, 1971: "What is good for all of us is good for each of us."

to control its policies).⁷⁸

If the foregoing analysis is at all accurate, several conclusions may be drawn.

1. The nation-state, although it has lost and will continue to lose much of its economic sovereignty to the global companies, will not wither away. It may not be the optimum political organization--more and more sober students recognize that acting alone it is unable to cope with most of the major problems of the era--but it will remain, in facade at least. The companies surely are private governments in the range and scope of their activities, but there are functions to be performed that require institutions similar to public governments.

2. Nonetheless, with the coming of the internationalization of production it has become obvious that the nation-state is not the optimum political organization as it is now constituted. This augurs for integration into regional, and possibly ideological, groupings; the models here are the European Economic Community for Europe, and COMECON, for the Soviet bloc. For the United States, integration of the nations of the North Atlantic community is far from fanciful. Already it (with Japan) has its "constitution" in the treaty establishing the Organization for Economic Cooperation and Development (OECD). Not that the process of community building has proceeded very far; but surely such existing measures as NATO (for military defense) and the way in which European and American central bankers cooperate

⁷⁸See Miller, The Constitutional Law of the "Security State," 10 Stan. L. Rev. 620 (1958).

in monetary matters is impressive testimony of the direction in which political organization is moving.

3. Simultaneously, technological developments are leading toward closer ties between nations. This may be the era of the heyday of nationalism, but technology tends to be geo-centric. When technology is married to business enterprise, it is more and more seen that the optimal organization of resources and markets cuts across national borders.

4. Within industrialized nations, of whatever ideology, similar institutions tend to be established. There is little difference, in this respect, between the USA and the USSR--save, and this is very important, in who owns the enterprises. Galbraith has labelled this the "principle of convergence" of industrialized societies, a thesis echoed by such other observers as Raymond Aron.

5. Even with its basic commitment to private enterprise, the United States has never been a nation in which the economic and the political order were sharply separated. Rather, a principle of cooperation between government and business has always existed in the country; evidence of that principle may be found running back even to pre-American Revolution days. Government needs business, now more than ever; and the contrary is also true: business needs government. The result is a "government-business partnership," a euphemism for a native form of American corporativism that has developed slowly for more than two centuries and that today is becoming more and more obvious. Particularly true for domestic matters, it is not invalid in the world community. We are ruled by two systems of governance--

the territorial nation-state and the economic entity--acting together. The public interest is what is good for the "group-person"--that new form of social order.

6. The consequences for American constitutionalism are several--and profound. They include: (a) federalism will become even more moribund, despite a latter-day movement toward "participatory democracy"; the most significant units of our federal system will be "functional"--the corporations (and other pluralistic groups); (b) more power will flow to the executive-administrative branch, with both Congress and the courts suffering a marked diminution of status; the modern state is the adminis-state, and all modern governments, including that of the United States, are dominated by the Executive; (c) in public policy matters, the lines between public and private and between foreign and domestic will ever increasingly be blurred; at times they will even be erased; and (d) the Constitution, through some means, must be able either to work extraterritorially or it will gradually sink into oblivion. This last proposition, admittedly controversial, merits separate treatment.

7. The basic question is: How can an essentially domestically oriented Constitution be made to operate in a situation when most, perhaps all, public policy questions have significant, even controlling, foreign or international dimensions? No ready answer to that question is available. As a preliminary matter, one can ask whether any of the four methods of constitutional change is sufficient to the need. Can the Constitution be adapted to an interdependent world without

thoroughgoing revision? The answer is: Possibly.⁷⁹

Amendment, of course, is always possible, even to the extent of entirely rewriting the Constitution. But it is a highly improbable technique. Much more probable is a combination of the other three methods--custom and usage (as in international monetary matters today), political actions (the treaty establishing the OECD provides an example, despite some precautionary language inserted by the Senate in its consent to ratification), and judicial action (or possibly inaction, since much of American foreign affairs does not get before the courts). A commitment to political integration by slow stages with the nations of the North Atlantic community does seem possible without an amendment, and even though ultimately it would mean supranationalism on a large scale. Already this has been done in small measure in international commodity agreements and in the workings of the International Monetary Fund, both of which have a degree of supranationalism. The same may be said for NATO, in the routine operations of which a good deal of international administration is accomplished.

