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The Modern Corporate State

*Private Governments
and the American
Constitution*

Arthur Selwyn Miller

Contributions in American Studies, Number 23



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TOWARD A DEFINITION OF THE CORPORATE STATE

*The United States has moved well down the path toward
a corporate state.*

—DANIEL FUSFELD¹

There is no indigenous American corporatist theory, but the corporate state does exist in fact.

That paradox is explainable: there is little American philosophy, political or otherwise, that is worth mention—other than that poor substitute for not having a philosophy, pragmatism. American thought is largely derivative. It gnaws over the products of European writers much like medieval scholastics pored over Aristotle. Exegesis on themes struck early by Mill or Kant, by Hume or Locke, by Aquinas or Marx, among others, makes up the bulk of the American philosophical tradition. A nation of immigrants has looked to the homelands for intellectual inspiration—save for pragmatism. Conceived by Charles Peirce and nurtured into fruition by William James, the pragmatic “philosophy” substitutes action for thought. It eschews ends or purposes. Official action in the federal government provides apt illustration; there, as Charles Lindblom once put it, the science of “muddling through” prevails.² A policy issue is identified with a search for empirical data, and consensus is the test for validity. If it—a policy—works in the sense of being accepted by the common denominator of policymakers, it then is “good policy.” Pragmatism thus is more concerned with method than with judgment.

In the early 1960s the pragmatic temper regnant was the ne plus ultra of governmental policymakers. To be a “hard-headed pragmatist” was equated with wisdom, with harsh realism rather than mushy idealism. The “best and the brightest” considered that the “facts” of policy were all that mattered—a dismal illusion that is based on the fallacious notion that “facts speak for themselves.” That they do not should be obvious, but it is not. Facts do not exist, as Whitehead once said, “in nonentity.”³ There are no facts apart from a theory. The hard-headed pragmatists are intellectual prisoners of defunct academicians and of inarticulated major premises.

Hans Morgenthau (a European immigrant) pointed out in 1962 how pragmatism and empiricism are terms employed with pride in Washington (they still are): “They are used as though to be pragmatic and empirical when faced with a political problem were to be rational almost by definition.”⁴ Deep-seated thought habits permit officials to approach fundamental social problems with a series of piecemeal, empirical attacks, without the accompaniment of any thought-out plan. Problems are looked upon as headaches and handled accordingly—with the quick “fix,” the aspirin tablet, the temporary expedient that will enable the problem to be “solved” and allow attention to be devoted to the next one.

That mind set is pathetic at best, dangerous at worst. It is entirely inadequate to the needs of the modern age, if not the past, as is evident from even a casual survey of the many problems or crises facing the United States (and, indeed, the entire planet). The net effect, as crisis piles on crisis, each one potentially more terrible or lethal than its predecessor or concomitant, is that the institutional capacity of the nation (the nation-state, as a generic group) has now come under its most severe test since its inception about 300 years ago.

It has long been obvious that the American dream has ended, although many still believe in its tenets. The process began with the closing of the frontier and the immersion, first begun in the Spanish-American War and accelerated in World War I, of the United States deeply and irreversibly into planetary affairs. Before 1900 it was possible to believe in the idea of progress and of a world in which things got better and better. Protected by the oceans and the British navy, the country prospered by exploiting the untold and seemingly endless resources of the empty continent. Much of that had been wrest

away through imperialistic adventures, to be sure, but still the dream persisted that, in some way and somehow, Americans were special—a little better than people elsewhere. The bubble burst in the cynicism that followed World War I and collapsed entirely in the Great Depression.

The point, however, is not to retrace that well-known path but to suggest that adherence to pragmatism made little lasting difference when the problems were the relatively simple ones of filling and developing a virgin continent. Mistakes made could easily be corrected; the margin for error was great. We can no longer so indulge ourselves. The intellectual gap, unfilled by the pragmatic temper, must now be filled. Americans will need to know where they are, as well as where they have been, if ever they are to be able to attain a decent future. That future will not come by happenstance or by accident or by muddling through in a series of ad hoc decisions taken just before (or just when) a problem erupts into a crisis.

