Sovereignty in a Global Economy†

On March 21, 1972, Jack Anderson wrote that the International Telephone and Telegraph Corporation was involved in a 'bizarre plot to stop the 1970 election of leftist Chilean President Salvador Allende.'[1] ITT was prepared to allocate one million dollars to stop what they viewed as unfavorable trends in Chilean politics. The Senate Subcommittee on Multinational Corporations in its report on the matter viewed the whole situation in no uncertain terms:

> "The attitude of the company perhaps was best summed up by [ITT Vice President] Gerrity when he asked, 'What's wrong with taking care of No.1?' The Subcommittee limits its comments on this statement to the observation that 'No. 1' should not be allowed an undue role in determining U.S. foreign policy."[2]

The ITT controversy points up the difficulty policy makers have in dealing with the multinational corporation. ITT was pursuing what it considered to be a legitimate business policy, but this ran counter to U.S. interests, not to mention the interests of Chilean sovereignty. Not only has it become harder to control and regulate corporate activity, the increasingly interdependent nature of economies is also making it harder for an individual state to control their economic destiny by promoting growth within their territories.

A government's power to limit actions of private organizations, and the power to act and influence the structure of the economy, together form a definition of the sovereignty of that government. The U.S. Constitution contains the broad outlines of that definition for the Federal government and the states. Our system of government is one of limits: sovereignty is distributed among different entities in order to insure that no part of government is able to encroach on individual liberties the way that the Crown of England did before the American Revolution.

Because the Constitution was drafted in an age when economic activity was performed by small groups in a largely localized setting, there are no specific Constitutional provisions to deal with the large multinational corporation. Yet, the multinational corporation has many powers that would have been considered the province of a sovereign government in years past. The addition of this new actor in the policy arena has forced a reinterpretation of the Constitution to give government greater powers. The Commerce and Necessary and Proper Clauses[3] have formed the foundation for the ability of government to redress civil rights abuses, protect privacy and affirmatively promote

In examining the relationship between our public forms of government and the private types of economic organizations, technology plays a vital role. Our largest corporations, from the railroads, to the telephone companies, to IBM have all sprung up in direct response to opportunities created by changing technology. In many cases, new technologies were the result of significant support by the state. The railroads would not have been successful without the

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1. Report to the Committee on Foreign Relations, United States Senate, by the Subcommittee on Multinational Corporations, June 21, 1973, *The International Telephone and Telegraph Company and Chile* (Washington, D.C.: GPO, 1973), reprinted in George Modelski, ed., *Transnational Corporations and World Order*, W.H. Freeman (1979), p. 226.

2. id. at 241.

3. U.S. Const., Art. I, § 2, cl. 8 (Commerce Clause) and cl. 1 (Necessary and Proper Clause).

support of the Federal government and the delegation of the power of eminent domain to secure a right of way.

This paper will begin by looking at how sovereignty was originally divided and limited under the system put in place by the Constitutional Convention. Then, we will examine the gradual change through the 1930's as government moved from one of limits to a positive state. Direct help to industry, overall control in the form of antitrust and specific regulation of industries formed the response to abuses resulting from the concentration of power that arose from the Industrial Revolution. Next, we will examine the effect of the lastest round of technological change as corporations and economies begin to shift from a national to international focus. The new technologies have posed significant challenge to policy makers and have resulted in a variety of new measures such as the regulation of transnational data flows, the protection of individual privacy as well as a different conception of the proper role of the Federal government. Finally, we will examine two fundamental Constitutional implications: the allocation of power between the public and private organizations and the allocation of power between state, national and international forms of public government.

As we examine this latest set of challenges, it is useful to remember how often this situation has confronted us in the past. In March, 1786, James Madison wrote a letter to Thomas Jefferson, then our Minister to France, complaining that "Most of our political evils may be traced to our commercial ones, as most of our moral may to our political."[4] Madison was certainly not the first national leader trying to cope with how to deal with the economy. The relationship between the state and the economy has been a central theme in public affairs for many years, receiving treatment by distinguished social commentators from Marx to Hobbes. Even by 1939, when much of our antitrust and regulatory apparatus had been put in place, Eugene Stacy writing about the need for more assertive planning efforts in the economy, said

> "A conflict rages between technology and politics. Economics, so closely linked to both, has become the major battlefield. Stability and peace will reign in the world economy only when, somehow, the forces on the side of technology and the forces on the side of politics have once more been accommodated to each other."[5]

National sovereignty as the supreme power of rulers over their citizens is a concept that fell in disuse during the middle ages. In the feudal systems that arose after the fall of Rome, there were many checks on the King by the various components of the aristocracy. It was only with the emergence of the modern nation-state that the restraints on rulers began to disappear and doctrines like sovereign immunity began to appear.[6]

One of the triumphs of our Constitution was the concept that individuals, not nations, have supreme power. Adolf Berle called this "conception of the free individual as the chief concern and also chief integer of organized society" the "greatest single achievement of eighteenth-century thought."[7] The sovereignty of government was limited in order to protect the sovereignty of individuals. Not all modern governments have been founded on this principle. Corporatist governments such as Italy under Mussolini, Spain under Rivera, Portugal under Salazar and Brazil under Vargas all saw a "nation made up of a number of diverse economic or functional groups rather than of atomistic individuals."[8]

The fear of government led to a government, The Confederation, which vested virtually no power in the Federal government. The Confederation was not even a government, the title "firm league of friendship" being preferred.[9] What little power there was, was

4. Carl Van Doren, *The Great Rehearsal*, Viking Press (1948) republished by Time Life Books (1965), p. 182

5. Eugene Stacy, *World Economy in Transition: Technology vs. Politics, Laissez Faire vs. Planning, Power vs. Welfare* (Publications of the Council on Foreign Relations) (New York: Council on Foreign Relations, 1939), p. 52 quoted in Roger Gilpin, *The Politics of Transnational Relations* in George Modelski, ed., *Transnational Corporations and World Order*, W.H. Freeman (1979), p. 69.

6. George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, XIII Louisiana Law Review 476 - 494 (1953). Pugh quotes Bodin (1576), Hobbes (1651) and Machiavelli (1513) as some of the early strong proponents of the idea that sovereignty is the supreme power over its citizens.

7. Adolf Berle in the forward to Edward S. Mason, ed., *The Corporation in Modern Society*, Antheneum (New York, 1975), p. xi.

8. Arthur Selwyn Miller, *The Modern Corporate State*, op. cit. p. 25.

9. Peters, *A More Perfect Union* Crown Publishers (New York, 1987), p. 5.

readily usurped by the independent state governments. Virginia even went so far as to separately ratify the peace treaty with Great Britain so there would be no doubts as to its legitimacy.[10]

Because all the delegates to the Constitutional Convention were aware that "the history of the Confederation had been full of encroachments by individual states upon the central government"[11] much of the debate focused on distributing sovereignty between the Federal and State governments. Almost all agreed that it would be impossible to secure for each State "all rights of independent sovereignty to each, and yet provide for the interest and safety of all."[12]

When Virginia decided to ratify the peace treaty with Great Britain, it was certainly not the only attempt that the states functioned as independent sovereigns. "Several states had borrowed, or tried to borrow, money abroad as if they were sovereign republics. Nine of the states, from Massachusetts to South Carolina, had organized navies of their own, and all of them regarded their militia forces as state armies."[13]

James Madison had been making an extensive study of Republican governments before the Constitutional Convention. Many people were acutely aware of the problems with the Confederation. Madison, in a letter to Edmund Randolph, Virginia's governor said that "an individual independence of the states is utterly irreconcilable with the idea of an aggregate sovereignty."[14]

The debate on the distribution of powers, and sovereignty, between the Federal and state governments became the central focus of the Convention. Every attempt was made to insure that the central government would not encroach on the states, and the no government would encroach on the rights of the individual. Even as the Constitution granted power to the new government, it made every attempt to limit those powers.

Two structural devices were used to insure that government would operate in a deliberate and non-intrusive manner. The doctrine of federalism carefully split sovereignty between the several states and the central government. Because of splits in the Convention, the exact nature of the relationship was left vague enough that "credible arguments may be developed in support of almost any interpretation."[15] Even though the exact nature of the split in powers between Federal and state was not detailed, it was widely believed that the Federal government would only need to intervene in such inherently national tasks as dealing with foreign commerce. The fears of opponents of federal power were such that the Tenth Amendment was added to the Bill of Rights with the provision that powers "not delegated to the United States" were "reserved to the states respectively, or to the people."[16] Even this was a great change from the Articles of Convention that had allowed the federal government only those rights "expressly delegated."[17]

Within the Federal government, the Constitution limits power among branches through the devise of separation of powers. The bulk of the Constitution deals with which functions are allocated to which branch of government. Legislative powers were specifically enumerated in Article I, § 2. The assumption was that government that governed least governed best. Even those affirmative powers that we take for granted, such as the ability of the Supreme Court to declare a law unconstitutional had to evolve form the basic limitations of the text. In 1803, Chief Justice Marshall forcefully carved a role of judicial review into the Constitution in declaring an act of Congress to be unconstitutional in *Marbury v. Madison*.[18] Twenty years later, there was still objection to allowing the judiciary to overturn acts of the legislature, considered to be the most direct voice of the people.[19] It took over 100 years for the roles of the legislature, judiciary and executive to be defined in a way that each was able to deal with the increased complexity of society.

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10. Carl Van Doren, *The Great Rehearsal*, Viking Press (1948) republished by Time Life Books (1965), pp. 40-41.
11. id at 56.
12. The President of the Federal Convention to the President of the Continental Congress, September 17, 1987 in Carl Van Doren, *The Great Rehearsal*, Viking Press (1948) republished by Time Life Books (1965), p. 162.
13. Carl Van Doren, *The Great Rehearsal*, Viking Press (1948) republished by Time Life Books (1965), p.56.
14. Peters, *A More Perfect Union*, Crown Publishers (New York, 1987)
15. Note, *American Federalism*, Vanderbilt Law Review (1982)
16. U.S. Const., 10th amend.
17. *See* McCulloch v. Maryland (1819).
18. Marbury v. Madison, 1 Cranch 137 (1803).
19. Justice Gibson's dissent in Eakin v. Raub, 12 S. & R. 330 (Pa. 1825)

The problems of commerce had certainly received attention both before and during the drafting of the Constitution. At the time, however, the laissez-faire school of economic thought made the economy a separate inquiry from politics and governments. There was very little concentration of economic power of the scale that we know today. If government governed best that governed least, the same held for economic activity. The commerce clause[20] was not even discussed by the Committee of the Whole before being passed unanimously by the Constitutional Convention.[21]

Since groups did not really play a part in late eighteenth century,[22] it took until 1958 before a Constitutional right to association was recognized by Justice Harlan in the case of *NAACP v. Alabama*. Harlan recognized the many types of associations, stating "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters ..."[23] In fact, we had to bring the modern corporation into the framework of Constitutional law by the dubious legal mechanism of making the corporation a "person."[24] Even the political party, that bedrock of our political system, had to be rationalized long after the Constitution had been ratified.