A revolution to supranationalism, on an ad hoc, piece by piece basis would not be more startling than the constitutional revolution of the 1930's that changed the United States, firmly and irreversibly, to the Positive State.⁸⁰ That was accomplished without amendment,

⁷⁹ For an adumbration of the methods of constitutional change, see Miller, Change and the Constitution, 1970 Law and the Social Order 231.

⁸⁰ The concept of the "positive state" is outlined in A. Miller, The Supreme Court and American Capitalism (1968).

but by political programs backed by judicial approbation (sometimes silent, as with the Employment Act of 1946). The massive changes that have taken place in the American constitutional order, mainly without amendment, provide impressive testimony to the notion that even such an alteration as is here postulated could be done.

This has been a brief inquiry into the implications of the impact of corporate supranationalism on the American constitutional order. That sovereignty is shared in the world arena, that there is a fusion of economic and political power, needs little documentation. That the next generation of American constitutional lawyers must be concerned with the economic (and political) power of the overmighty economic sovereignties called corporations seems obvious. They are providing a basis in the living law of society for some sort of multinational constitutionalism. The nation-state, even such a super-power as the United States, is, accordingly, in a marasmic state. It will not, it should be iterated, disappear, for it has its indispensable functions to perform, functions that the corporations (and other groups) simply do not want to, or cannot, do. But in its historical form at least, surely it is not the optimum political order. At one time the church dominated the Western world, only to be supplanted by the nation-state. Now the latter is evolving into something new; that, we call multinational corporativism (it is discussed more fully below).

Corporate Citizenship

The notion of citizenship of the corporation, of allegiances being owed to an inchoate collective body, has been mentioned above. The present discussion develops that idea further. Citizenship so considered must of course be based upon a theory of political organization on a functional or occupational-industrial basis rather than on a geographic basis.⁸¹ The principal hypothesis here advanced is that citizenship of the international corporate manager, and indeed of members of the techno-structure far down the corporate hierarchy, is tending to become dual; allegiances are owed in part to the nation-state and in part to the corporation.

Under the orthodox view, citizenship attaches merely to the political order; by birth or by blood or by naturalization, one achieves a certain status conferred by the state. Normally, this relates only to the territorial nation-state. However, in some instances dual nationality (or citizenship) is possible; some states permit one to renounce his citizenship to take on another, whereas others refuse to allow voluntary divestiture. (There is a considerable body of American constitutional law on the question of involuntary loss of citizenship.)⁸² And in what seems to be a unique

⁸¹As such it bears resemblance to theories of syndicalism and corporativism. See, inter alia, M. Olson, The Logic of Collective Action (1965); M. Elbow, French Corporative Theory, 1789-1948 (1953).

⁸²For discussion, see, for example, Roche, The Expatriation Cases: "Breathes There the Man, with Soul So Dead . . .?", 1963 Sup. Ct. Rev. 325.

situation, the state of Israel claims that Jews everywhere are also citizens of Israel, simply because of religious ties, regardless of whether or not an individual wishes it.⁸³

The unresolved, threshold question is whether a person can be considered to be a citizen of both the territorial state and a non-geographic entity, such as the corporation. The answer suggested here is in the affirmative. If the corporation is viewed, as indeed it should be, as something more than an economic entity or a constitutional (legal) person, but also as a political order and a social system, then it becomes obvious, as Andrew Hacker has said, that the time has come "for us to recognize a new kind of citizenship: corporation citizenship."⁸⁴

The late Charles Wilson, of General Motors, is famed for a misquoted malapropism which had him identifying the interests of GM with those of the United States. But he was, and is, not alone in that belief: Corporate managers readily perceive the "public interest" being furthered by their activities; employing the comforting, however erroneous, theories of Adam Smith, they are able

⁸³ Discussed in Mallison, The Zionist-Israel Juridical Claims to Constitute "The Jewish People" Nationality Entity and to Confer Membership Upon It: Appraisal in Public International Law, 32 Geo. Wash. L. Rev. 963 (1964); Mallison and Mallison, An International Law Appraisal of the Juridical Characteristics of the Resistance of the People of Palestine: The Struggle for Human Rights (photo copy of paper presented in Sept. 1972 at the meeting of Commission on Human Rights in Palestine of the Second World Conference of Christians for Palestine).

⁸⁴ Hacker, Politics and the Corporation, in The Corporation Take-Over 260 (A. Hacker ed. 1964).

to translate individual (natural person and corporation) greed or self-interest into the public good. On the other hand, as David Finn has said, "not only personal concerns but the special interests of individual departments or subsidiaries must be subordinated to the good of the company as a whole."⁸⁵ Over-all company goals are rigorously, even ruthlessly, pursued.