Americans are uneasy today simply because, for the first time in almost 200 years, they cannot contemplate the future with confidence. Although they continue to be short-term hedonists, perpetually searching for the quick return, the easy dollar, the immediate reward, and in so doing destroying their priceless and irreplaceable patrimony, some faint stirrings portending intellectual change are becoming evident. Still largely a nation of Micawbers, with a touching faith that something will turn up to rescue them from their present follies and pleasures, many Americans have substituted science for God and believe, deep down, there will always be a technological "fix" to extricate them from the quicksand of escalating problems. A few—far too few as yet—have a larger vision. The publication in 1970 of *A Theory of Justice* by philosopher John Rawls may well mark an intellectual watershed.⁵

The purpose of this essay, however, is not to chronicle the emergence of new strands of thinking that go far beyond pragmatism. Rather, it is the much more limited, yet still essential, aim of accurately describing the nature of the American political economy as seen from the perspective of constitutional theory; and then from that description extrapolating some of the present-day trends in order to call attention to certain dangers to the values inherent in constitutionalism. In other words, the corporate state, American style, will be de-

scribed, as to both its contours and development. It is a product of pragmatism, which will explain how it can exist without any indigenous corporatist theory. It was not planned; it just grew—much like the Vietnam conflict grew without design by a series of small steps. Over the decades since 1787 a series of seemingly unconnected steps have little by little produced a new constitutional order—sans amendment and sans fanfare.

In this chapter the outlines of American corporatism will be set forth in skeletal form. Fuller details will come later. First, however, brief reference to European corporatist theory is desirable.

Forty years ago Mihail Lanoilescu maintained that the twentieth century was destined to become the "century of corporatism," a statement that, in 1934, was not a prediction but a description.⁶ Many countries in western Europe were corporatist: Italy under Mussolini, Spain under Rivera, Portugal under Salazar, Austria under Dollfuss, and Germany under Hitler. In this hemisphere, Brazil under Vargas was corporatist. (In practice, however, many of the corporatist plans "either remained vague projects to be realized in some distant future or became passive instruments for carrying out the policies dictated from above by an absolute central authority,"⁷ as in Italy.) Even the United States, in the National Industrial Recovery Act of 1933, experimented with a version of the corporate state. Although the NIRA was outlawed by the Supreme Court in 1935, the economic and cultural forces that brought it—as well as other examples of twentieth-century corporatism—into existence have not ceased to operate. And the government-business relations then formalized continued in another form. As the United States, as well as all other nations, fearfully enters in the 1970s into a period of an "end to growth" and sees massive realignments in historic Western-Third World relationships, there has come a resurgence of interest in ideas and concepts that have lain dormant since the 1930s. Further, informal accommodations have by now solidified into a corpus of customary law. But to speak glibly of the corporate state is not to define it or to determine how it could come into being under the fixed Constitution of 1787.

European corporatist theory is a view of society that sees a nation as made up of a number of diverse economic or functional groups rather than of atomistic individuals. It involves the rediscovery of society—more accurately, the group—as the basic unit and attempts to

counteract what is considered to be excessive individualism. That, in briefest terms, is a call for a form of latter-day feudalism. (The United States today is appropriately labeled "neofeudalist.")

Historically, corporatist thought was mainly Roman Catholic. During the nineteenth century a reaction set in against a perceived undue emphasis on individualism brought about by the French Revolution. These Catholic (and other Christian) scholars proposed a reversion to the corporate character of medieval society. Two encyclicals, *Rerum Novarum* issued by Pope Leo XIII in 1891 and *Quadragesimo Anno* promulgated by Pius XI in 1931, are the intellectual landmarks of that stream of thought. The search was for "community" during a time when individualism was the sine qua non of Western life.

Corporativism also meant the discovery (or rediscovery) of a mystical entity called "society," itself a corporate organization, one with drives and purposes of its own that transcend the arithmetical sum of the private interests of the citizenry. The development in theory thus is cyclical. Using the French Revolution as a turning point toward the high point of discrete individualism, the trend today (during this century) is toward the decline of individualism and the rise of group behavior. Sir Henry Maine, writing in *Ancient Law* a century ago, opined that the development of "progressive societies" was from "status to contract"—in other words, from feudalism to individualism.⁸ At the precise time that he published those oft-cited remarks (1861), already society was turning back to a new form of feudalism. By 1939, two distinguished French economists characterized the developments as a "piecemeal emergence of corporatism [*corporatisme*]," noting a general tendency that "free contract has receded in the face of legal regulation. Markets . . . have been 'made sane' by the public authorities who, partly by legislation and partly by giving legal force to private professional agreements, have substituted statutory imperatives for the spontaneous adaptation of supply to demand."⁹

Corporativism as a formal theory all but collapsed with the fall of Nazi Germany and Fascist Italy. It remained in Franco's Spain and exists today in Sweden, Japan, and some other nations of the non-Soviet part of the world. There is much similarity between the United States and the Soviet Union. As Robin Marris has said: "The significant difference between managerial capitalism and managerial

socialism lies less in the character of the rules of the game than in who sets them. In socialism, the rules are set by political government. In capitalism, they emerge indirectly from a body of law and custom, founded on the concepts of private property and slowly developed."¹⁰ But that does not mean that the U.S.S.R. is corporatist. The similarities go to the physical appearance of the two industrialized powers and to their bureaucracies. In Marris's words, who sets the "rules of the game" is of critical importance.