Anytime there is a legal recognition of a group, there implies a form of distribution of sovereignty to that group. Many commentators make a careful distinction between delegation of political or administrative power and the delegation of sovereignty.[25] Others maintain maintains that the law of associations (including corporations) can only be understood as a "distribution of sovereignty to private persons beyond the precincts of the state apparatus."[26]

Whether the modern corporation has usurped or been given sovereignty, or if we merely see a delegation of a revocable power depends on the ability of our law to adapt to changing conditions. The corporation was originally conceived of as totally subservient to the interests of the State. As Hobbes observed in *Leviathan*, all sovereignty rested with the State "for what is it to divide the Power of the Common- wealth, but to dissolve it; for Powers divided mutually destroy each other."[27] Hobbes notwithstanding, powers are divided. The next sections detail the distribution of sovereignty, first between state and Federal governments, then to the Corporation as a private government and then finally from the nation-state to international groups.

The Constitution, as originally written, was a statement of general principles that required constant interpretation. Many modern rights, such as the right to privacy, cannot be found in any textual portion of the Constitution.[28] There is currently a raging debate on how far we should "interpret" the textual fabric of the Constitution.[29] It does not matter for this inquiry if recent Supreme Court decisions do or not represent the original intent of the framers. However interpreted, the Constitution contains a set of broad principles that have been applied to face the realities of a changing world. Because the Constitution is not a prescriptive document, it can be said, with some justification, that the "government of the United States has been less changed since 1789 than the government of any other important country in the world."[30]

Within the broad principles of the Constitution there evolved a wide variety of policy tools to implement the principles. To see how sovereignty is affected by the multinational corporation, we must look at the policy tools used to control and promote corporate activity. It is also important to look beyond

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20. U.S. Const., Art. I, § 2, cl. 8.
21. Stern, *That Commerce Which Concerns More States Than One*, Harvard Law Review (1934).
22. We deal here with groups such as corporations or associations. Note that the we've always asserted the dominance of the unitary group (society as represented by our government) over the individual. See the Japanese internment cases where Hugo Black rationalized imprisonment by saying that citizenship has duties as well as rights. Korematsu v. United States, 323 U.S. 214 (1944)
23. NAACP v. Alabama, 357 U.S. 449 (1958).
24. Santa Clara County v. Southern Pacific Railway Corp., 118 U.S. 394 (1896)
25. See, e.g. Sigmund Timberg, *The Corporation as a Technique of International Administration*, 19 University of Chicago Law Review 739 - 758, 743 (1952).
26. Arthur J. Jacobson, *The Private Use of Public Authority: Sovereignty and Associations in the Common Law*, 29 Buffalo Law Review 600 - 665 (1980)
27. T. Hobbes, *Leviathan* (1909) (previously published in London 1651) quoted in Arthur J. Jacobson, *The Private Use of Public Authority: Sovereignty and Associations in the Common Law*, 29 Buffalo Law Review 600 - 665 (1980), p. 601
28. *See* Roe v. Wade, 410 U.S. 113 (1973).
29. See the recent exchange of pleasantries between Attorney General Edwin Meese and Justice Brennan.
30. D.W. Brogan, in his introduction to Carl Van Doren, The Great Rehearsal, Viking Press (1948) republished by Time Life Books (1965), p. xiv.

the words of the policy makers. The law cannot be measured by the text but becomes reality only in its practical application to day to day situations. This concept of a "living law"[31] is particularly important if we are examining the effect of corporations and technology. Many of the effects of corporate activity, such as unemployment caused by the closing of a technologically outmoded steel plant have a dramatic effect on our ability to promote "life, liberty and the pursuit of happiness." These practical effects limit the governments ability to act and have as much of an impact on the sovereignty of government as direct challenges such as an ability to protect the privacy of citizens or to assure national security by prohibiting the export of technology.

The leisurely economic pace present during the Constitutional Convention soon gave way to the industrial revolution. In *The Visible Hand*, Alfred Chandler, Jr. shows the furious pace of development, particularly in the transportation industries. Steamships began being used on the Mississippi and in the great lakes, and by the 1840's were being used on the high seas.[32] Steamships opened up large new markets, particularly in the West. The steamships were soon followed by the railroads, opening up the Great Plains and other areas not accessible by river travel.

By the 1850's the railroads had grown to the size where management was unable to control operations. The Erie railroad began using the newly invented telegraph to control operations. This was swiftly followed by other railroads, then by generalized use of the telegraph for communication.[33] The telegraph was soon supplanted by the telephone. Fierce competition ensued between Western Union and the new Bell Company. With long-distance service not yet feasible, the two split the market, the long-distance service being provided by telegraph and the telephone company providing local service.[34] Even when Bell's patent monopoly ran out, the company used a pattern of takeovers, price discrimination, and other tactics to hold off competition until the era of regulation began.[35]

The growth of the support industries, the railroads, telegraphs and telephones, was swiftly followed by unprecedented growth in manufacturing. Coal and oil supplied the heavy industries such as steel and aluminum. These large manufacturing enterprises formed the basis for the U.S. and continues to provide a large proportion of jobs, particularly in the industrial northeast. In all of these industries, the communications infrastructure provided a vital underpining for economic growth.

In many ways, the infrastructure growth in the late nineteenth century is similar to the infrastructure now being put into place using new communications and computing technologies. Many observers have hailed recent technological change as moving society from the earlier industrial system into a "post industrial society."[36] This shift is exemplified by a more away from primary activities such as manufacturing into information-intensive activities such as services.[37]

A strong case is being made that the change in technology is making a transformation in our economy, but that the transformation is occurring to both industry and services. In a recent Technology Review article, Stephen Cohen and John Zysman point out a large portion of jobs usually classified as service employment is directly dependent upon manufacturing.[38]

What has changed in the last few decades has been a shift from national markets to international markets. International communications carriers have grown greatly, and many American multinational corporations now are increasingly dependent on income from outside the United States.[39] IBM, Ford and many other companies derive more than 50% of

31. The concept of a living law first enunciated in Ehrlich, *The Fundamental Principles of the Sociology of Law* as quoted in Hall, *Readings in Jurisprudence* 825 (1938). *See also* Arthur Selwyn Miller, *The Modern Corporate State*, Greenwood Press.

32. Alfred Chandler, Jr., *The Visible Hand: The Managerial Revolution in American Business* (Belknap, 1977), p. 33.

33. James R. Beniger, *The Control Revolution: Technological and Economic Origins of the Information* Society (Harvard University Press, 1986), p. 229-241.

34. Gerald W. Brock, *The Telecommunications Industry: The Dynamics of Market Structure* (Harvard University Press, 1981), p. 99.

35. id., p. 110-113.

36. Daniel Bell, *The Coming of Post-Industrial Society: A Venture in Social Forecasting* (Basic Books, 1976).

37. *See, e.g.,* Marc Porat, *The Information Economy: Definition and Measurement*, Office of Telecommunications, U.S. Department of Commerce, 1977.

38. Stephen Cohen and John Zysman, *The Myth of a Post-Industrial Economy*, Technology Review, vol. 90, no. 2, Feb/Mar 1987, p. 54.

39. Bell, *The Coming of Post-Industrial Society*, Basic Books (NY, 1976), pp. 484-485.

their income from foreign operations. Foreign-based multinational corporations are also expanding into the United States. Foreign-based direct investment in the united states grew from 69.5 billion in 1980 up to 159.6 billion in 1984.[40] The first wave of technological change, centered around the Industrial Revolution forced a change in the way the Constitution was interpreted. The government of limited powers with a strong emphasis on Federalism gave way to a strong Federal government. Over 100 years, the Constitution was reinterpreted to allow regulation, antitrust laws and a strong positive hand in shaping the nature of industrial society. The next few sections examine the move away from a government of limits and show the types of responses put into place to allow government to deal effectively with corporations.

Early Judicial Limits

In the late 18th century, four influential development corporations bribed the Georgia legislature into selling them what has now become Alabama and Mississippi for one and a half cents.[41] When a new Georgia legislature tried to invalidate the Yazoo land frauds, as they came to be known, the sale was upheld by the Supreme Court in *Fletcher v. Peck*.[42] The Court decided that the rights of the corporations had "vested" and could not be taken away.[43] Not only was the legislature bound by previous laws it had passed, but legislatures could even be bound by actions from their former rulers, the Crown of England. In *Dartmouth College v. Woodward*, Marshall wrote that the New Hampshire legislature could not tamper with the terms of a British charter to the College.[44]

The Fourteenth Amendment, prohibiting the deprivation of "life, liberty or property" without "due process of law"[45] became the linchpin of the Court's efforts to protects the rights of business. Because individual entrepreneurs owned most American business well through the beginning of the 20th century, this was not a radical departure from the Jeffersonian ideals in the Bill of Rights. Of course, it is important to note that the opposite decision in *Fletcher*, the victims of the Yazoo land frauds, could also have been faithful to a concept of individual rights.