If citizenship is viewed functionally, rather than as an attribute of positive law (as, that is, a characteristic that can be conferred only by the state), then it is necessary to ask for the factors that make up citizenship. There is a dual aspect to that question:

(a) With whom does the individual person identify? which organization commands his loyalties and allegiances? (b) What type of reciprocal obligations flow from the organization to the individual? This is not the place to do more than pose such questions; they will require answer in another place. Suffice it now merely to quote Hacker again:⁸⁶

. . . managers and workers alike are uprooted, but it is the former--the middle class--who seek adjustment and new roots because of the profound changes they have undergone in environment, expectations, and status. Eastman Kodak's medical plans, IBM's country clubs, Richfield Oil's model homes, du Pont's psychiatrists, Reynolds Tobacco's chaplains, and even RCA's neckties with the corporate insignia--all are symptomatic of the effort to establish a feeling of community within the corporation. The middle-class employee no longer has an alternative community in which he can find a sense of belonging. The national government is too large and

⁸⁵D. Finn, The Corporate Oligarch 135 (1969).

⁸⁶A. Hacker, The End of the American Era 72 (1970).

unwieldily to provide this satisfaction; and local governments are too ineffectual to cater to such deep-seated needs. Government provides various welfare services at various levels, but they are far from being programs that will meet the social and psychological needs of the middle class.

Thus there has emerged the equivalent of a new kind of citizenship. It is not the same as our traditional view of citizenship

Hacker, of course, speaks here of the domestic corporation. If his views are valid, as I believe they are, then they are applicable with even greater force to the MNEs. Those who toil and spin for the MNEs are a part of a community, non-geographical but nevertheless identifiable, that has its rewards and punishments and, even more importantly, gives satisfactions greater than the orthodox political order.

The state, to be sure, claims and attempts to enforce a monopoly on loyalty. But this is a relatively new development in Western history, as Robert Nisbet has forcefully demonstrated.⁸⁷ And to the extent that it had force and effect in international law, it has broken down in recent years. The United Nations, for example, was recognized as an international public body by the International Court of Justice.⁸⁸ The subjects of international law are no longer limited to nation-states; in the words of the Secretary-General of the United Nations, "Practice has abandoned the doctrine that States

⁸⁷R. Nisbet, Community and Power (1962) (first published as The Quest for Community in 1953).

⁸⁸United Nations Reparation Case, (1949) I.C.J. 174.

are the exclusive subjects of international rights and duties."⁸⁹

Transnational organizations that are beginning to achieve recognition as international public bodies include the Knights of Malta, the Ismaili sect, and the Roman Catholic Church.⁹⁰

The clear implication of calling the United Nations a subject of international law, as was done in the United Nations Reparation Case, plus the dawning recognition of bodies other than nation-states as subjects of international law, is that reciprocal rights and duties attach to those who identify with these new subjects. In traditional legal parlance, those rights and duties, as well as the identifications with non-nation groups, bespeak nationality or citizenship. Functionally, this is a practical consideration, as Professor Helen Silving has said:⁹¹ "Nationality law is closely connected with the political structure of country, more so than most branches of law. It determines who should be a 'citizen,' and thus what shall be the composition of the 'nation'." Or as the Supreme Court of the United States said in 1913: "Citizenship is membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of society. These are reciprocal obligations,

⁸⁹ Memo. of Sec. Gen. of U.N., in Survey of Int'l Law in Relation to the Work of Codification of the Int'l Law Comm'n, A/cn.4/1/Rev. 1, p. 19 (Feb. 10, 1949).

⁹⁰ See McDougal, International Law, Power and Policy: A Contemporary Conception, 82 Recueil des Cours 137 (1953) (speaking of a hierarchy of participants in the "world community"). See also Farran, The Sovereign Order of Malta in International Law, 3 Int'l and Comp. L. Q. 217 (1954).

⁹¹ Silving, Nationality in Comparative Law, 5 Am. J. Comp. L. 410 (1956).

one being a compensation for the other."⁹²

In answering the question of whether a given organization has achieved the status of an international public body, empirical tests rather than abstract formulae must be applied. As Professor Hersh Lauterpacht has put it, "in each particular case the question of whether a person or a body is a subject of international law must be answered in a pragmatic manner by reference to actual experience and to the reason of the law as distinguished from a preconceived notion as to who can be subjects of international law."⁹³ While admittedly corporations (and other transnational entities) are not usually considered to be subjects of international law, an analysis of the role they play in the world community and the manner in which people adhere to them, while simultaneously clinging to their formal allegiances to nation-states, tends to indicate that a concept of dual citizenship is being created.

