Were the Luddites Necessarily Wrong?: A Note on the Constitutionality of the “New Technology Bill of Rights”*

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Abstract

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There is a war on, but only one side is armed: this is the essence of the technology question today. On the one side is private capital, scientized and subsidized, mobile and global, and now heavily armed with military-spawned command, control, and communication technologies. Empowered by the second Industrial Revolution, capital is moving decisively now to enlarge and consolidate the social dominance it secured in the first. 

On the other side, those under assault hastily abandon the field for lack of an agenda, an arsenal or an army. Their own comprehension and critical abilities confounded by the cultural barrage, they take refuge in alternating strategies of appeasement and accommodation, denial and delusion, and reel in desperate disarray before this seemingly inexorable onslaught—which is known in polite circles as “technological change.”

—David F. Noble1

I.

Unemployment is something we can all grasp and understand—and fear, too, for Homo sapiens has always been Homo faber as well. People are significant in the eyes of others not so much for what they are but for what they do. Meet someone for the first time at almost any cocktail party and the inevitable question soon pops out: “Where do you work?” or perhaps “What do you do?” In an ostensibly classless society, one’s occupation or vocation solidifies his status in so-

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society. Work is the central factor of Western nations. Those who do not work, unless they have been favored by fortune with inherited wealth, are often scorned: They are called “welfare cheaters” or “bums.” As Dr. Ralf Dahrendorf, Director of the London School of Economics, has observed: “Labor at the center of society means that every aspect of life must accommodate it—education, vacations, and retirement. In the labor society education conforms to the discipline and demands of work. Vacations serve as recovery periods, time to renew energies to return to work refreshed. For progressive labor societies, at least, retirement is a ‘well earned rest after a lifetime of hard work.’”

It is beyond question that the United States has always been a “labor society.”

The essential question posed by the International Association of Machinists (IAM’s) “New Technology Bill of Rights” is how Americans should adapt to the sudden end of such a society and its transmutation into a society in which human labor has been largely eliminated. The IAM believes that adaptation should not be left to chance or to the vagaries of the “market.” Theirs is a suggestion that affirmative governmental action be taken to deal with a new situation in the human condition. I will leave to others the question of the wisdom of the IAM proposal. In this brief commentary I pose and seek to answer the question of whether constitutional impediments exist that would bar the Bill of Rights of the IAM from going into effect.

The short answer to that question is “no”—there is nothing in the Constitution, as a document or as construed, that would invalidate what the IAM proposes. Let me explain. I begin with several assumptions. First, the new technologies of microprocessing and computers pose a clear and present danger to Homo faber. Mass man has become obsolete, superfluous to the needs of the emergent politico-economic order. Too many people are chasing too few jobs, a diminishing number of jobs. No one quite knows what to do with surplus people, although Professor Richard Rubenstein has developed some grim scenarios about what might happen. Second, it is, as Jacques Ellul has maintained,
“impossible to trust the spontaneous employment which men will make of the available technical means.” 4 The meaning is clear: positive action should be taken to ameliorate the adverse consequences of new technologies. Third, corrective action, should it come (which by no means is certain), can derive only from government—the federal government. That is so because a holistic approach is indispensable, one that encompasses the entire spectrum of man’s position in nature and his relationships with his fellow humans. No other societal institution is capable even of considering, let alone undertaking, a program of comprehensive adaptation to what the scientists and technologists have wrought.

I do not propose to prove those assumptions. They are self-evident, and stated as givens in order to set the pattern for the ensuing brief discussion of validity of one of the consequences of technological change—the terminal sense of the loss of work itself by increasing numbers of Americans (and others throughout the world). My net conclusion is that the advent of the new technologies requires a thorough re-examination and reorganization of the political economy of the nation—indeed, of the world. The New Technology Bill of Rights is a proper step in that direction.

II.

The time has come for serious consideration to be given to the idea that constitutions should be directed toward the reasonable satisfaction of human needs and desires, as well as merely establishing frameworks of government and setting forth a set of negative limitations on what government officers can do. 5 What follows is in many respects a variation on a theme struck by Leon Duguit many years ago: 6 “Any system of public law can be vital only so far as it is based on a given sanction to the following rules: First, the holders of power cannot do certain things; second, there are certain things they must do.” In recent de-

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5. This is the thesis of my book in progress, supra note *.
cades, all three branches of the national government have risen in some
degree to confront Duguit's challenge. Congress has enacted numerous
statutes, the sum of which is to institutionalize the American version of
the welfare state. The Executive has cooperated, in greater or lesser
degree, by putting those legislative commands into operational reality.
And the Supreme Court has constitutionalized those efforts to meet the
"must do" part of Duguit's formulation. The requirement now it to
face up to the challenge posed by the IAM.