Even regulation of working conditions was held to be a violation of due process, not to be sustained as a valid exercise of the states police power to protect the public's safety, morals or welfare. In *Lochner v. New York*, the Court ruled that New York state could not limit the maximum number of hours individuals could work in a bakery.[46]

The Federal Government was no more successful than the states in attempting to regulate working conditions. The Commerce Clause was often interpreted as a restraint on Federal action rather than a grant of authority. The problem was that the language of the clause said that Congress had the power to regulate "commerce The word "commerce" was interpreted in an early antitrust case as only regulating commerce, and not manufacturing. The Court was able to make the distinction by saying that "commerce succeeds to manufacture and is not a part of it."[48] The words "among the several states" were interpreted to prohibit regulation that was properly the province of the states. Of course it was no coincidence that the populist views of the Federal government were not necessarily shared by the state legislatures. In *Hammer v. Dagenhart*, the Court ruled that the commerce clause prohibited federal regulation of working conditions for children because it was a matter for state concern.[49] Nor was the Congress able to prevent anti-union discrimination by the large railroad companies.[50]

Emergence of the Positive State[51]

The end of a government of limits began long before many of the cases invalidating various Congressional or state initiatives. As the Industrial Revolution got underway, the one area that demanded Federal

40. Raymond Vernon, *Multinationals are Mushrooming*, Challenge, May-June 1986, pp. 41-47.

41. Arthur Selwyn Miller, *The Modern Corporate State*, op. cit., p. 42-43.

42. Fletcher v. Peck, 10 U.S. 87 (1910)

43. The notion of vested rights has its origins in Marbury v. Madison 5 U.S. (1 Cranch) 137 (1803) where, in dicta, Justice Marshall declared that legal rights "vested" in Marbury could limit the actions of any governmental agent, including the chief executive. See Tribe, *American Constitutional Law*, Foundation Press (1978), p. 456.

44. Dartmouth College v. Woodward, 17 U.S. (4 Wheat) 518 (1815)

45. U.S. Const., XIV amend.

46. Lochner v. New York, 198 U.S. 45 (1905)

47. U.S. Const., Art. I, § 2, cl. 8.

48. U.S. v. EC Knight 156 U.S. 1 (1895)

49. Hammer v. Dagenhart, 247 U.S. 251 (1918)

50. Adair v. U.S., 208 U.S. 161 (1908)

51. The term comes from Arthur Sewlyn Miller, *The Modern Corporate State*, op. cit.

involvement was the transportation infrastructure. When it came to regulating the emerging technology of steamboats, the Court found a firm Federal power to regulate the granting of licenses saying that "the sovereignty of Congress, though limited to specified objects, is plenary as to those objects."[52] In 1914, when corporations began complaining about discriminatory rate structures, the Courts allowed Congress to regulate intrastate rates in Texas when they had an impact on the commerce of neighboring Shreveport, Louisiana.[53]

The Courts also began to allow more regulation of some of the specific health and safety problems caused by new manufacturing technologies. Thus in *Hipolite Egg v. U.S.*, health inspections were allowed long after the eggs were clearly out of interstate commerce.[54] Laurence Tribe calls this process an "internal erosion" of the doctrine of limits typified in Lochner because of "external attacks on their underlying philosophical and factual premises."[55] It is clear that as corporations gained power and began to affect our lives, it no longer made sense to tie the hands of policy makers. The programs of populist leaders such as Theodore Roosevelt insured that pressure would be felt to subject corporations and the technology they employed to some basic rules.

The death knell to the government of limits was the Great Depression. In a series of cases, the Courts first attempted to block the new conception of an active government advocated by Roosevelt and his "New Deal" and then finally capitulated under immense public pressure. The first New Deal legislation relied heavily on private industry to administer codes of conduct and fair competition. This delegation of authority to private industry was found to be unconstitutional in a series of decisions.[56]

Finally, possibly in reaction to the President's court-packing plan[57] the Court began to yield. In a "dramatic reversal", the Supreme Court allowed minimum wage legislation that it had invalidated the previous year.[58] In *NLRB v. Jones & Laughlin*, the Court approved the legality of the National Labor Relations Act of 1935, prohibiting a series of unfair labor practices by corporations.[59] In *Mulford v. Smith*, Congress was allowed to regulate how much businessmen were allowed to sell by imposing marketing quota provisions.[60]

As the power of Congress to regulate increased, it began to tread into the areas previously reserved to the states. In *U.S. v. Rock Royal Co-operative*, Congress was allowed to begin setting the prices of all milk, since it was impossible to distinguish intrastate from interstate milk once it got mixed together.[61] In *U.S. v. Darby*, the Court overruled its previous decision in *Hammer v. Dagenhart* prohibiting the regulation of hours and wages of employees.[62]

Coupled with what Tribe calls a "judicial abdication after the collapse of Lochner"[63] was a flurry of legislation that radically changed the role of the Executive and Legislative branches. Arthur Miller points to three statutes as typifying the change from a "constitution of limitations to one of powers."[64] The Employment Act of 1945 was a legislative recognition that the Federal government has a responsibility for aggregate economic well-being.[65] The Civil Rights Act of 1964 allowed government to use economic regulations to redress previous violations of civil rights.[66] Finally, the Sherman Act was a recognition that Congress could set overall goals controlling the size and nature of business activity.[67]

We will now look at several specific ways that the Positive State has aided in the application of technology to modern corporations and the

52. Gibbons v. Ogdens, 22 U.S. (9 Wheat.) 1 (1824)

53. Houston E. & W. Texas Ry. Co. v. United States (The Shreveport Rate Case), 234 U.S. 342 (1914)

54. Hipolite Egg v. U.S., (1911)

55. Laurence Tribe, *American Constitutional Law*, p. 442.

56. The National Industrial Recovery Act was struck down, first in Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) then in Schechter Poultry Corp. United States, 295, U.S. 495 (1935). The Bituminous Coal Conservation Act of 1935 was struck down in Carter v. Carter Coal Co., 298 U.S. 238 (1936). *See* Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 Harvard Law Review, 645 (1946).

57. Gerald Gunther, *Constitutional Law*, 11th ed. (Foundation Press, 1985), p. 129

58. *See,* Laurence Tribe, *American Constitutional Law*, p. 450. The Court had invalidated the legislation in Morehead v. New York ex. rel. Tipaldo (1936) then approved legislation "not materially distinguishable" in West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

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

60. Mulford v. Smith, 307 U.S. 38 (1939).

61. U.S. v. Rock Royal Co-operative, 307 U.S. 533 (1939).

62. U.S. v. Darby, 312 U.S. 100 (1941)

63. Tribe, American Constitutional Law, p. 450

64. Arthur Selwyn Miller, *The Modern Corporate State*, p. 91

65. Employment Act, 15 U.S.C. sec. 1021-24 (1964)

66. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) and Katzenbach v. McClung, 379 U.S. 294 (1964)

67. Sherman Act

subsequent control of corporate activity. First, direct help by the government resulted in the growth of many of the new technologies. Next, government used general tools such as antitrust to set overall goals for the economy. Government used several types of regulation to control specific abuses. Regulation came in three waves, starting with the early 20th century, then a renewed batch of regulations in the 1960's, and finally a deregulation movement in the early 1970's.

Helping Industry

Although the Supreme Court prohibited much regulation in the Lochner era, there was still direct involvement by the Federal and state governments to aid the development of technology and its application. Congress was entrusted by the constitution with the power to "promote the progress of science"[68] and to establish weights and measures. The patent system which was developed has been a fundamental part of the legal infrastructure. One of the earliest roles for the Federal government, the patent and copyright systems have only recently begun to feel the strains of technology.[69] The ability to easily duplicate printed matter and software protection have led to strains on the copyright system. Computer software has proved to be a challenge to the traditional patent system prohibition against the patenting of "mathematical formula or ideas."[70]

This direct role in promoting science and technology was supplemented by some more subtle measures. In addition to the patent system, the Federal government established a series of protective tariffs to protect fledgling industries from being overrun by their British counterparts.[71] Trade policy and tariffs have continued to play an important part in Government efforts to shield weak or fledgling industries. Despite the Bretton Woods system conception of a laissez fair system of no barriers to trade, protective tariffs are playing an increasingly important role in Federal policy, as witnessed by President Reagan's recent imposition of barriers against computers, tv sets and rotary drills from Japan.[72] Direct government involvement was supplemented by laying down a legal infrastructure in the common-law. The general incorporation laws promoted (or at least permitted) the beginning of large accumulations of capital for general purpose corporations. The power of eminent domain was applied to secure rights of way for railroads and telegraph lines. The states applied nuisance doctrines to extend immunities to industrial and transportation enterprises.[73]

With the passage of the 16th Amendment,[74] the increased revenue base of the federal government provided a valuable tool in the form of the tax code. Capital depreciation programs, direct support of Research and Development and government procurement policies make the Federal government a potent force in influencing the application of technology. .FS Government support of R&D has been an important factor in promoting new technologies. An example is the recent commercialization of relational database software for computers. Although some of the original work was done at IBM[75] the University of California at Berkeley served as a place to do continued research.[76] This led to the formation of a company, Relational Technology, Inc. (RTI) which has used the research at the University of California to funnel new developments into one of the leading relational database packages, Ingres. The Board of Directors consists of professors who work at the University to develop new technology then use that technology for developing new products. Work on distributed databases, partially funded by the National Science Foundation, has recently led to the introduction by RTI of a distributed database package.

68. U.S. Const., Art. I, § 2.

69. United States Copyright Law, 17 U.S.C sec 101 et. seq., 35 U.S.C sec. 100 et. seq. (Patents)

70. *But see* Diamond v. Diehr 450 U.S. 175 (1981) (claim relying on computer software not necessarily unpatentable)

71. Harry Scheiber, *Technology and Law in American Development, 1790 to the Present*, in Stuart Bruchey and Joel Colton,eds., *Technology Economy, and Society* (Columbia University Press, 1987) Page numbers are from a pre-publication Working Paper produced by the Earl Warren Legal Institute, School of Law (Boalt Hall), University of California at Berkeley.

72. Gerald M. Boyd, *President Imposes Tariff on Imports Against Japanese*, New York Times, April 18, 1987, p. 1

73. Scheiber, p. 18

74. U.S. Const., XVI amend.

75. *See* C.J. Date, *An Introduction to Database Systems*, vol. 1 (Addison Wesley, 1982)

76. See Michael Stonebraker, ed., *The Ingres Papers: Anatomy of a Relational Database System* (Addison-Wesley, 1986).

Limits on Industry

The primary tool used to influence the structure of our industrial system has been the antitrust laws. Their passage was prompted by the tactics of highly monopolized corporations in businesses ranging from oil to sugar to whiskey. Large concentrations of power and wealth meant that the large industrial combines were wiping out competition from smaller businesses using a variety of predatory tactics. Once enough monopoly power was reached the corporations were splitting the market into cartels, charging higher prices than a competitive market would bear.