Proof of such a proposition would require knowledge beyond that presently available, knowledge not only about what the MNEs do in fact insofar as planetary decision-making is concerned, but also about the psychology--the motivations, the preferences, the values--of individual members of the sociological communities called the corporations. The first requirement will be deferred until the next section. As for the second, data are simply nonexistent. At most, a tentative hypothesis can be advanced about the concept of

⁹² *Luria v. United States*, 231 U.S. 9, 22 (1913).

⁹³ H. Lauterpacht, International Law and Human Rights 12 (1950).

corporate citizenship. Surely, however, it is a possible implication of the multiplicity of subjects of international law that loyalties of identifiable human beings are also multiple.⁹⁴ That is what is suggested here.

I do not mean to imply that duality of citizenship means that state and enterprise are equal--whatever that may mean--in fact. The nation-state, speaking generically, is still the dominant organ in world affairs (certainly it is the most visible), but that should not be taken to mean that the situation will continue or that the nation will eventually win out in any struggle for power between it and the MNE. Already suggested above is the notion that sovereignty is divided in the world community and the idea that citizenship is dual. Attention is now turned to the last of the three political consequences of economic power that were singled out for attention--the growing fusion of the political power of the nations and the economic power of the MNEs.

The Corporate State

The 20th century, it has been well said, is the century of corporativism. Indigenous to Europe, it is now spreading elsewhere. The United States is not immune from the development. It has become, if not truistic, at least common, so to term the U.S.A.

That, however, is an analysis of the internal politico-economic

⁹⁴ See McDougal, Lasswell and Reisman, The World Constitutive Process of Authoritative Decision, 19 J. Legal Ed. 253 (1967) (describing five participants or subjects, including the nation-state).

order. May the same propositions be advanced insofar as matters external to the nation-state are concerned, in, that is, the "world community"?⁹⁵ To answer that question requires insight into the manner in which political and economic power come together--now, in the past, and in the future. It is their interactions that are the core of corporativism.

In order to be able to visualize the form that planetary corporativism takes (or has taken and will take, depending on the tense one employs), it is useful to consider the fundamental aspects of the domestic corporate state. These will be briefly stated, but with the caveat that it is recognized that complex matters are being dealt with, matters that do not lend themselves to simplification. A beginning may be made with a statement made in 1931 by lawyer Adolf Berle and economist Gardiner Means:⁹⁶

The rise of the modern corporation has brought a concentration of economic power which can cope on equal terms with the modern state--economic power versus political power, each strong in its own field. The state seeks in some aspects to regulate the corporation, while the corporation, steadily becoming more powerful, seeks independence and not infrequently endeavors to avail itself, through indirect influence, of governmental

⁹⁵The term is placed in quotation marks simply because of my belief that there is no such thing as a global community, except on the very highest level of abstraction--at which point the concept of community becomes meaningless. Cf. R. Nisbet, supra note 87 passim.

⁹⁶Quoted from the Encyclopedia of the Social Sciences, in J. Commons, The Economics of Collective Action 58-9 (1950). Berle and Means make the same point in their minor classic, The Modern Corporation and Private Property (1932) and it was repeated by Berle many times--for example, in Berle, Coherency and the Social Sciences, in People, Power, and Politics 10 (E. Gould and L. Steele eds. 1961).

power. Not impossibly the economic organism, now typified by the corporation, may win equality with the state and perhaps even supersede it as the dominant institution of social organization. The law of corporations, accordingly, might well be considered as a potential constitutional law for the new economic state; while business practice assumes many of the aspects of administrative government.

If from that statement is extracted the phrase, ". . . the corporation . . . [both] seeks independence and not infrequently endeavors to avail itself, through indirect influence, of governmental power. . .," then the germ of the view of American corporativism may be seen. It is, however, a two-way street, for the state seeks to employ the corporation for its ends. The resulting relationship, when one strips the veneer off of it, is a symbiosis; each entity--enterprise and state--needs the other and uses the other. Indeed it would be difficult to visualize either existing without the other, if one views only the United States.