Since enactment of the IAM proposal would constitute a struc-
tural change in government, a basic alteration in what I have elsewhere
called the Political and the Economic Constitutions,7 purists might ar-
gue that if it is to come it should be by constitutional amendment.
That, however, is not necessary. Amendment at best is a ponderous
blunderbuss ill-suited to the requirements of a rapidly changing nation.
That, it be noted, has been true since at least 1791, when the Bill of
Rights was added to the Document drafted in 1787. Only the four-
teenth amendment may be said to be of supreme importance. The other
fifteen vary in significance from the repealed eighteenth to the nine-
teenth (voting rights for females); those of any consequence could have
been put into law by innovative congressional action pursuant to section
V of the fourteenth amendment.

We have become accustomed to and by and large agree with the
notion of judicial exegesis of the Constitution. However much some
may disagree with specific constitutional decisions by the Supreme
Court, there can be no question that the Justices do sit as a continuous
constitutional convention. They progressively update the fundamental
law. Each generation of Americans writes its own constitution, having
received a tacit delegation of powers from the framers to do so. (The
Supreme Court also received a tacit delegation of powers from those
who drafted the Document of 1787.) And the Constitution has always
been relative to circumstances.8 It could scarcely be otherwise. Govern-
ment and law are more reflective of social conditions than determinants
of those conditions—at least historically. Law, including constitutional
law, is less a priori than a posteriori.

The new technology poses constitutional problems. Can they be

8. See A. MILLER, DEMOCRATIC DICTATORSHIP: THE EMERGING CONSTITUTION
OF CONTROL passim (1981); A. MILLER, TOWARD INCREASED JUDICIAL ACTIVISM:
The Political Role of the Supreme Court (1982).
met by means other than amendment? The answer can only be "yes," once it is perceived that the interpretation and development of the Constitution is emphatically not a judicial monopoly. The myth system is to the contrary: Under it, amendment or judicial exegesis are the only legitimate ways to alter the fundamental law. But under the operational code of the American constitutional order the Constitution is constantly in a state of becoming, altered not only by judicial decrees but by certain legislative and executive acts.

A number of statutes can be viewed as "quasi-constitutional in nature"; they sought to "clarify and define certain basic relationships among the branches of government."9 At least the following statutes fall into that category (although I see no reason to soften the label with a "quasi"): the Judiciary Act of 1789, the Sherman Antitrust Act, the statute establishing the Federal Reserve Board, the Budget and Accounting Act of 1921, the National Labor Relations Act of 1935, the Employment Act of 1946, the Civil Rights Act of 1964, the National Environmental Policy Act of 1969, the War Powers Resolution of 1973, and the Budget and Impoundment Control Act of 1974. There may be others, notably the National Security Act of 1947 and the National Emergencies Act, but that listing clearly demonstrates that Congress does indeed make constitutive decisions. Each of the statutes effected something of a structural change in the nature of American government; they delineate "structures and processes"10 rather than setting forth substantive policies.

As with Congress, so with the President: some of the Chief Executive's decisions or actions merit consideration as alteration of the Constitution. The ready example is the warmaking power. Expressly vested in Congress by Article I, and thus under the myth system solely a legislative power, that notion was dealt a body blow by President Lincoln at the beginning of the Civil War.11 Bit by bit since then—and even before then—the White House has become the center of effective control over the use of violence. That is so even though Congress has sought to retrieve some of its lost powers by the War Powers Resolution. Events since 1973 increasingly indicate that the Resolution is a

10. Id. at 397.
11. For discussion, see C. Rossiter, Constitutional Dictatorship: Crisis Government in the Modern Democracies (1948); Miller, Reason of State and the Emergent Constitution of Control, 64 Minn. L. Rev. 585, 595-97 (1980).
A constitutional shift of major proportions has taken place.

By no means are Congress and the President always at loggerheads. Many presidential actions, taken without express authority, get at least tacit congressional approval through appropriations and other means. Despite the conventional wisdom to the contrary, the norm between the branches is cooperation rather than conflict. Witness the manner in which Congress routinely appropriated funds for waging a presidential war in Vietnam. Witness also the establishment of the National Security Agency by a still secret executive order. In both instances, Congress did not dissent from presidential incursions on the legislative turf. There is a further lesson: In general, the Supreme Court goes along with congressional and executive constitutive decision-making. Examples are easily found: the Prize Cases, the Jones & Laughlin decision sustaining the National Labor Relations Act, and the brace of decisions upholding the Civil Rights Act. The Justices, as Professor Martin Shapiro has commented, are part of the governing coalition of the nation; and judicial independence exists more in the myth system than in the operational code.