Responding to popular pressure the Congress enacted a series of measures to limit the power of corporations. The Sherman Act was a general prohibition against contracts or combinations "in the form of trust or otherwise, or conspiracy, in restraint of trade."[77] Not only were contracts in restraint of trade illegal, unilateral conduct in the forms of an "attempt to monopolize" were prohibited.[78] The Sherman Act was followed by the Clayton act, which enumerated specifically prohibited practices[79] and the Federal Trade Commission Act which set up an administrative agency to investigate "unfair methods of competition."[80]

The Sherman Act did not fair particularly well in the Courts during its first few years. In the *E.C. Knight Case*, the Court ruled that "manufacturing is not commerce" and the Sherman Act therefore did not apply to activities of the sugar trust.[81] The initial success of the Sherman Act was in the Northern Securities Case, where the Court ruled that placing two competing railroads under one holding company was an illegal restraint of trade.[82] Since then, the law has evolved to prohibit a variety of specific practices, as well as the attainment of excessive monopoly power as being contrary to public policy.[83]

The antitrust laws have had an uneven history as an effective tool for federal policy. Recently, under pressure from international competition enhanced by uncertainty about how to best apply new technologies to American industry, the antitrust laws have fell into disuse. One of the last remaining large antitrust actions, the 1969 suit against IBM[84] was finally dropped at the same time as the 1982 AT&T consent decree was agreed upon.[85]

Regulation of industry began to take place at the same time as the more general antitrust laws were implemented. Regulation was only allowed at first in those industries that were "clothed" or "affected with a public interest."[86]

Rate regulation was one of the first types of measures upheld. The Interstate Commerce Commission Act of 1887 was a reaction to railroad rate discounts for large shippers coupled with higher rates for short hauls.[87] Rate regulation was expanded towards a concept of a public utility, where an industry such as an electricity producer was granted a monopoly in return for rate regulation by a state or city public utility commission. The electric industry, one of the early advocates of public utility regulation, was instrumental in this new type of regulation, arguing that economies of scale made the public monopoly desirable.[88] Of course, those industries not granted a monopoly were not quite as enthusiastic: the railroad industry, for example, mounted a vigorous campaign against ICC rate regulation.[89]

Regulation, in the form of the ICC and the public utilities, has undergone a decrease in recent years. Scheduling and price restrictions for airlines were phased out by the Civil Aeronautics Board.[90] The Federal Communications Commission, began allowing limited competition in the telephone

77. Sherman Antitrust Act of 1890, 18 U.S.C.A. sec 1-7.

78. id., sec. 2.

79. Clayton Act of 1914 prohibited, inter alia, price discrimination and exclusive contracts. See David D. Martin, *Mergers and the Clayton Act*, University of California Press, 1959.

80. FTC Act of 1914

81. U.S. v. EC Knight, 156 U.S. 1 (1895)

82. Northern Securities Co. v. United States, 193 U.S. 197 (1904)

83. *See, e.g.* United States v. Griffith, 334 U.S. 100, 107 (1948) ("monopoly power ... may itself constitute an evil and stand condemned ... even though it remains unexercised.")

84. United States v. IBM, Civil No. 69-200 (S.D.N.Y. 1969). See, Fisher, McGowan, Greenwood, *Folded, Spindled, and Mutilated: Economic Analysis and U.S. v. IBM.* (MIT Press, 1983) See also Bruce Gilchrist, Milton R. Wessel, *Government Regulation of the Computer Industry* (AFIPS Press, 1972).

85. Ernest Holsendolph, *U.S. Settles Phone Suit, Drops IBM Case*, New York Times, January 9, 1982, p. 1.

86. Munn v. Illinois, 94 U.S. 113 (1877)

87. *See* Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions*, vol. 1, p. 63 (John Wiley, 1970).

88. See Douglas Anderson, *Regulatory Politics and Electric Utilities* (Anderson House, 1980), p. 36-37.

89. Alfred Chandler, *The Visible Hand* (Belknap, 1977), p. 175.

90. Kahn, vol. 2, p. 217

industry[91] then launched a series of Computer Inquiries on how to regulate communications and computers.[92] The Congress also began questioning the desirability of continued regulation of the communications industry.[93] Finally, along with the dismissal of the IBM antitrust suit, the Department of Justice signed a consent decree with AT&T leading to widespread divestiture.[94]

Although specific regulation is still in operation at the local level, for local phone companies, electric companies and other utilities, Congress and the Courts have spurred a broad deregulation movement in other traditional areas. Most rate regulation in interstate commerce has been dropped as an incentive to competition or to promote the competitiveness of U.S. industries.

Another type of regulation, over health, safety and the environment has proved more durable. The first safety regulation was an act in 1838 in response to the over 300 annual deaths caused by steamboat boiler explosions. The act ended up being "poorly administered and lacking in effectiveness, but it did "establish the principle of federal regulation."[95] One of the initial problems was that government bureaucracies did not have the technical expertise to effectively regulate industry. By 1900, there were increasing pockets of state and national government technical expertise in "mining, forestry,engineering, geology, fisheries, plant breeding and pathology,and animal disease, as well as in the general field of public health and sanitation."[96]

Regulation of the byproducts of corporate activity, rather than the specific rates or operating structure, received an important boost in the late 1960s and early 1970s. The publication of Rachel Carson's *Silent Spring* and the growth of the environmental movement led to the passage in 1972 of the Environmental Protection Act. New legislation in 1972 also strengthened the ability of the Food and Drug Administration to deal with advances in the manufacture of drugs by increasing the supervision of laboratory and field testing activities.[97]

The set of tools available to policy makers to carry out broad goals has changed dramatically, largely as the result of technology. Increased international interdependence and competition seems to have reduced the effectiveness of antitrust and many forms of direct regulation. The rational that other corporations do not have their "hands tied" has served as the justification for taking off many of the limits we had previously imposed on corporate conduct.

Despite the purported death of antitrust and regulation, there are still several traditional government policy tools that seem to still be effective. The government still has a role in establishing the legal infrastructure of patent protection, product liability, contracts and the other facets of the common law. The Courts are currently trying to adapt principles fashioned many years ago to the realities of new modes of operation.

Health and safety regulation are also important, and effective tools. Although by no means popular with everybody, the EPA has been widely credited with helping reduce pollution in the air and waters. OSHA has been effective in setting minimum safety standards in a variety of industries, although many feel that OSHA has overstepped its bounds in recent years.

Finally, the government has the important role of promoting and helping apply new technologies. The current industrial policy debate focuses on the role of government in promoting industrialization and economic growth. Government research efforts, from DARPA to the National Science Foundation to NASA have contributed greatly to U.S. dominance in many segments of computer and communications technologies.

The system of antitrust and regulation that was put into place from 1860 to 1970 continues to play a vital role in defining the relationship between the

91. *See* Carterphone Decision, 13 FCC 2d 420 (1968)

92. *See* Second Computer Inquiry, 77 FCC 2d 384 (1980)

93. *See Telecommunications in Transition: The Status of Competition in the Telecommunications Industry*, Subcommittee on Telecommunications, Consumer Protection and Finance, Committee on Energy and Commerce, U.S. House of Representatives, November 3, 1981, Committee Print 97-V.

94. District Court's Opinion in U.S. v. AT&T reprinted in 43 Antitrust Trade and Regulation Report 1077 (special supplement)

95. Harry Scheiber, *Technology and Law in American Development, 1790 to the Present*, in Stuart Bruchey and Joel Colton, eds., *Technology Economy, and Society* (Columbia University Press, 1987) Page numbers are from a pre-publication Working Paper produced by the Earl Warren Legal Institute, School of Law (Boalt Hall), University of California at Berkeley, p. 8

96. id., p. 22

97. id. at 34

corporation and government. However, begining in the 1930's communications technology once again broadened the scope of the public policy arena. Just as the telegraph, railroads, steamboats, and the telephone provided a national market, digital switching and high-speed computers are providing an international market.

Corporations quickly adopted the new technologies. Government, faced with the multinational corporation and the invisible flow of data across national borders has slowly begun to update the system of regulation that has been put in place. As we have already seen, many forms of rate regulation have been abolished. The next few sections discuss the way that government has responded to the new international nature of the corporation.

Foreign Policy and Federalism

Even when the Court was striking down affirmative regulation by Congress under the Commerce Clause, there were some areas where it was readily conceded that the nation must act with one voice. In *Missouri v. Holland,* domestic regulation which could not have stood if justified solely on the commerce clause was allowed to stand because it was enacted in pursuance to a treaty with Canada.[98] As long as the treaty underlying the regulation was "properly the subject of negotiation"[99] the Federal government was allowed to act in ways that the normal bounds of federalism might prohibit.[100]

It is interesting that the Constitution does not explicitly grant Congress the ability to enact legislation for the regulation of foreign affairs. The only textual mentions are the treaty power[101] and the Commerce Clause enumerated power of regulating "commerce with Foreign nations."[102] Wherever the textual foundation for the ability to regulate foreign affairs, the Court has almost without fail affirmed federal supremacy.[103] As Justice Sutherland said in *Curtiss-Wright* that there was a "fundamental" difference between the "powers of the federal government in respect to foreign or external affairs and those in respect of domestic or internal affairs."[104] Even if the Constitution had not explicitly granted plenary power over foreign affairs, Justice Sutherland felt that this was such an inherent part of national sovereignty that the federal government had inherited the powers from Great Britain at the time of independence. Since this was never a states power, it could not fall under the 10th Amendment reservation of powers not delegated.[105]

Federal preemption of state regulation in foreign matters takes on added importance as more of our trade becomes international. A state buy-American law was invalidated as an encroachment over the federal government's exclusive power over foreign affairs.[106] Although the states are allowed to tax multinational corporations,[107] the Court only allows international unitary taxes as valid under the Commerce Clause if they do not create a risk of multiple taxation or impair federal uniformity in an area where federal uniformity is essential.[108] The concept that the States are preempted from regulating in areas completely occupied by the Federal government is important because there are a large variety of Congressional laws regulating interstate commerce.[109]

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98. Missouri v. Holland 252 U.S. 416 (1920)

99. DeGeofrey v. Riggs 133 U.S. 258 (1890)

100. Worries about the unbridled treaty power and the advent of the United Nations as a possible threat to national sovereignty led to the Bricker Amendment in 1953 that would have required that all legislation must be "valid in the absence of treaty." *See* Gunther, *American Constitutional Law*, p. 227

101. U.S. Const. art. II, § 2, cl. 2.

102. U.S. Const. art. I, § 8, cl. 3.

103. There are some limits. For example, President Truman was unable to justify occupation of U.S. steel mills in response to threatened labor problems using the justification of Korean war and the threat to national security of non-operating steel mills. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

104. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).