One other view is worth noting at the outset--Franz Neumann's statement that:⁹⁷ "The significance of political power must be squarely faced. 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." What that means is that the corporate state, American style, should be viewed as a product of history. There has always been a closer

⁹⁷ F. Neumann, The Democratic and the Authoritarian State (1957).

relationship between state and enterprise than the American mythology, particularly that purveyed by the Supreme Court, maintained. As Dean Eugene V. Rostow once put it, "the line between public and private action is blurred, and always has been blurred, in American law."⁹⁸

That development, over the decades, may be seen both in private and public law. As for the former, it is familiar learning that tort and contract principles were employed by judges (the principal lawmakers of the 19th and early 20th centuries) in ways to further and protect the growth of industrial enterprise. The point has been put in another place by the present writer: The need exists "to look beyond the facade of law and the political system to determine who benefits, and how, from that system. If politics, as Harold Lasswell has said, is a question of who gets what, where, when, and how, then judge-made private law--ostensibly normatively neutral and a product of a jurisprudential cosmology, attributed to Blackstone, that spoke in terms of eternal verities entirely divorced from the muck and mire of ordinary human affairs--historically helped to settle a number of these questions. In sum, it helped the corporations; if we want to be charitable, we can say that it was for the achievement of some public end."⁹⁹

That protecting blanket of private law was accompanied by a set of public law (constitutional) doctrines created by the Supreme Court

⁹⁸E. Rostow, Planning for Freedom: The Public Law of American Capitalism 366 (1959).

⁹⁹Miller, Legal Foundations of the Corporate State, supra note 2.

in the post-Civil War period. Not only were corporations found to be persons within the meaning of the protections afforded by the due process clauses, those clauses were in effect rewritten by the Court so as to strike down adverse legislation dealing with industrial relations.¹⁰⁰ If we consider the Supreme Court to be an instrument of governance, which it surely is, and that it renders decisions for reasons other than Blackstone's quaint jurisprudential notions, then we may perceive a corpus of public law that insulated the companies from the pressures of a rising trade-union movement, Populism, and Grangerism.

That period of judicial protection was supplanted in 1937 and ensuing years by an unannounced but definite high degree of deference accorded to the political branches of government in their economic policy decisions. After the Court had struck down the National Recovery Act of 1933,¹⁰¹ an overt attempt to engraft a form of corporativism upon the political economy, it soon stood aside and found no barriers in the fundamental law to the creation of an indigenous corporativism by slow accretion of congressional statutes, executive actions, administrative rulings, and a patina of custom and usage that have created a set of narrowly based elites, made up of both private citizens and public officials, that control increasingly

¹⁰⁰The history is outlined in A. Miller, supra note 80, and in McCloskey, Economic Due Process and the Supreme Court: An Exhumation and Reburial, 1962 Supreme Court Review 34.

¹⁰¹Not, however, because it was a form of corporativism, but for other reasons. See Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

large segments of policy.

This means that a new politico-economic order is in process of becoming, a "group-person" (to use Gierke's label)¹⁰² that at once transcends the arithmetical sum of its parts, which are the public group of government and the private group of the corporations (and other important social organizations). The shorthand term for this is the corporate state. It has at least the following elements: (1) the merger, actual or tacit, between political and economic power; (2) a legal nexus between the two forms of power; (3) the consequence of some type of corporate body that both encompasses the two and is greater than the arithmetical sum of the two; and (4) a diminution of the social and legal role of the individual qua individual. Time and space permit discussion of only the second-- the question of how in legal theory the fusion of the two types of social power can be said to have taken place.¹⁰³

Some nations have answered that question by enacting statutes or by executive fiat; examples include Italy under Mussolini and Spain under Franco. For a nation such as the United States the answer is much more difficult. Required is a "living law" analysis, in the Ehrlichian sense,¹⁰⁴ which requires: (1) focus on the important

¹⁰² See O. von Gierke, supra note 73, discussed in Miller, supra note 2.

¹⁰³ For fuller discussion, see my Journal of Economic Issues article, supra note 2, and my forthcoming The Modern Corporate State: An Essay in Constitutional Theory (unpublished book manuscript).

¹⁰⁴ See Ehrlich, supra note 46.

societal decisions and asking the question: Who makes those decisions, how, and with what effects? (2) a distinction between those who exercise formal authority to make such decisions and those who exercise effective control over them; (3) a knowledge of the factors that influence or control given decisions; and (4) an appreciation of what difference decisions make in the social structure.