ELEMENTS OF AMERICAN CORPORATIVISM

Corporatist theory begins with the recognition of the group as the basic societal unit. The isolated individual does not exist as such. Hobbes could say that man in a state of nature had a life that was "solitary, poor, nasty, brutish, and short," a quintet of attributes that probably was at least 80 percent correct. It is only in the last 200 to 300 years that theories of atomistic individualism—the worth of the "natural" person qua human being—had any currency. Before that, and at the present, the individual merges, subtly or overtly, into some type of organizational activity.

Orthodox constitutional theory and doctrine recognize the existence of but two entities: government and the individual person. Nothing intermediate is envisaged. The Constitution limits government in favor of individuals, a notion based on the unstated assumption that individuals live and act as autonomous units. Not even the political party is mentioned in the fundamental law, and it is only through a dubious, sometimes disputed, but nonetheless impregnable construction that artificial persons (mainly corporations) are called constitutional persons.¹¹ If anything, the Constitution, as drafted and surely as interpreted during the nineteenth and early twentieth centuries, is based on the Protestant Ethic. A basic tenet of this concept is individualism, both political and economic, an individualism that found expression in Adam Smith, Ricardo, Locke, Mill, Sumner, and Spencer, among others. These and other commentators extolled the sacredness of property, decried the spiritually debilitating effects of security, and asserted the supreme virtues of hard work, thrift, and independence— notions that received official approbation by British statesmen while the Irish starved during the

Great Hunger, by Herbert Hoover during the Great Depression, and by Richard Nixon in the depression of 1974.

The allegedly autonomous, isolated individual really spends his life as a member of groups; further, he is significant only as a member of a group or groups. As an individual he has neither political nor economic power. But when associated with others he gains the strength to prevail or to refute or at least to influence. The Protestant Ethic, accordingly, has been replaced by the Social Ethic: "That contemporary body of thought that makes morally legitimate the pressures of society against the individual. Its major propositions are three: a belief in the group as the source of creativity; a belief in 'belongingness' as the ultimate need of the individual; and a belief in the application of science to achieve belongingness."¹²

For the individual, the group provides a means for the escape from anomie by persons who are beset, as seems to be the general rule, with feelings of isolation, of nothingness, of rootlessness and purposelessness. It also enables, if one accepts Thomas Hill Green's views, individuals to increase and strengthen their liberty and freedom.¹³ That seeming paradox is explained by the theory that through union persons may accomplish objectives which they as individuals would be unable to achieve and may also oppose coercive tactics of other and stronger individuals or associations. For society, on the other hand, voluntary groups and associations are a means by which some of the urgent business of society is performed. They are agencies of social control, operating as arms of the state in the performance of some of the preferred activities of society. They may be considered to be the recipients of delegated power from the state.

This is not new in history; apparently it has always been so. Nor is it new to this decade to suggest the importance of groups. In 1944 Robert Merriam asserted: "The lone individual does not figure either in family relations, in neighborhood relations, in state relations, in social relations, or in the higher values of religion. Nowhere is he left without guiding social groups, personalities, and principles."¹⁴ There can be little question that group interests, as Charles Beard said in 1945,¹⁵ have always formed the very essence of politics both in theory and practice. Associational activity thus is the way in which the individual achieves his meaning. That notion by John Dewey was echoed in 1952 by Earl Latham when he said that "the chief social

values cherished by individuals in modern society are realized through groups."¹⁶ And it is the organization, not the individual, which is productive in an industrial society.

Law and legal theorists, however, have lagged behind. Only in very recent years has the Supreme Court read a right of association into the Constitution.¹⁷ Group theories of law have yet to replace the individualistic theories that have prevailed since the inception of the republic. The theory of the corporate state, American style, in final analysis is a statement of group legal theory, with particular emphasis on the business corporations. In the corporate state the social and legal role of the individual qua individual is supplanted by the individual qua member of group(s).

FUSION OF ECONOMIC AND POLITICAL POWER

The group as the dominant societal entity has one unavoidable consequence: sovereignty, Bodin and Austin to the contrary notwithstanding, is splintered. It is shared by public government and the private governments of the corporations.