105. Sutherland, *Constitutional Power and World Affairs* (1919). Sutherland's arguments are of dubious historical merit, but nonetheless make an interesting comment on the nature of sovereignty. *See* Lofgren, *U.S. v. Curtiss-Wright: A Historical Reassessment*, 83 Yale Law Journal (1973) for an examination of the historical basis for Sutherland's case.

106. Bethlehem Steel Corp. v. Board of Commissioners of the Department of Water & Power, 80 Cal. Reptr. 800 (Ct. App. 2d Dist. 1969)

107. Container Corporation of America v. Franchise Tax Board, 103 S.Ct. 2933 (1983)

108. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979). *See* Note, *The Supreme Court Upholds Worldwide Unitary Taxation*, 25 Boston College Law Review 645-683, May, 1984.

109. Examples include Carriage of Goods by Sea Act, the Export Administration Act, the Foreign Corrupt Practices act, various antitrust and securities laws. Treaties are also considered preemptive for Commerce Clause purposes. A wide variety of treaties, including over 40 Friendship, Commerce and Navigation bilateral treaties as well as multilateral agreements such as the International Monetary Fund Agreement (restrictions on foreign exchange and other monetary rules), or the Warsaw Convention (regulates air travel), make state action a difficult proposition at best. *See* William N. Eskridge, Jr., *The Constitu-*

Controlling Behavior Abroad

With limited movement from state to state, jurisdiction over individuals and corporations could be strictly allocated by territorial boundaries. In *Pennoyer v. Neff*, Justice Field said that "every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory." The corollary of the principle was that "no state can exercise direct jurisdiction and authority over persons or property without its territory."[110] Territory as a primary base of jurisdiction existed at the Federal as well as the state level, preventing the application of antitrust law to the acts of a U.S. corporation operating in Panama.[111]

The advent of the automobile and the resulting growth in interstate traffic forced a change to the traditional concept of jurisdiction (and sovereignty) based only on territory. jMore and more corporations were starting to expand into new markets. Expansion of the transportation infrastructure and the advent of distributor networks allowed corporations to market goods in areas where they didn't have a physical presence. In a line of decisions beginning with *International Shoe Co. v. Washington*, the Court allowed suits over corporations that had been "doing business" in the area.[112]

The doing business test in *International Shoe* was an admission that states had sovereignty over actions that effected them as well as persons in their territory. A similar test is often applied to see if the U.S. has jurisdiction over the actions of a multinational abroad. In the *ALCOA* antitrust case, Judge Learned Hand found that "agreements between wholly foreign companies may be inferred, their substantively deleterious effects on U.S. commerce demonstrated, and liabilities imposed in respect thereof."[113]

The exception to the primacy of the territorial basis of jurisdiction was citizenship. In *Blackmeir v. United States*, the Court allowed service on a U.S. citizen in France.[114] In 1839, Chief Justice Taney stated that a "corporation can have no legal existence out of the bundaries [sic] of the sovereignty by which it is created."[115] Later on of course, corporations were made into people, not citizens, and were thus still immune on these grounds for a while.[116]

Although the citizenship principle was largely supplanted by an effects test at the state level, the principle of nationality is an important source of jurisdiction in international law.[117] The Supreme Court has affirmed jurisdiction over extraterritorial conduct of corporations in such contexts as the imposition of fines for failure to obey subpoenas in a criminal cases and the award of damages for unfair trade practices.[118] Another use of the nationality principle is the Foreign Corrupt Practices Act which governs the behavior of U.S. corporations even when such behavior may be the cultural norm in the host country.[119]

Several factors have served to apply different standards to operations in the United States and to those outside, even if the same corporation is involved. The U.S. courts have a traditional reluctance to be as aggressive in overseeing the other branches when it comes to foreign policy.[120] in, Congress has applied different standards to international behavior in many areas. Sec. 2 of the

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tion and International Business Transactions, Newsletter, Institute of Government, University of Virginia, Vol. 62, No. 10 (May 1986)

110. Pennoyer v. Neff, 95 U.S. 714 (1877)

111. American Banana Co. v. United Fruit Co., 213 U.S. 347

112. International Shoe v. Washington, 326 U.S. 310 (1945). *See also* World-Wide Volkswagen Corporation v. Woodson, 44 U.S. 286 (1980).

113. Kelvin Jones, *Everywhere Abroad and Nowhere at Home: The Global Corporation and the International State*, International Journal of the Sociology of Law 12: 85-103, 98 (1984). United States v. Aluminum Co. of America (ALCOA), 148 F.2d 416 (2d Cir., 1945)

114. 284 U.S. 421 (1932). *See also* Milliken v. Meyer, 311 U.S. 457 (1940) (state court has jurisdiction over citizens).

115. Bank of Augusta, 38 U.S. (13 Pet) 519, 588 (1839).

116. Santa Clara County v. Southern Pacific Railway Co., 118 U.S. 394j86)

117. Janelle M. Diller, *Title VII of the Civil Rights Act of 1964 and the Multinational Enterprise*, 73 Georgetown Law Journal 1465-1498 (1985). *See also*, Restatement (Second) of Foreign Relations Law of the United States sec. 27 (1965).

118. id., p. 1480.

119. Foreign Corrupt Practices Act, 15 U.S.C sec 78dd (Supp. III 1979). See also John Paugh, *The Application of U.S. Economic Regulations to International Commerce: A Comparison of the Sherman Act and U.S. International Trade Regulation Laws*, 13 Law and Policy in International Business 961-995 (1981). *But see* Zahourek v. Arthur Young and Co., 750 F.2d 827 (10th Cir. 1984) (Age Discrimination in Employment Act does not apply to termination of employment of American citizen by American employer in foreign country).

120. Chicago & Southern Air Lines v. Waterman Steamship Corp, 333 U.S. 103, 111 (1948) ("Foreign policy decisions are wholly confided to the political departments of the government..."), quoted in Paugh, op. cit.

1919 Webb-Pomerene Export Trade Act provided certain exemptions which allowed price fixing and market sharing in respect of foreign trade, providing it did not affect other domestic or exporting U.S. companies. Lately, there have been many legislative proposals to make U.S. business more competitive including creation of export trading companies immune from U.S. antitrust or amending the Sherman or Clayton acts to exclude certain export-related conduct from their application.[121]

Antitrust, as a set of general rules governing behavior is very similar with the Bretton Woods system of international trade put into place by the US with a set of international agreements put into place after World War II regulating international trade and capital.[122] The GATT and the IMF "represented a long tradition in American though on international relations. The American liberal ideal since the founding of the Republic has been the substitution of commercial for political relations between states."[123] Both antitrust and our foreign economic policies are based on this liberal ideal.

As the Bretton Woods system of free trade begins to deteriorate and as the system of antitrust becomes less effective in an international system of markets, there have many efforts to move towards another system. The calls for a new economic order are a reaction by Third World countries to a system that they perceive as being unduley advantageous to the US and other developed countries. Even the other developed countries have been looking for alternatives to Bretton Woods and a system dominated by the U.S. The efforts of Japan and the EEC are evidence of an effort to build an economic base less dependent on the United States.[124]

As competition from other countries grows, calls for protectionism and other policy tools at odds with the foundations of Bretton Woods have become louder within the U.S. In advocating an industrial policy, Reich deplores the growth of protectionism, seeing it as a tool to protect uncompetitive industries. He notes that "the most competitive businesses within each of America's major industries ... have seldom sought protection but have often had it thrust upon them."[125] As evidenced by recent tariff policies against Japan, however, there is a growing emphasis on protectionism and direct government support as opposed to the more general tools of antitrust and general agreements.

Policing New Technologies

The Constitution makes no mention of a guarantee of privacy. To guarantee this right of privacy, the Court had to find support for the general concept in "several fundamental constitutional guarantees" such as due process protections.[126] In *Roe v. Wade*, Justice Douglas pointed to a "zone of privacy" that is created around many of the provisions of the Bill of Rights.[127] However, not all privacy concerns have been elevated to a Constitutional level of protection. The Court limited to protection to areas "fundamental" or "implicit in the concept of ordered liberty."[128]

To protect privacy, policy makers have supplemented the general concept implicit in the Constitutional interpretations with common law and legislative guarantees. An influential 1890 article by Warren and Brandeis[129] led to a tort claim of invasion of privacy.[130] The invasion of privacy cause of action was a reaction to a new technological development - the perceived excesses of the populist press made possible by large-scale printing presses.[131] The common law privacy claim finally received constitutional treatment when it conflicted with the 1st Ammendment rights of freedom of the press. In a series of decisions, the Court found that privacy was not invaded when incorrect information about a "public figure" was disseminated by the press without

121. John Paugh, *The Application of U.S. Economic Regulations to International Commerce: A Comparison of the Sherman Act and U.S. International Trade Regulation Laws*, 13 Law and Policy in International Business 961-995 (1981)

122. Articles of Agreement, International Monetary Fund and the General Agreement on Tariffs and trade together regulated many international capital and trade controls. *See* Kenneth W. Dam, *The Rules of the Game, Reform and Evolution in the International Monetary System*, University of Chicago Press (Chicago: 1982)

123. Roger Gilpin, *The Politics of Transnational Relations* in George Modelski, ed., *Transnational Corporations and World Order*, W.H. Freeman (1979), p. 73.

124. id., p. 81.

125. Robert B. Reich, *The Next American Frontier*, (Times Books, 1983), p. 197.

126. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

127. Roe v. Wade, 410 U.S. 113 (1973)

128. Paul v. Davis, 424 U.S. 693 (1976).

129. Warren & Brandeis, *The Right to Privacy*, 4 Harvard Law Review 193 (1890).

130. 3 Restatement (Second) of Torts, sec. 652A (1977).

131. Warren & Brandeis, *The Right to Privacy*, 4 Harvard Law Review 193, 196 (1890).

knowledge of the inaccuracy.[132] In balancing the First Ammendment against privacy interests, the Courts were elevating privacy to Constitutional status.