Enactment, therefore, of the IAM's proposed "New Technology Bill of Rights" would embed into the law a statute that would approach the dimension of a constitutional amendment. It would basically change the relationship of the workers to the "private" governments of the nation, principally the supercorporations. There is nothing in the proposal that would, under present doctrine, fail to pass constitutional muster. A series of Supreme Court decisions beginning with the Gold Clause Cases, passing through Jones & Laughlin and Katzenbach v. McClung, and extending to United States v. Perez is proof positive that existing law would validate what on first glance seems to be a revolutionary proposal by the IAM. Given the requisite political will to enact the proposal, it is wholly safe to forecast that the Supreme Court

would not invalidate it. The persistent and unresolved problem, of course, is how to generate that political will.

No one expects either House of Congress to rush forward in full or even partial acceptance of the proposal. That it merits full consideration, and soon, should go without saying. Call it Luddism if one wishes, but the point is not that, but of determining who should bear, if indeed anyone should, the dreadful costs of adapting to a new economy. It cuts against the grain of the constitutional commitment to "equal justice under law" to say that displaced workers should alone shoulder the brunt of the loss of work itself.

III.

If it is assumed, as it should be, that Congress is far from likely to enact anything remotely similar to the IAM's proposal, does that end the matter? Not necessarily. But it would be enormously difficult to get something substantial done. Again, let me explain.

I set aside the notion that any one or even a combination of the several states could do the necessary. A company can play off one state against another and choose the one that maximizes the firm's interests. Furthermore, since under Wickard v. Filburn and Katzenbach v. McClung\(^{16}\) there is very little of economic importance that does not fall within the ambit of the federal government's power to govern commerce, the constitutional hurdle of unduly burdening interstate commerce would have to be surmounted. There is little reason to expect that the present-day Supreme Court, dominated as it is by corporation lawyers, would validate, say, an attempt by the state of Ohio to prevent runaway plants or to ensure that corporations, once established in the state, stay there. Profit maximization is the primary, if not the sole, goal of corporate management. An effort by any one state to enact the IAM proposal for companies doing business within that state would certainly engender hostile opposition from the entire business community. That hostility, in turn, is not likely to allow the state to prevail before the Supreme Court when lawsuits are brought, as surely they would. The pro-business attitude of today's Court is illustrated in, to cite only one decision, First National Bank v. Bellotti.\(^{17}\)

The ultimate need, if anything is going to be done, is for a great national debate about the pros and cons of the new technology to take place. How can it be started—and continued? "If there's ever gonna be change in America, it's gonna be cause every community in America's ready for it and—boom! There's gonna be a big tidal wave, and it's just gonna crash down on Washington, and the people are finally gonna be heard." 18 That "tidal wave" could create the necessary political will in Congress. How can it be done? I venture, very tentatively and with full cognizance of the inherent difficulties in the proposition, that the Supreme Court could, at least in theory, provide the catalyst for stimulating such a debate.

I have argued elsewhere that the Supreme Court should strive to make decisions that maximize human dignity. 19 Just as in Brown v. Board of Education the Warren Court struck a blow for the decent treatment of black Americans and in Roe v. Wade the Burger Court carried on that theme (holding that women should have the right to control their own bodies), 20 so it is here: The Court arguably can help in achieving a smoother transition to the new society that is fast becoming the norm. It, of course, would not be easy. But since both Brown and Roe can be read as official statements that precipitated great national debates (on race and abortion), it would not be a novel proposition for the Supreme Court to do something similar about the societal impact of technology. Two ways theoretically exist: first, the Court could attempt to impose affirmative duties on Congress and the President to take appropriate action concerning technology; and second, the corporation could be constitutionalized by updating the "state action" doctrine, followed by finding that workers—those willing and able—had a constitutional right to a job (in general, but not a specific job). I shall discuss each in turn, repeating at the outset the admonition that the ideas are proffered only tentatively.


19. Miller, Toward Increased Judicial Activism: The Political Role of the Supreme Court ch. 11 (1982).

A. Affirmative Duties on Government

I begin by acknowledging that for the Supreme Court to try to impose affirmative duties on Congress and the President to deal properly and effectively with the impact of new technologies is not a particularly promising avenue to take. But it is worth exploring, even though what immediately follows may be categorized as utopian thinking. There is a value in such thinking, if only to encourage people to elevate the level of their responses to new social conditions. The Supreme Court has long acted as what Judge J. Skelly Wright once termed "the conscience of a sovereign people." In recent decades—at least since Brown v. Board of Education—the courts have become targets of pressure groups, especially when the avowedly political branches of government refuse or fail to act and deal with what are perceived by segments of the citizenry as justified grievances.