Such large and difficult questions can be given only summary treatment here. The basic idea proffered is that important societal decisions tend more and more to be made by an amalgam of the interactions of public and private bureaucracies. Quite often, but not always, these decisions--they are matters of important public policy--are put into official form through the formal authority of government officials. (This is not always so, for perhaps equally often corporate managers can do so, but only with express or tacit delegation of authority from the state, the state having what Wolfgang Friedmann once termed a "reserve function.")¹⁰⁵ The flow of decisions thus made, which often are administrative rather than legislative or judicial, constitute the living law. They need not, it should be noted, be formalized in administrative rule or legislative enactment; they are, to vary the terminology of John R. Commons, the "working rules" of American corporativism.¹⁰⁶

The living law is principally associated with Eugen Ehrlich, the

¹⁰⁵ Friedmann, Corporate Power, Government by Private Groups, and the Law, 57 Colum. L. Rev. 155 (1957).

¹⁰⁶ J. Commons, Legal Foundations of Capitalism (1924) passim.

Austrian jurist who wrote The Fundamental Principles of the Sociology of Law several decades ago. Ehrlich maintained that the living law is to be seen in contrast to that which is in force merely in the courts and with the officials. The living law, to him, is law that is not imprisoned in formal rules of law, but which nevertheless dominates life itself. To find it, one must be privy to not only the orthodox legal research materials, but also the study of life itself, of commerce, of customs and usage, and of the several types of organizations, both those recognized by formal law and those that are disapproved by that law. In other words, the living law is the flow of authoritative decisions, in the McDougal sense,¹⁰⁷ but with the decisions emanating both from the public and the private bureaucracies. It is what the important decision-makers actually do; it is a process, a flow of decisions rather than a static system. The black-letter rules are important and necessary, but are only a part of the picture--a datum, a point of departure for more meaningful analysis. The myriad routine transactions between the two characteristic institutions of the day--big government and big business--make up a body of living law. At times it is made overt in statute, administrative ruling, or even judicial decision, but not always or even mostly. This is particularly true of the "how" of decision-making, the procedure by which decisions are made; it, too is law in the sense used here.

¹⁰⁷ See, for example, McDougal, Law as a Process of Decision, 1 Natural L. Forum 53 (1956).

What is suggested is that a system of law exists within the United States, which consists of the informal transactions between government and pluralistic social groups--in present inquiry, the corporations. Although at times it is formalized, more often it exists as a set of working rules which are understood by the participants, but which seldom get a formal imprimatur, or, for that matter, which are often kept secret from all except a select few. This system is not necessarily cohesive and consistent; it is a series of laws, rather than a logical whole. It is the means by which the various sub-governments within Washington operate. This complex web of informal interactions constitutes what, with Ehrlich, is called the living law of American corporativism. If the notion is valid, then it effects the legal nexus between the corporation and the state. It is law in that it enables power to be exercised, and it is invisible law in that it is not codified or otherwise entombed in the musty volumes of law libraries. Commons's "working rules" appear to approximate this view; for example, he speaks of the corporation charter as a

group of promises and commands which the state makes in the form of working rules indicating how the officials of the state shall act in the future in matters affecting the association, the members of the association, and the persons not members. It is these promises and commands, or working rules, of officials which constitute the charter and determine the status of the association. . . . This collective, intangible living process of individuals, the functionaries of the state find already in a trembling existence and then proceed "artificially" to guide the individuals concerned and give it a safer existence. The guidance is made through promising to them a certain line of behavior on the part of public officials, which sets forth the limits on their

private behavior and the assistance they may expect on the part of public officials.¹⁰⁸

Within the American constitutional system, that "assistance" about which Commons speaks is subject to the highest degree of discretion on the part of public officials, the constitutional and statutory law of delegation of legislative power having invested the bureaucracy with uncontrolled governing power--uncontrolled in the sense of interdictory rules of law.¹⁰⁹ (Ours is emphatically a government of men, not of laws, says Washington lawyer Charles Horsky--and that it is, with the "superlawyers" in Washington operating as power brokers between business and government.)¹¹⁰

So much for prologue on the concept of corporativism. Can the same notions be applied to the larger-than-national scheme? The (admittedly) tentative answer is in the affirmative, coupled with the caveat that much research must be conducted in order to produce verified data that would validate such an hypothesis. Enough evidence is now available, however, for the state-centered view of world politics and world law to be an outdated paradigm; so much is shown in the seminal volume, Transnational Relations and World Politics, edited by Professors Robert O. Keohane and Joseph S. Nye, Jr.¹¹¹

¹⁰⁸ Commons, supra note 106.