Following on the steps of the printing presses were the telegraph and then the telephone. Both technologies were amenable to interception, by government as well as by private parties. In a 1928 decision, the Court ruled that the Fourth and Fifth Amendments did not apply to protect against government interception because there was no physical trespass on property.[133] In 1934, legislation was passed prohibiting all interception of communications unless certain due process constraints were followed.[134] This was quickly reviewed by the Court and was held to bind everyone, including Federal Government officers.[135] Finally, in 1967 the court overruled their previous position and held that wiretapping was just as much a trespass as walking into a person's home without a warrant.[136]

Divulging information by private individuals did not fare as well in the courts. In *U.S. v. Miller* the courts ruled that a bank customer did not have a legitimate "expectation of privacy" in bank records.[137] In response, Congress extended a legislative guarantee in the Right to Financial Privacy Act of 1978 and further strengthened those guarantees over the next few years.[138]

Interception of information in the stream of communication was covered by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which prohibited "aural" interception by government, the general public or the common carriers except under prescribed situations.[139] Title III was rewritten in 1986 to cover data communications, extending the definition beyond "aural" communications and covering data waiting in queues for transmission as well as copies of communications held by system operators as a backup copy.[140]

Many other countries have expressed concern about the privacy of their citizens caused by transnational data flows by large multinationals. A Council of Europe resolution in 1973 found that European laws did not sufficiently protect individuals against technological intrusions in the Private sector.[141] Sweden was the first to react, creating a Data Inspection Board with the power to grant licenses to all persons who wish to start a computer data base containing information on people.[142] Most other European have passed personal privacy regulations with limitations on the amount of personal data as well as provisions for the relevance, accuracy and security of the data.[143]

Once personal privacy was assured it did not take long for countries to realize that most flows of information were commercial data and not necessarily falling under the realm of privacy regulation. As the OECD concluded, "though personal privacy has been widely discussed over the last few years, we found that a great deal more transborder traffic relates to sensitive corporate information."[144] Several countries began using the regulation of transnational data flows as a tool in their economic policy or to protect broader definitions of national sovereignty than privacy.

Regulation of transnational data flows can provide an important foundation for the ability of a government to enforce its laws. The Canadian Bank

132. *See, e.g.* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)

133. Olmstead v. United States, 277 U.S. 438 (1928)

134. Section 605 of the Communications Act of 1934

135. Nardone v. United States, 302 U.S. 379 (1937).

136. Katz v. United States, 389 U.S. 347 (1967)

137. United States v. Miller, 425 U.S. 435 (1976)

138. *See* Fair Credit Reporting Act, 15 U.S.CA sec. 1681-1681t (1982). (Regulates those preparing or furnishing consumer credit reports expected to be used in employment, credit, or insurance granting decisions). A good summary of recent financial privacy legislation is contained in *Federal Government Information Technology: Electronic Surveillance and Civil Liberties* (Washington, D.C.: U.S. Congress, Office of Technology Assessment, OTA-CIT-293, October 1985). See also Rhys A. Sterling, Privacy, *Computerized Information Systems, and the Common Law - A comparative Study in the Private Sector*, 18 Gonzaga Law Review 567-604 (1982/83)

139. Title III required certification by an Assistant Attorney General and approval by a Federal judge before approving a wiretapping order. The other limited exception is for the common carrier allowing monitoring only for the purpose of quality and service checks.

140. Electronic Communications Privacy Act of 1986

141. Council of Europe, Resolution 73(22) on the Protection of the Privacy of Individuals vis-a-vis Electronic Data Banks in the Private Sector - Adopted September 26, 1973. In 5 Computer L. Serv. (Callaghan) app. 9-5.2b (1975).

142. Swedish Data Act of 1973

143. *See* William L. Fishman, *Introduction to Transborder Data Flows*, Stanford Journal of International Law, Vol. XVI, Summer 1980, p. 1. *See also*, Law No. 78-17 of January 6, 1978 Concerning Data Processing, Files and Liberties (France) in 5 Computer L. Serv. (Callaghnan) app. 9-5.2a No. 4 (1979) or Norwegian Privacy Act of 1977, 5 Computer L. Serv. (Callaghan) app. 9-5.2a No. 5 (1979).

144. *The Usage of International Data Networks in Europe*, OECD, Paris, 1979 (Series on Information Computer Communications Policy), p. 34.

Act, for example, requires that all banks maintain in Canada a minimum set of records related to its transactions in Canada.[145] What some might consider to be a distortion of trade is, when looked at from a sovereignty viewpoint, a legitimate regulation of banking.

Another, more traditional, application of transnational data flow regulation is the imposition of local processing requirements. West Germany, for example requires that all "international leased lines must terminate in a single computer system and all data processing of international information must be done in West Germany before the data is distributed within the country."[146]

Access to corporate databases became a direct confrontation between the policies of the United and of France over aid to the U.S.SR in its construction of the Siberian gas pipeline. The U.S. had imposed a ban on U.S. participation in the venture, but the French subsidiary of Dresser entered into an agreement. Dresser (France) was unable to access the corporation's database in the U.S. and was thus unable to meet its commitments on the Siberian gas pipeline.[147]

What began as a concern over the applications of international communications technology to individual privacy has since spread to a variety of functions of the nation-state. An OECD examination of international data networks concluded that "Certainly the increasing influence of multinational companies in the trade and industry of many different countries has resulted in data relevant to the day to day functioning of a country being held outside its borders. If that data is withheld for hostile or other reasons then the industry of a country may be put at risk."[148]

145. Peter Robinson, *Sovereignty and Data: Some Perspectives*, presentation to a Conference on "The Information Economy: Its Implications for Canada's Industrial Strategy", Royal Society of Canada, 30 May - 1 June, 1984.

146. *See* Meheroo Jussawalla and Chee-Wah Cheah, *Emerging economic constraints on transborder data flows*, Telecommunications Policy December 1983, pp. 285-296 at p. 292. *See also* Joseph P. Markoski, *Telecommunications Regulations as Barriers to the Transborder Flow of Information*, Cornell International Law Journal, Vol. 14, No. 2, Summer, 1981, p. 287.

147. See Peter Robinson, *Sovereignty and Data: Some Perspectives*, presentation to a Conference on "The Information Economy: Its Implications for Canada's Industrial Strategy", Royal Society of Canada, 30 May - 1 June, 1984.

148. *The Usage of International Data Networks in Europe*, OECD, Paris, 1979 (Series on Information Computer Communications Policy), p. 36.

International Public Government

In numbers there is strength. When European industry was faced with increased competition, both within Europe and from American and Japanese multinationals, their response was to form the European Community. The European Community was an outgrowth of the European Coal and Steel Community Treaty in 1951, European Economic Community (EEC) and European Atomic Energy Community (Euratom) in 1957. In 1967, a Council of Ministers was named as an umbrella group. The EEC was firmly "founded on a shared commitment to economic integration."[149]

The European Community is a particularly rare breed of international cooperation. Despite all the internal bickering by common market participants, nation-states have ceded a great deal of sovereignty over international affairs to a regional group. By harmonizing policies ranging from steel production[150] to shareholder rights[151] the Community has provided a larger internal market for industry as well as more potent barriers to foreign firms.

Communications technology has provided a strong impetus for a more subtle form of international cooperation: the setting of standards and the provision of an international communications infrastructure. In most cases, both private and public actors play significant roles.

Allocation of radio wave-lengths, the International Postal Union, and the Intelstat Corporation are three examples of nation-states working together to provide a communications infrastructure.[152] In many cases, international cooperation for provision of an international infrastructure was initiated by private actors. The Society for Worldwide Interbank Financial Telecommunication (SWIFT) is a group started by the

149. John La Calamita, *The "World Court": Coping with Political Realism and the Sovereign Tribe in International Adjudication*, 17 Ottawa Law Review 553-588 (1985), p. 557.

150. *See* David Dale Martin, *The Davignon Plan: Whither Competition Policy in the ECSC?*, Antitrust Bulletin XXIV, No. 4, Winter 1979, p. 837.

151. Schneebaum, *The Company Law Harmonization Program of the European Community*, in Fisher and Turner, eds., *Regulating the Multinational Enterprise*, Praeger Publishers (NY, 1983)

152. Sigmund Timberg, *The Corporation as a Technique of International Administration*, 19 University of Chicago Law Review 739 - 758, 1952. It is interesting to note that the nations that formed Intelstat chose the corporate form of organization rather than, for example, an International Convention or other more traditional technique.

banking community to simplify international electronic funds transfers.[153] The international data networks often include competition between private and public groups. Euronet, for example is a publicly owned value added network. Tymnet and Telenet, both privately owned packet switched networks, are able to operate in many of the same territories as Euronet.

Standards have become vital for the continued application and integration of computer and communications systems. The push for standards has been initiated from a variety of different places. Governments and large corporations, the two big users of communications and computer systems, have been staunch advocates of standardization to permit them independence from one particular equipment vendor. An influential early study to the President of France pointed to international standards as the only way to keep France from being at the mercy of IBM.[154]

The Defense Advanced Research Projects Agency (DARPA) was responsible for one of the local area network protocols most widely used now.[155] General Motors, one of the largest purchasers of factory automation equipment was the impetus for the MAP protocols now being widely implemented as a standard technique for linking tools, controllers, robots and other factory equipment. Both General Motors and DARPA were able to force standardization in the marketplace by the sheer size of their buying power. They both stated that all future procurements must be compatible with a set of protocols.

At the international level, the International Standards Organization and the International Telegraph and Telephone Consultative Committee (CCITT) have been responsible for standardizing many aspects of wide-area communications. CCITT recommendations have been adopted by most segments of the computer and communications industry and cover everything from the physical interface standard[156] to the standardization of the format of data packets transmitted over packet switched networks.[157] The X.400 message handling protocol is permitting electronic mail and messaging systems to be interconnected even though they are made by different vendors.[158] Digital Equipment Corporation (DEC), for example, makes an X.400 Router that allows any node on a DEC network to prepare electronic mail for delivery on any other system around the world that supports the X.400 Protocol.[159] Other international standards regulate everything from credit card number systems[160] to setting standards for electronic funds transfer.[161]

These standards could be viewed as a decrease in sovereignty of the Federal government. It is true that U.S. industry must now look to the international groups for guidance on technical directions, but this has also permitted the tremendous growth of U.S. industry abroad. The international communications structure is just as necessary now as was the national system of regulation for telegraphs and railroads in the late 1800's. Although states were forced to cede their regulatory powers, the result was an increase in economic levels in all states.