Judicial interpretation (and enforcement) of affirmative duties of government is by no means novel. In race relations, legislative reapportionment, administration of the criminal law, and perhaps elsewhere, obligations have been placed on governmental officers to do something positive (as distinguished from refraining from not doing something—the time-honored ideal of constitutions as limitations on government). Add the fact that since Cooper v. Aaron, and perhaps before, it is widely accepted that the logically impossible has been by some means known only to the Justices transmogrified into the possible—that a general principle can be inferred from one particular—and it is apparent that the Court has indeed become a de facto third (and perhaps highest) legislative chamber.

The argument, telescoped here, derives from (perhaps antedates, although I know of no prior judicial statement) Chief Justice Charles

21. See W. Galston, Justice and the Human Good ch. 2 (198). Professor Galston maintains that utopian thought "performs three related political functions. First, it guides our deliberation. . . . Second, it justifies our actions. . . . Third, it serves as the basis for the evaluation of existing institutions and practices. . . . I am convinced that no political theory that seeks to be practical can dispense with it." Id. at 14-15.


24. For further discussion see A. Miller, supra note 22, at chapters 4-5.
Evans Hughes' opinion in *West Coast Hotel v. Parrish.* There, Hughes, dealing with the validity of a state's minimum wage legislation, said in part:

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

With that language, particularly the concluding two sentences, Hughes changed the nature of liberty under the Constitution. "From being a limitation on legislative power," Professor Edward S. Corwin explained, "the due process clause became an actual instigation to legislation of a leveling character." In effect, Hughes adopted without acknowledgment Thomas Hill Green's concept of positive freedom and of collective well-being. To Green, freedom meant "a positive power or capacity of doing or enjoying something worth doing or enjoying...in common with others." Freedom thus depends on the "help and security" given by others, and which a person helps to secure for others. As Chief Justice Hughes put it, the liberty protected by due process is in a "social organization" that requires the protection of law against social evils.

Do the deleterious second-order consequences of new technolo-

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gies—mainly unemployment—require "the protection of law?" The answer can only be "yes." What can the Supreme Court contribute to the fulfillment of that requirement? As all know, the Justices have identified new rights outside of the constitutional text, both historically (as in liberty of contract), and contemporaneously. Privacy is the ready example here; but there are others. Can a similar right be created in the economic sphere? As we have seen, there is already an explicit governmental commitment to maximize employment and to further the economic well-being of Americans, seen, for example, in the Employment Act of 1946 and the Humphrey-Hawkins Act of 1978.

For the Supreme Court to do the necessary—to, that is, require political action "reasonable in relation to its subject"—would necessitate judicial innovation of a high level. The orthodox doctrine of judicial power under the Constitution requires that there be a justiciable controversy before courts can act. Some person, preferably someone out of work and wanting a job, would seek a court decree mandating that serious attention be accorded to employment security, followed by action which would affirm "every worker's right to be employed with decent wages at some job or another—but not necessarily always at the same job." Or, in the plaintive language of a retired policeman and former marine, "I don't think our system is all bad... What I object to is, there's no planning, I don't care how much money it takes. They should put every guy that wants to work, to work." The implication, of course, is that there should be a constitutional right to a job.

Merely stating such an idea does violence to the accepted norms of judicial behavior under the Constitution. But is the notion really so extreme? I think not, although I readily concede that there is little authority, as lawyers understand authority, to buttress it. To my knowledge, the only Justice of the Supreme Court who ever suggested as much is the late Justice William O. Douglas, who in 1955 asserted in a Supreme Court conference: "There is a constitutional right in this country for a citizen to have a job. There is a constitutional right to be a policeman or a lawyer." (The second sentence was an attempted

refutation of the Holmes dictum, followed by his disciple Justice Frankfurter, that "there was no constitutional right to be a police-
man."\textsuperscript{33} The basic principle that would have to be established (invented) is that the liberty protected by due process includes a right to a
job; or perhaps more concretely, that the citizenry have property rights in jobs. Recognition of such a due process right, when viewed ab-
stractly, is certainly no more extreme or revolutionary than the Su-
preme Court's unexplained flash of revelation in 1886 that a corpora-
tion—a disembodied economic entity—was a person within the
meaning of the fourteenth amendment; or, for that matter, the 1973
similar revelation that a woman could have an abortion by invoking a
right of privacy (which, incidentally, meant that the Justices refused to
recognize that a fetus is a constitutional person). This is said, be it
noted, not to take sides on either question, but simply to mention the
obvious: that the Justices have found rights lurking somewhere in the
interstices of the Constitution that could not possibly have been in the
minds of those who wrote and those who ratified the Document and its
amendments. The Bill of Rights and the Civil War amendments are
statements of legally-concretized decency aimed at government and
designed to canalize its relationships with the populace. Or as Justice
Frankfurter observed in 1949: "It is of the very nature of a free society
to advance in its standards of what is deemed reasonable and right.
Representing as it does a living principle, due process is not confined
within a permanent catalogue of what may at a given time be deemed
the limits or the essentials of fundamental rights."\textsuperscript{34} So, I suggest it is
here. Judicial exegesis, and expansion, of the Constitution is routine, as
Justice Byron White stated in 1966 and Justice William Brennan in
1980.