¹⁰⁹ Cf. K. Davis, Discretionary Justice: A Preliminary Inquiry (1969).

¹¹⁰ See C. Horsky, The Washington Lawyer (1972); J. Goulden, The Superlawyers (1972).

¹¹¹ Published in 1972.

As Seyom Brown, Senior Fellow at the Brookings Institution, has said:¹¹²

"The cumulative picture that emerges is one of governments losing their controlling influence over important transnational flows of people, material, money, and ideas, while other organizations--corporations, professional and trade associations, quasi-governments--gain in ability to allocate resources, privileges, and penalties across national boundaries." At least three implications may be drawn from this: (1) the state-centered paradigm of world politics, which focuses on the strategies, capabilities, and interactions of nation-states, is no longer valid; indeed, it never was entirely valid, but it is becoming less so; (2) the nation-states do not (and will not) necessarily prevail over private transnational interests should conflicts occur; the orthodox assumption is that the nation-state will win out; the point, however, is not the ultimate power of the state in such clashes but whether the cumulative power of the transnational private interests often intimidate, and thus dominate, the very governmental agencies that purportedly regulate them; and (3) it is not necessarily valid to maintain that creation of a single global economy within which goods and services can be exchanged freely on the basis of comparative advantage would be the optimum way of allocating the world's resources; despite the belief that it is, it may well be that "the transnationally mobile are rewarded at the expense of the nationally mobile."¹¹³ In

¹¹²Brown, A Study of Conglomerate Powers That Transcend Nations, Saturday Review, May 20, 1972, p. 64.

¹¹³Keohane and Nye supra note 111.

short, a just world order gradually evolving out of expanding socio-economic intercourse, made possible by new transportation and communications technologies, might well increase conflict rather than eliminate it.¹¹⁴

Be that as it may (it is put forth merely for purposes of conjecture), the implication of this too-brief analysis is that the rise of the MNEs is a post-colonial form of private economic imperialism. As Peter B. Evans said, "With the growing predominance of the multinational corporation, increasing numbers of a poor country's economic actors become responsible to superiors and stockholders who are citizens of other countries. If a similar chain of command existed in public organizations, the poor country would be deemed a colony."¹¹⁵ Even affluent countries, such as Canada, can be subjected to this type of neocolonialism.¹¹⁶ And the further implication is that the MNE quite often, although not always, is the "chosen instrument" of the powerful nation-state (such as the United

¹¹⁴ Brown, supra note 112.

¹¹⁵ Evans, National Autonomy and Economic Development: Critical Perspectives on Multinational Corporations in Poor Countries, in Keohane and Nye, supra note 111, at 325.

¹¹⁶ "The international corporations have evidently declared ideological war on the 'antiquated' nation-state. . . . The charge that materialism, modernization and internationalism is the new liberal creed of corporate capitalism is a valid one. The implication is clear: the nation-state as a political unit of democratic decision-making must, in the interest of 'progress,' yield control to the new mercantile mini-powers." Levitt, The Hinterland Economy, 50 Canadian Forum 163 (July-Aug. 1970). See K. Levitt, Silent Surrender (1970); Cox, Labor and Transnational Relations, in Keohane and Nye, supra note 111, at 204.

States).¹¹⁷ But the analogue is also noteworthy: As Professor Dennis M. Ray has said, quite often corporations can shape the environment in which the problems of American foreign relations grow and can also define the "axiomatic." "Axiomatic decisions," says Ray, "are those which are virtually automatic; those actions by government which no longer require explicit means-ends calculations and, indeed, are rarely accompanied by debate . . ."¹¹⁸ For example, it is "axiomatic" that the U.S. government should intervene to protect American life and property abroad. But whose life and whose property? And why? To what ends? If Jack Anderson's expose of ITT's covert activities in Chile, carried on with the help of the American government, are even partially correct,¹¹⁹ then there is hard evidence of business-government collaboration in the "world community." Another name for it would be corporativism, American style.

It is, in sum, more than an a priori hypothesis that the MNEs and the state are often partners in fact, if not in theory. They ride on a bicycle built for two, with the unanswered question being who is doing the steering. Compare in this regard the statement of

¹¹⁷As in the airlines industry, and also in international communications.