Private Governments

> "Those who own economic goods exercise a kind of governmental power. Being entitled to retain their property or part with it as they choose,the owners like petty sovereigns can dictate the terms and conditions their neighbors must perform to have access to the property. In this sense every lawful economic power becomes a type of political power."[162]

153. Meheroo Jussawalla and Chee-Wah Cheah, *Emerging economic constraints on transborder data flows*, Telecommunications Policy December 1983, pp. 285-296.

154. Nora and Minc, *The Computerization of Society* (MIT Press, 1980), p. 79.

155. DARPA officially endorsed the TCP/IP upper-level protocols as the basis for the government-sponsored ARPAnet which linked together government and university research organizations, along with many government contractors. TCP/IP has become a standard in one of the larger segments of the minicomputer market - those based on the UNIX operating system.

156. CCITT recommendation X.21

157. CCITT recommendation X.25.

158. International Telegraph and Telephone Consultative Committee (CCITT), Volume VIII: *Data Communication Networks Message Handling Systems (Red Book)*, Recommendations X.400-X.430, Geneva, 1985.

159. See Digital Equipment Corporation, *Network and Communications Buyer's Guide*, April-June 1987.

160. International Standards Organization, Standard 2894

161. See e.g. International Standards Organization, Standards 6113 (standard format for bank telecommunications messages), or 7746 (telex formats for interbank payment messages)

162. Edmond Cahn, Book Review (of *Hale, Freedom Through Law* [1952]), New York Times, Jan. 18, 1953 quote in Arthur Selwyn Miller, *The Modern Corporate State*, p. 41.

There is a myth that the corporation, conceived by the state, is always a creature of the state. Justice Marshall, in the *Dartmouth College* case stated that the corporation, "being the mere creature of the law, possesses only those properties which the charter of its creation confers on it, either expressly, or as incidental to its very existence."[163] Once conceived, however, the corporation is "no more dependent on the act of conception than is a natural person."[164] The corporation is helped in its exercise of power not only by a set of constitutional guarantees, but by the common law and by the practical effects of the concentration of economic power.

It is useful to remember that the colonies were founded largely through the efforts of the trading corporations to exploit the resources of the new world. Early corporations including the English East India Company, and the Hudson Bay Company in the Americas, had monopoly privileges, immunities from import and export laws and custom duties, the power to tax their own members, decide their own disputes, and the ability to defend themselves against pirates and other external enemies. The English East India Company ruled India with an iron grip and also made some contributions to culture by subsidizing, among others, Charles Lamb and John Stuart Mill.[165]

It is hard to find a constitutional basis of authority for the modern corporation. The Court, in its role as guardian of the Constitution, has always been reluctant to see any of the branches of government delegate authority. The doctrine of separation of powers has also been interpreted as a requirement that powers, once delegated to a branch, must stay there.[166] The National Industrial Recovery Act was invalidated as an overbroad delegation of authority to the private sector.[167]

The Constitution, as a government limiting the exercise of public power against individuals, is ill equipped to deal explicitly with private pools of authority. In many areas, however, the Constitution is silent and we must look to the common law for the basis of private authority. Tort doctrines of contributory negligence, assumption of risk and the fellow servant rule all served to insulate the corporation from liability to the individual working for it, and thus gave the corporation the ability to act freely within certain grounds.[168] Contracts are another area where the modern corporation is able to use the common law to provide a basis of authority. Although contracts were originally conceived as "the sum of consensual arrangements among persons, forming spontaneously without the artifice of sovereignty,"[169] it is widely accepted that in many contracts, corporations are able to literally dictate the terms on which people may use their services.[170]

It is evident from the previous discussion of the Positive State that government is concerned with controlling the direction of corporate activity. The Constitution, however, deals with another set of concerns. Up until the middle of this century, corporations were based in territories centered on the nation- state. This meant that regulation based on the Commerce Clause provided a fairly effective basis for control.

As we enter an era of multinational corporations and international interdependence, however, the delegation of private authority has led to an independent base of power for the corporation. Multinationals can effect the ability of the nation-state to act and can drastically effect national policies in such areas the balance of payments, the distribution of income and the levels of employment in different regions.[171]

163. Dartmouth College v. Woodward, 4 Wheaton 518 (1819)

164. Arthur Selwyn Miller, *The Modern Corporate State*, p. 53

165. Sigmund Timberg, *The Corporation as a Technique of International Administration*, 19 University of Chicago Law Review 739 - 758, 1952.

166. See Chadha.

167. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). A similar delegation was invalidated in Carter v. Carter Coal Co., 298 U.S. 238 (1936).

168. Arthur Miller, *The Modern Corporate State*, p. 47. Note however the actions of several state courts in the 1960's expanding the product liability doctrines to find an industry-wide source of strict liability against manufacturers of defective products. See Harry Scheiber, *Technology and Law in American Development, 1790 to the Present*, in Stuart Bruchey and Joel Colton, eds., Technology Economy, and Society (Columbia University Press, 1987) Page numbers are from a pre-publication Working Paper produced by the Earl Warren Legal Institute, School of Law (Boalt Hall), University of California at Berkeley.

169. Arthur J. Jacobson, The Private Use of Public Authority: Sovereignty and Associations in the Common Law, 29 Buffalo Law Review 600 - 665 (1980).

170. Note the emphasis in the Uniform Commercial Code on standardized contracts (UCC 2-207). There are some limits. In UCC 2-301, contracts may not be imposed that are "unconscionable." The doctrine of unconscionability as a check on corporate power is a recent phenomenon and has received uneven treatment in the state courts.

171. Raymond Vernon, *Sovereignty at Bay Ten Years After*, International Organization, 35, 3, Summer 1981, pp. 517-529

The Corporation in a Pluralistic Society

Early in the debate during the Constitutional Convention, it was agreed that the economic power of the states would not be an appropriate way of allocating representation in the legislature. As Elbridge Gerry, the delegate from Massachusetts stated,"Property is not the rule of representation."[172] The idea of economic power as proportional to political power did not sit well with the foundations of Jeffersonian democracy.

The public corporation also has a populist nature to it, at least in the definitional stages. The corporation is meant to function as a mini-democracy.[173] The Securities and Exchange Commission has put in place an elaborate set of proxy solicitation rules and insider trading rules to insure that all get equal access to economic opportunities.

Despite the concept of shareholder democracy, there is significant evidence that corporations function as a technocracy, with the managers assuming effective control over decisions. In an influential early book on the subject, *The Modern Corporation and Private Property*, Berle and Means found that small shareholders had virtually no voice in the operation of the corporations.[174] Even larger shareholders were frequently at odds with management, who was armed with large proxy votes from the small shareholders.

Corporations have an effect over many publics besides shareholders. Labor unions were a device to promote the participation, or at least representation, of the work-force in decisions that would affect their lives. However, union membership has been declining, and is mainly limited to the older industries such as steel. In 1958, union members comprised 33 percent of the non-agriculture workforce. By 1980, membership had declined to 24.5 percent of the workforce.[175]

It is not obvious that large corporations are a necessity to promote economic well being and technological change. Although Galbraith maintains that the "modern industry of a few large firms [is] an almost perfect instrument for inducing technical change,"[176] extensive research by economists such as Edwin Mansfield has failed to turn up any conclusive evidence in support of that proposition.[177]

The computer and communications industry are frequently cited as examples of the beneficial effects of the large corporation. It is useful to remember that AT&T was able to fund its highly successful research efforts through a public subsidy. IBM, despite its size and the size of its R&D budget, has always lagged the market in introducing new products.[178] There is some evidence that moderate levels of concentration are positively correlated with productivity increases, "particularly when advances in the relevant knowledge base occur slowly."[179] The AT&T divestiture points up this phenomenon. As the market began changing quickly, policy makers were quick to realize that our competitiveness was being diminished in the communications industry.

Large corporations like Xerox, IBM and AT&T have been well-known for their contributions to the basic knowledge base, but have often left application of the technology to others. For example, recent standardization in the laser printer page description languages around Adobe Post-Script™ is the result of basic technology developed at Xerox's Palo Alto Research Center, then applied by others. The Apple MacIntosh also uses technology developed at Xerox PARC. The Unix™ operating system, developed by AT&T has spawned a whole raft of start-up companies. Only recently has begun to successfully exploit Unix™ in their own products.

Another justification for the size of the corporations is that economies of scale and scope make the large corporation the only effective tool in a

172. Peters, *A More Perfect Union*, Crown Publishers (New York, 1987), p. 75

173. Abram Chayes, *The Modern Corporation and the Rule of Law* in Edward S. Mason, ed., *The Corporation in Modern Society*, Antheneum (New York, 1975), p.39.

174. Berle and Means, *The Modern Corporation and Private Property*, revised edition (Harcourt, Brace & World, 1968), p. 82. The only other analogous situation the authors could find was the Catholic Church where "the Pope selects the Cardinals and the College of Cardinals in turn select the succeeding Pope."

175. Alvin L. Goldman, *Labor Law and Industrial Relations in the United States of America*, BNA Books (2d ed., Washington, D.C., 1984), p. 47.

176. John Kenneth Galbraith, *American Capitalism* (Boston: Houghton Mifflin, 1952), p. 91.

177. *See, e.g.* Mansfield, Rapoport, Schnee, Wagner and Hamburger, *Research and Innovation in the Modern Corporation* (Norton, 1971), p. 13.

178. The IBM PC was introduced in response to the success of Apple. The IBM 32-bit minicomputers have always lagged market leaders such as Digital Equipment Corporation or Data General.

179. F.M. Scherer, *Industrial Market Structure and Economic Performance*, 2d edition (Houghton Mifflin, 1980), p. 438.

competitive world economy. Corporations quickly realized however, that increased size had many disadvantages. General Motors was one of the first corporations to move to a decentralized multidivisional form of corporate organization.[180] In a long series of empirical studies, Scherer concluded that "economies of scale at the plant level do not in the vast majority of instances necessitate high national concentration levels for U.S. manufacturing industries."[181]

If the large corporation is neither democratic nor necessarily more innovative, many of the arguments against subjecting corporate government to limits disappear. While it is important to remain competitive, evidence points to a conclusion that while it is important to help industry in general, promoting industry is not necessarily incompatible with the goal of promoting diversity and control by populist mechanisms.