Consider, for example, such cases as \textit{Wesberry v. Sanders}, \textit{Powell v. McCormack}, and \textit{Buckley v. Valeo},\textsuperscript{35} each of which dealt with Con-
gress as either actual or tacit defendant. Consider, too, the spate of
recent decisions—the landmark case in \textit{United States v. Nixon}\textsuperscript{36}—which are judicial interventions into the area of presidential
power and discretion. Taken in their entirety, they evidence a growing

\begin{itemize}
\item 33. \textit{Id.} The Holmes assertion may be found in McAuliffe v. Mayor of New Bed-
ford, 155 Mass. 216, 220 (1892).
\item 34. \textit{Wolf v. Colorado, 338 U.S. 25, 27 (1949).}
\item 35. \textit{Buckley v. Valeo, 424 U.S. 1 (1976); Powell v. McCormack, 395 U.S. 486
(1969); Wesberry v. Sanders, 376 U.S. 1 (1964).}
\item 36. \textit{418 U.S. 683 (1974).}
\end{itemize}
willingness of the Supreme Court to intervene in both the national legislative and the executive processes. *Wesberry*, for example, told the House of Representatives (via the state governments) how Representatives had to be elected; and *Nixon* was an order to a sitting President to act as an ordinary citizen in criminal law matters. Add to *Nixon* the *Steel Seizure Case*,\(^37\) which was really directed toward President Truman, and it can readily be seen that the Justices consider themselves to be a constituent part of government, equal in title and equal in dignity to the other branches. Judicial legislation has become a commonplace.

The sticking points in present context are, of course, the questions of justiciability and of enforcement. As for the former, the Court would have to take a mental leap and make what Frankfurter once called a "logically arbitrary but sociologically nonarbitrary" decision to find a constitutional case or controversy. Not that the method would be anything novel: Justiciability has long been characterized by judicial fiat. As in *Perkins v. Lukens Steel Co.*,\(^38\) the "reasoning," such as it is, to justify finding or not finding justiciability (standing, etc.) usually is circular. That is accepted, with little opposition, as proper judicial behavior. If, then, the National Treasury Employees Union could succeed in a suit against President Nixon to enforce a statutory responsibility,\(^39\) it would take no major extension of that principle for courts to find justiciable controversies in present context. The point, to be sure, is debatable and also controversial. After all, if the Court in the *Weber* case could determine the "spirit" of the relevant statute,\(^40\) why could it not further determine that the spirit of the Employment and Humphrey-Hawkins Acts gave someone the requisite status to have their provisions carried into effect?

Enforcement is quite another matter. There is no present way that the Justices can do more than try to precipitate a great national debate that would, sooner or later, end in political action. The Justices, however, have long been America's first faculty of political economy, a vital national seminar in which the nation's values are often first debated and articulated. Could that "seminar" discussion be raised to the level

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38. 310 U.S. 113 (1940).
of serious consideration of a constitutional right to a job? A tribunal that rose to the challenge of rectifying long-standing practices of racial discrimination, that created a constitutional right to an abortion, that eliminated the "rotten boroughs" of the nation, that stared down a sitting President, and that revamped the administration of the criminal law, surely is capable of dealing with the problem of how the economic rights of workers are to be determined under the Constitution.\textsuperscript{41}

That, of course, is constitutional heresy. I do not expect ready agreement (in any degree) with such a proposal. But the Court has always been deeply immersed in politics. To Judge Spencer Roane of Virginia the decision of the Supreme Court in \textit{Cohens v. Virginia}\textsuperscript{42} was heretical: "It can only be accounted for by that love of power which history informs us infects and corrupts all who possess it, and from which even the upright and eminent judges are not exempt." To Roane, the \textit{Cohens} decision was "most monstrous and unexampled."\textsuperscript{43} It was heresy when I was in law school to assert that judicial action could be state action within the meaning of the fourteenth amendment, but the Court took the plunge in \textit{Shelley v. Kraemer} and \textit{Barrows v. Jackson}.\textsuperscript{44} In like manner, Justice Hugo Black outraged Justice Felix Frankfurter when he maintained in \textit{Adamson v. California} that the fourteenth amendment incorporated the Bill of Rights as a limitation on the states as well as the federal government.\textsuperscript{45} As all know, Black's heresy has now become the conventional wisdom. Consider, furthermore, the firestorm of disapproval that erupted when the Court held in 1954 that black Americans were entitled to decent treatment in the public schools. \textit{Roe v. Wade} received a similar reaction. The point is that the Supreme Court may have decided some issues that turned out to be "self-inflicted wounds";\textsuperscript{46} but even so, it has emerged from the fray