¹¹⁸Ray, Corporations and American Foreign Relations, 403 Annals 80 (Sept. 1972).

¹¹⁹A new subcommittee, headed by Senator Frank Church, of the Senate Committee on Foreign Relations has been established and will inquire inter alia into the political impact of the multinational corporations in the developing countries. Cf. Miller, The Global Corporation and American Constitutionalism: Some Political Consequences of Economic Power, 6 J. Int'l L. and Econ. 235 (1972).

Professor Robert Gilpin with that of former Deputy Assistant Secretary of Defense Arthur Barber; says Gilpin: ". . . the role of the nation-state in economic as well as in political life is increasing and . . . the multinational corporation is actually a stimulant to the further extension of state power in the economic realm";¹²⁰ Barber maintains that the MNE is "bringing an end to middle class society and the dominance of the nation-state."¹²¹ Just as the East India Company was, while privately owned and operated for the profit of shareholders, in effect an instrument of the British government,¹²² so too are the Fords and IBMs and Mitsuis and Unilevers and other corporate giants of the modern age.

That view, however, is being contested by some corporate officials, who are beginning to think in terms of "anational" corporations. "We appear," said Carl A. Gerstacker, chairman of the board of Dow Chemical Company, in early 1972, "to be moving strongly in the direction of what will not be really multinational or international companies as we know them today, but what we might call 'anational' companies-- companies without any nationality, belonging to all nationalities."¹²³

¹²⁰Gilpin, The Politics of Transnational Economic Relations, in Keohane and Nye, supra note 111, at 48.

¹²¹Barber, quoted in Galloway, Worldwide Corporations and International Integration: The Case of INTELSAT, 24 Int'l Org. 506 (1970).

¹²²See J. Gardner, The East India Company (1972); see also Heilbroner, The Multinational Corporation and the Nation-State, New York Rev., Feb. 11, 1971, p. 23.

¹²³Jensen, Worldwide Companies Outgrow Nations, N. Y. Times, Feb. 13, 1972, Sec. 3, p. 1.

If that should take place--the main obstacle now is the American tax laws--then corporations would no longer be instruments of American policy; they would be free from the laws of any nation save those in which they did business. No longer, says Gerstacker, would his company have to comply with United States law concerning his operations outside the United States. To achieve anationalism it would be necessary to incorporate in some principality, such as Monaco, or perhaps on some tiny island in the Caribbean. Admittedly, however, this is not a present fact. It would be difficult, perhaps impossible, to predict the success of the drive for denationalizing the corporation. No doubt it would be strenuously resisted by the political leaders and, quite possibly, by the trade unions. Nationality of corporations, however, is at best a nebulous legal concept, and has become more so with ownership of shares being held by citizens of many nation-states.¹²⁴

There is, furthermore, a strong reason for the corporation to retain ties to a nation-state such as the United States. As a superpower that, for better or worse, is the dominant political entity in the world, the U.S. can through one means or another provide protections to corporations that they cannot themselves develop. There is, in other words, a reciprocal need of the two--corporation and nation-state--for each other. Through various techniques, including the use of violence, the political order can protect the property and assets of the companies. The price for that is paid through taxation

¹²⁴ Cf. Miller, The Corporation as a Private Government in the World Community, 46 Va. L. Rev. 1539 (1960).

and such regulation as can be effected. In the resolution of the conflicts between the two forms of social order--political and economic--a system of symbiotic cooperation and close partnership is likely to be the result; at times that cooperation may appear antagonistic, but only sporadically. The basic pattern will be for the corporation and the state to be the two sides of one coin; neither could exist in the modern world without the other.

IV. CONCLUSION

It is enough now to summarize: Technology plus Organization equals the multinational enterprise (in brief, $T + O = MNE$), but only by permitting its existence, not requiring it. The MNE and the nation-state are the major participants in the planetary order; the enterprise has a political role and the state has an economic role; they are conjoined ever increasingly into a system of global corporativism. Only by an act of faith, not necessarily self-evident, can one believe that the "public interest"--that is, the interests of all the peoples of the world--will result from this fusion of power. Much more likely, the rich will get richer and the poor will get poorer.¹²⁵ If that be so, then the MNE is a technique to further the economic well-being of the already affluent nation-states of the planet.

¹²⁵Cf. G. Myrdal, Asian Drama (1968); B. Ward, The Rich Nations and the Poor Nations (1962); P. Worsley, The Third World (1964).

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