Some writers view communications and computer technologies as providing some potential for decentralization. In *Work and Politics*, Sabel argues that the system of mass production and specialized machines in the Industrial Revolution was not the result of the inexorable logic of technological advance, but of the distribution and power and wealth in the 18th and 19th century. General purpose programmable machines, such as the computer, allow a potential for a more decentralized economy.[182] In their report to the President of France, Nora and Minc also pointed out that new communications networks could just as easily lead to decentralization of power as it could to more concentration.[183] Sabel argues that the current system of mass production and specialized machines is the result, not of the inexorable logic of technological advance, but of the distribution of power and wealth in the 18th and 19th century U.S. and Great Britain.

180. Alfred D. Chandler, Jr., *Strategy and Structure: Chapters in the History of the Industrial Enterprise* (MIT Press: 1962)

181. F.M. Scherer, *Industrial Market Structure and Economic Performance*, 2d edition (Houghton Mifflin, 1980), p. 95.

182. Sabel, *Work and Politics*, Cambridge University Press (Cambridge, 1982)

183. Nora and Minc, *The Computerization of Society* (MIT Press, 1981)

Limiting Private Government

"Who selected these men, if not to rule over us, at least to exercise vast authority, and to whom are they responsible?" asked Edward Mason.[184] Writing in the same volume, Adolf Berle wrote that "Constitutional protections and limitations were ... designed to shelter him from the rapacities, cruelties, or compulsion of arbitrary government power. May he not now need like protection from these non-Statist organizations of economic power?"[185]

As we have seen, the Constitution was designed to deal with the relationship of individuals to the state. The *Civil Rights Cases (1883)* said that the constitution applies only to government.[186] Violations of civil liberties under the Bill of Rights usually require some form of "state action." Thus, in *Jackson v. Metropolitan Edison, Co.*, a public utility was found not to fall within the ambit of the state-action concept and thus could not be held amenable to due process standards.[187]

The "state action" has posed a dilemma for the courts when presented with clear violations of civil liberties by private groups. In *Shelley v. Kraemer* the Court found that a racially restrictive covenant, in itself strictly a private arrangement, became state action when presented to the courts for enforcement.[188] Likewise, in the case of a company town there was no state action involved when Jehovah's Witnesses attempted to evangelize on the streets. The Court found however that using the state trespass laws to protect private property rights would involve the state in a violation of the Jehovah's Witnesses First Ammendment rights and could not be upheld.[189] However, when alternatives have existed, the courts have been reluctant to press this line of reasoning further. In *Lloyd Corp. v. Tanner*, the Court did not see a violation of First Ammendment rights in a

184. Introduction, Edward Mason, ed., Edward S. Mason, ed., *The Corporation in Modern Society*, Antheneum (New York, 1975), p. 1.

185. A. Berle, in the forward to Edward S. Mason, ed., *The Corporation in Modern Society*, Antheneum (New York, 1975), p. xi.

186. Civil Rights Cases, 109 U.S. 3 (1883). The Court, in the Civil Rights Cases concluded that Congress could regulate private conduct under the Thirteenth Ammendment but that the legislation had to be only concerned with slavery and its incidents. See Tribe, *American Constitutional Law*, p. 258.

187. Jackson v. Metropolitan Edison, Co., 419 U.S. 345 (1974)

188. Shelley v. Kraemer, 334 U.S. 1 (1948)

189. Marsh v. Alabama, 326 U.S. 501 (1946)

prohibition from passing out antiwar pamphlets in a privately-owned shopping mall.[190]

There have been some indirect applications of civil liberties protections to private actions. The 1964 Civil Rights Act uses the commerce clause to make the connection to private corporations. In two important 1964 cases validating the Act, the Court found that attempts to deal with matters such as the "deprivation of personal dignity" were valid exercises of the Commerce Clause.[191]

One of the fundamental limits on government is the requirement that it follow a procedure of "due process" before acting to deprive individuals of "life, liberty or the pursuit of happiness."[192] Due process has been invoked to prevent government, in its capacity as an employer, from arbitrarily terminating employment for government workers. In *Arnett v. Kennedy*, a three man plurality had ruled that a pretermination hearing for civil service termination was not required because it was not specifically required in the enabling legislation.[193] This was overturned in Cleveland Board of Education where the court found that the due process requirements of the 5th Ammendment[194] could not be superceded by legislative enactments.[195] This did not mean that government could not fire the worker: only that the worker was entitled to prior notice and to an opportunity to be heard.[196]

Through the use of indirect devices such as the Commerce Clause, portions of the Bill of Rights have been extended to the corporation by legislation. The Dealer's Day in Court Act was a recognition that large automobile companies have power over their franchise dealers and required that they could only cancel a franchise with just cause.[197] In dealing with employees and labor unions, Corporations are required to deal in good faith.[198]

Despite the extensive restraints on the government when it acts like a corporation - hiring and firing, or buying goods for example - there are no Constitutional restraints on the corporation when it acts in a similar manner. In feudal states, wealth was the property of the sovereign and had no restrictions on its use. We've recognized that government actions such as welfare payments create a relationship between the government and the individual. Once established, that relationship should not be arbitrarily terminated.[199]

Many observers of the growth of corporate power have advocated holding corporate government to the same standards as the government corporation. Adolf Berle was an early advocate of applying the 14th ammendment to "private sovereigns." Kingman Brewster has suggested that we examine the allocation of power to private corporations as a form of "economic federalism."[200] Once we recognize the corporation as government, it follows that we should at least consider subject the government to a set of limits.

Sovereignty as the ability to act

> "When we say that the new international economy now being built by global corporations threatens the sovereignty of the nation-state, we mean that its principal domestic powers and functions - the power to raise revenue, maintain employment, provide adequate social services, encourage the equitable allocation of income and wealth, maintain sound currency, keep prices and wages in line: in short the power to maintain a stable social equilibrium for the greater majority of its population - is being seriously undercut."[201]

190. Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551

191. *See* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) and Katzenback v. McClung, 379 U.S. 294 (1964).

192. U.S. Const., amend. V.

193. Arnett v. Kennedy, 416 U.S. 134 (1974).

194. As applied to the states via the Fourteenth Ammendment.

195. Cleveland Board of Education

196. *See* Fuentes v. Shevin, 407 U.S. 67 (1972)

197. See Abram Chayes, *The Modern Corporation and the Rule of Law*, in Edward S. Mason, ed., *The Corporation in Modern Society*, Antheneum (New York, 1975), pp. 43-44. See also Note, *Statutory Regulation of Manufacturer-Dealer Relations in the Automobile Industry*, Harvard Law Review, 70: 1239 (1957). The act is contained in 70 stat 1125, 15 usc. #1222 (Supp 1956).

198. Alvin L. Goldman, *Labor Law and Industrial Relations in the United States of America*, BNA Books (2d ed., Washington, D.C., 1984)

199. See Charles Reich, *The New Property/fP, 73 Yale L.J. 733 (1964). Reich's article was considered by many to be responsible for the concept of government entitlements as a form of property that could not be arbitrarily taken without due process.*

200. Kingman Brewster, Jr., The Corporation and Economic Federalism in Edward S. Mason, ed., The Corporation in Modern Society, Antheneum (New York, 1975), pp. 76-77

201. Barnet and Muller, Global Reach, Simon and Schuster (NY, 1974), p. 373.

The industrial policy debate is really an argument over what positive steps a country can take to keep control over its future. Some commentators advocate shifting the attention of government from declining industries, such as steel, to growth industries such as computer manufacturing. Robert Reich, one of the chief proponents of this school of thought, advocates a system of pointed direction by government to certain industries, accompanied by labor market and regional policies to ease the adjustment.[202]

It does not matter for this discussion which types of policies are most effective. Although some policy tools have become less effective and sovereignty has shifted from state to Federal and has begun to shift towards the international arena, there are still many effective techniques for the nation-state to use. Regulation, use of the tax code, Export Trading Companies, civil rights legislation, and a host of other techniques permit the nation-state a strong role in defining the state of the economy.

Even with the remaining power of the nation-state, it must be concluded that there has been an erosion of both public and national sovereignty. Technology has produced, aided greatly by the law, a series of large corporations and has integrated previously seperate markets. Just as the states could not hope to retain all their powers, the Federal government must also operate in a constrained environment. As one observer put it, "most states retain control over their policy instruments and are able to pursue their objectives. They are just less able to achieve them."[203]

The loss of sovereignty is being fiercly challenged by many countries. Standardization efforts, regional economic coalitions in the form of the EEC and extension of regulation to cover data flows as well as physical goods have all been successful policy tools. Many of these efforts are internationally based and insure that public government is allowed a voice in decisions as well as private government.

The significant change is that at the international level, corporations and governments take on much more equal positions. Corporations are big enough to compete with the government as buyers and are spread out enough to play nation-states off against themselves. In the international standards arena, corporations can be said to have just as much say in the definition and approval of standards as most countries.

As influential as the multinational is in helping define international systems, and in playing off one country against another, the nation-state appears to have kept much power over industry once it is physically located in the country. Large capital investments are a potent tool for forcing cooperation from a recalcitrant foreign multinational.

We have seen several sovereignty implications of changing technology and growing multinational corporations. Technology has permitted the growth of large corporations during the Industrial Revolution and has permitted the growth of multinational corporations during the Information Revolution. The result has been twofold. First, sovereignty has shifted from public to private groups. The corporation, through the ability to shift production among territories and through their sheer size and market power, have become a potent actor in the public policy arena.

Secondly, because of the internationalization of national economies, sovereignty has shifted form the federal to the international level. This is no different than the shift from the states to the federal government that started in the 1800's and continued through the New Deal. At the international level, regional economic organizations are the clearest evidence of the shift in sovereignty. However, more subtle forms of international government are the standards organizations which are a vital part of managing new communications technologies.

Just because sovereignty has shifted from private to public and from national to international doesn't mean the nation-state and our federal government do not have a role to play. Commentators such as Robert Reich have forcefully advocated a changing role for federal policy makers to enable them to deal with a changing economic reality.

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202. See e.g. Ira C. Magaziner and Robert Reich, Minding America's Business, Harcourt Brace Jovanovich (1982).

203. Thomas J. Biersteker, The Limits of State Power in the Contemporary World Economy, in Peter Brown and Henry Shue, eds., Boundaries: National Autonomy and Its Limits (Rowman and Littlefield), p. 147.