\textsuperscript{42} 19 U.S. (6 Wheat.) 264 (1821).

\textsuperscript{43} See C. Warren, \textit{I The Supreme Court in United States History} 555 (1926).

\textsuperscript{44} Shelley v. Kraemer, 334 U.S. 1 (1948); Barrows v. Jackson, 346 U.S. 249 (1953).

\textsuperscript{45} 332 U.S. 46 (1947).

\textsuperscript{46} The term comes from C. Hughes, \textit{The Supreme Court of the United States} 50 (1928). Hughes listed the Dred Scott decision, \textit{Dred Scott v. Sanford} 60 U.S. (19 How.) 393 (1857), the legal tender cases, \textit{Knox v. Lee}, 79 U.S. (12 Wall.)
seemingly stronger than ever. (None of the cases listed immediately above falls into a category of a self-inflicted wound. *Dred Scott's Case* is perhaps the chief example of such judicial behavior.)

The need, as has been suggested, is to generate a national debate on what should be done about the adverse second-order consequences of new technologies. My thought in this subsection is that the Supreme Court (courts generally) could play an important role in stimulating that debate. That, however, does not mean that the Justices could not act in another direction also. The focus of the next subsection concerns judicial recognition of the fact that corporations are "private" governments, the important actors of the Economic Constitution, and as such should have duties placed upon them.

**B. Constitutionalizing the Corporations**

That the United States is a corporate society is one of the commonplaces of the day. It has long been recognized that "voluntary private associations" play an important role in social affairs. I should like at this time to single out the business corporation—and of the corporations, the giant firms—for particular scrutiny. These companies dominate the private sector of the nation. Economically, that sector is a triad, consisting of the corporate economy (the giants), the small-business economy (much of which is also incorporated), and the nonprofits. Each part meshes with the others, but the giants—the supercorporations—are paramount, even though they are numerically much smaller. Those gigantic companies not only straddle the nation but usually operate throughout the world. They set the tone for and greatly influence the entire economy, government itself, and, indeed, all of society.

My thesis is that supercorporations are both economic entities and sociopolitical organizations that exist midway between natural persons and the state; as such, they should be perceived as "private" governments and held answerable to constitutional norms. They wield significant social and political power, but their constitutional legitimacy—their right or title to govern—has only a tenuous base. Rather


47. 60 U.S. (19 How.) 393 (1857).
like the way that Copernican astronomy superseded Ptolemaic cosmology, supercorporations have so eroded the premises of both classical economics and its political counterpart, liberal democracy, that new theories must be devised. Economists have yet to explain or to justify such massive conscious economic cooperation. So, too, with lawyers and political scientists: the corporation’s place in the constitutional system is far from settled. A new political economy has emerged in the United States in this century, but ancient and outmoded ideas of politics and economics still abide. “We are living in tomorrow’s world today, still using yesterday’s ideas.”

The preponderant social invention of the past century, supercorporations today occupy a place in society comparable in importance and influence to the Holy Roman Church in medieval Europe. With enormous assets, often running into tens of billions of dollars, they are concentrations of non-statist economic, and therefore of political, power not before known in human history. Corporate giants cannot avoid influencing human lives the world over on a scale similar to, and at times even dwarfing, public governments. Accordingly, Dr. Willis Harman maintains, “they face a demand that has historically been made only of government—that they assume responsibility for the welfare of those over whom they wield power.” The question in present context is whether that demand for corporate responsibility can be fulfilled through judicial action. Corporations have rights under the Constitution. Do they have concomitant duties? Corporations are constitutional persons. As such, do they have duties analogous to but not the same as those that natural persons have?

I answer those questions affirmatively. More specifically, I suggest that the Supreme Court could not only constitutionalize the corporation but could, following Chief Justice Hughes in the *Parrish* case, require that the giant firms develop policies that would include the welfare of the workers (as well as that of the stockholders). Again, I do not expect the present Court to leap to the challenge (save to shoot it down); but certainly the time has come to recognize the true nature of the supercorporations and do what is reasonably necessary about their undoubted power.

To bring the supercorporations within the ambit of the state action concept requires no major leap of doctrine. Indeed, the Supreme Court some years ago moved tentatively in that direction. But that movement

was halted with the appointment of the Nixonites to the High Bench, so that today it surely is accurate to say, with Charles Black, that state action is a "conceptual disaster area"; and with Christopher Stone that it is "now, more than ever, a shambles." The reason for such conceptual disarray is not difficult to locate: the Constitution was drafted on the assumption that only two important juridical entities existed—government and the natural person—but during recent years the United States has moved into what James Q. Wilson has called "the bureaucratic state." Few judges know quite how to deal with the admitted economic power of disembodied economic entities. The state action concept may have made some sense during the nineteenth century, when society's groups were small and decentralized; the public-private distinction, Morton Horwitz asserts, was "a rough approximation of reality" in the last century. Today's world is different.

Marsh v. Alabama is still in the United States Reports. It exists as a time bomb ticking away awaiting a time when lawyers and judges can perceive the obvious: that the corporations, as the principal exemplars of the Economic Constitution, are indeed private governments. There is no need to labor the point. The rise of the group and the emergence of a corporate, an organizational society, is plain beyond doubt. Constitutions, thus, should consider all—whether public or nominally private—who exercise significant power in the socio-political arena.

Over that hurdle, then the application of constitutional norms to purported private entities follows as a matter of course. The very concept of constitutionalism arose a few centuries ago as a means of combatting the overweening power of the political sovereign. Today we have both political and economic sovereigns, which are ever increasingly joined together in a form of corporatism, and the same type of thinking that contributed to the growth of constitutionalism should be applied to all organizations that wield significant social power. Profes-


sor David Ewing of the Harvard Business School observed in 1977:  

During the first two centuries of United States history, the trend was unmistakably to broaden the reach of the Constitution. Universal male suffrage, the abolition of slavery, bargaining rights for unions, female suffrage, the many extensions of due process to people under arrest or surveillance—these and many other events marked the ever-widening application of the Constitution. But the Constitution does not yet penetrate the organizational sector, the still-dark ghetto of American rights.

Ewing advocates that corporations (organizations, generally) be subjected to the limitations of an organizational bill of rights. He maintains that during America’s third century, one of the hallmarks of constitutionalism “should be concern for the rights of employees.”

What, however, are those rights? Professor Ewing’s call is basically one of bringing due process—procedural due process—to the workplace. He makes a persuasive case. The question posed in this essay is whether that conception can be carried a step further—into the realm of substantive due process. A generation ago the Vice-President and General Counsel of the Ford Motor Company, William T. Gossett, maintained that corporate management “no longer represents exclusively the interests of stockholders. With the passage of time, it must develop a variety of devices and procedures to assure that its dealings with other groups are fair and just.”

The other groups Gossett had in mind were employees, suppliers, dealers, customers and plant communities, “each of which has a separate claim on the corporation.”

What, then, is “fair and just”? And how can corporate management be stimulated to do more than pursue the single-minded goal of profit? Gossett tells us that there are conflicts of interest among the various groups in the corporate community; and then goes on to make this relevant statement:

One of the most dramatic conflicts of interest revolves about

55. Id. at 218. See Miller, A Modest Proposal for Helping to Tame the Corporate Beast, 8 Hofstra L. Rev. 79 (1979).
57. Id.
58. Id. at 187.
the decision of a large enterprise to move into a given community, or out of it—particularly the latter. There have been numerous instances where a single plant is the sole or major source of income for an entire community, and a callous attitude toward the effects of moving out could mean destruction for that community. The narrow interests of efficiency and profit-making for the stockholder might require such a move be made without delay. Yet the interests of local employees and the community might be so severely prejudiced that the corporation could not in good conscience move out without making every reasonable effort to mitigate the consequence of its going.

The problem, thus, is that of catching the conscience of the economic sovereigns—those who head the supercorporations. Courts are well suited to take on that task. The principle involved can be easily stated: Thou shalt not unreasonably harm members of the corporate community. Or put in affirmative terms: corporate management’s decisions must take into consideration all segments of the corporate community, not merely one (the stockholders).

Here, of course, is a legal no-man’s land. But the moral principle is clear, and can be translated into law by judicial decree. Consider, in this respect, what the well-known corporate lawyer, Adolf A. Berle, said in 1954:

Power to deal at will with other men’s property and occupation, however absolute it may be as a matter of technical contract law, is subject to certain limitations. They still lie in the field of inchoate law: we are not yet able to cite explicit case and statute law clearly stating those limitations. We can only say that in this field a matrix of equity jurisdiction is beginning to appear.

I do not wish at this time to do more than call attention to Berle’s idea of “inchoate law”; and then go on to suggest that in a few recent cases the Supreme Court has, for the public sector at least, rendered a series of decisions that evidence an emergent tendency—in Berle’s language, an “inchoate” tendency—toward finding a right to a job. In Elrod v. Burns, for example, the Court held that a newly elected Democratic sheriff could not fire some Republican employees simply because they

were members of another political party. And in *Branti v. Finkel*, the Justices expanded the immunity of non-civil services employees from patronage dismissals. Said Justice John Paul Stevens: "it is manifest that the continued employment of an assistant public defender cannot properly be conditioned upon his allegiance to the political party in control of the county government." In *Perry v. Sindermann*, a non-tenured college professor alleged an interest in continued employment, "though not secured by a formal contractual or tenure provision, was secured by a no less binding understanding fostered by the college administration." Sindermann asserted that the "college had a de facto tenure program, and that he had tenure under that program," and offered to prove that he had "no less a 'property' interest in continued employment than a formally tenured teacher" at colleges with a tenure system. Sindermann prevailed.

Are those decisions harbingers of things to come? That, of course, is possible but not probable. Other recent decisions, such as *Board of Regents v. Roth* and *Bishop v. Wood*, point in a contrary direction. The most that can be said is that the issue has not really been settled. It is in flux. My position is that of Justice William Brennan in the *Bishop* case: "There is certainly a federal dimension to the definition of 'property' in the Federal Constitution," a sentiment that Justice Stevens, writing for the majority, called "remarkably innovative." Brennan believed that state discharges implicated a constitutionally protected liberty interest.

I believe that there is much to be said for the Brennan position. That it has not yet commanded a majority, save in such decisions as *Elrod, Branti,* and *Sindermann,* means that the Court is still searching for a doctrine (or doctrines) that would control public employment situations. If the *Elrod* principle is carried over into the private governments of the nation, then something approximating a constitutional right to a job would be in the making. Or if not a right to a job, at least a right that, once hired, a person must not be treated arbitrarily.

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63. *Id.* at 599.
64. *Id.* at 600.
65. *Id.* at 601.
A brief word by way of conclusion: The IAM proposal presents critical questions about the nature of the American political economy. I believe that Robert A. Dahl was correct when he recently observed that "the commitment to corporate capitalism needs to be reconsidered. Earlier, when the framers had discussed their fears about majorities that might invade the rights of minorities, more often than not they mentioned rights to property. Their reasoned justification of a right to property, if they held one, would no doubt have been Lockean. Yet the Lockean justification makes no sense...when it is applied to the large modern business corporation." Historical capitalism is dying; of that there can be little doubt. What will replace it is by no means certain at this time. Capitalism today is ever increasingly collectivist in nature, which means that its economic decisions are made politically. It is not a stable system, as the IAM proposal evidences. For that reason, and perhaps for others, many nations today are moving toward nationalization. State-owned companies are on the rise. Professors Monsen and Walters tell us, throughout Western Europe. "European governments," they show, "now have a direct ownership stake in over half of Europe's largest companies." Those firms, plus the more market-oriented enterprises in the East, pose a direct challenge to American industry. How United States firms will react is one of the crucial politico-economic—that is, constitutional—questions of the day. The rise of the new economies will have to be met, in some form or another, by the United States. I believe that the consequence will be a growing form of an indigenous type of corporatism. If so, then the public-private distinction is on its way out. And it becomes all the more important that proposals such as the "New Technology Bill of Rights" be given comprehensive and respectful attention by those who wield effective power in America.

Finally: I do not wish to be placed in the position of using constitu-

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tional arguments as a form of “desperate legal acrobatics.”"71 Surely, however, the relationship of the populace—in present context, that of the workers—to the public and private governments of the nation is an important constitutional question. (Can someone name another that is more important?) If the IAM proposal necessitates the complete re-examination of the political economy of the nation, then such a scrutiny is long overdue. Furthermore, as Chief Justice Charles Evans Hughes once observed, “Behind the words of the constitutional provisions are postulates which limit and control.”72 One such postulate, I suggest, is a surpassingly important human need: the need to be needed. If the Constitution should, as has been suggested above, evolve into one that fulfills human needs and human deserts within environmental constraints, then the requirements of Homo faber should be recognized and realized. Government, I maintain, has no other purpose than to make every reasonable effort to see that human needs and deserts are in fact satisfied. More specifically, if “our constitutional system rests on a particular moral theory, that men have moral rights against the state,”73 I maintain that high among those “moral rights” is that of a constitutional right to a job.