To speak of sovereignty is to speak of power, the ultimate concept of politics and of constitutions—which organize the exercise of power and in the United States limit governmental power in favor of individuals and groups. For the moment, power may be defined succinctly as the capacity to make or influence decisions that affect the values of others. That, to be sure, is too abstract and says neither who in a given polity exercises power nor how it is exercised nor who is affected and how. Those questions will be developed later; it is sufficient now to emphasize one of the major segments of a definition of corporatism—the fusion of political and economic power.

The merger occurs in at least two ways. First is the influence that economic power centers can and do bring in fact upon public governmental structures. And second, there is the exercise of political power within the amorphous confines of the corporate community itself, the corporation being a political order as well as an economic entity (and a sociological community).

The close intertwining of public and private power is no new development. Depending on how one reads American economic and legal history, it can be seen far back into the nineteenth and even the eighteenth centuries.

teenth centuries. The line between public and private is blurred, and always has been blurred, in American law, the myth to the contrary notwithstanding. But what was relatively minor in the nineteenth century has in recent decades become central to the politico-economic order.

THE LEGAL NEXUS

To be corporatist, however, there must be a legal connection between public government and private groups—corporations and unions, in the main. Corporatist theory requires it and the European models all display that overt connection, by statute or fiat. But how, outside of perhaps the armaments industry where there is a contractual relationship between the major arms producers and the government, can it be demonstrated that necessary nexus exists?

To answer that question requires analysis of the nature of law itself, how it is created and promulgated and how it is enforced. If, as Professor Andrew Hacker has said, "neither our constitutional law nor our political theory is able to account for the corporate presence in the arena of social power,"¹⁸ and if corporate managers do rule, at least in part, then it is clear that they have no direct, express delegation of power from the state. Corporatism in Europe has such a delegation. American views of law, however, are in the main based on Austinian notions of sovereignty, under which law is the command of the sovereign—that is, the government.

That conception is too limited; it does not take other power centers into account. Nor does it make a distinction between those who have formal authority to make power decisions and those who wield effective control over them. What is needed, accordingly, is a "living law" analysis, which requires primary focus upon the important societal decision and asks the question, *Who* makes those decisions, *how*, and with what *effects*? The living law is principally associated with Eugen Ehrlich, an Austrian jurist who set out his theories in *The Fundamental Principles of the Sociology of Law* in 1912. Ehrlich maintained that the living law is to be seen in contrast to that which is in force merely in the courts and with the officials. It is law not imprisoned in rules of law but which nevertheless dominates life itself. It is to be found in "the modern documents, and also by immediate study of

life itself, of commerce, of customs and usage, and of all sorts of organizations, including those recognized by the law, and, indeed, those disapproved by the law."¹⁹

In other words, the living law is the flow of decisions important to Americans. Some are made by private officers, others by public officials. It is what important decision makers actually do, a flow of decisions, a process rather than a static system. The myriad routine transactions between the two characteristic institutions of the day—big government and big business—make up a body of the living law. At times put into statute, administrative ruling, or court decision, it also exists as an inchoate set of "working rules" by which the corporate state gets its business done. A series of laws (in Ehrlich's sense) rather than a logical whole, the living law is the grease that keeps the wheels of government going. The living law, often not codified, is the legal nexus between political and economic power.

THE CORPORATE STATE AS GROUP-PERSON

The corporate state is the hypostatization of the public interest, and the public interest is greater than the arithmetical sum of the private interests of the nation. Government has a momentum of its own, separate from and greater than individual interests. At a 1962 press conference, President Kennedy was asked about a statement of Secretary of Labor Arthur Goldberg about the need for a third person—the public—at the bargaining table when collective bargaining agreements were negotiated. Said the President in reply: "These companies are free and the unions are free. All we [the executive] can try to do is to indicate to them the public interest which is there. After all, the public interest is the sum of the private interests, or perhaps it's even sometimes a little more. *In fact, it is a little more.*"²⁰ With that statement, Kennedy (perhaps unwittingly) articulated a view of government at odds with the historic Constitution. He revealed his belief in a transcendent public interest. (The phrase "perhaps unwittingly" is used deliberately, for by no means is it clear that the President did not know what he said. After all, it was in his inaugural address that he uttered the statement, often repeated, about citizens asking not what their country could do for them but what they could do for their country—a sentiment perilously close to the *Todo Por La*

Patria slogan seen on public buildings throughout Franco Spain. And Spain is a corporate state.)

A considerable body of constitutional law illustrates the dominance of society as a corporate body over the individual. Government, the voice and instrument of society, has drives and interests of its own to further. Thus, as Justice Holmes once said, a man can be marched up to the front with a bayonet at his back, there to die for his country, and the Constitution will not prevent it. And as Justice Hugo Black said in 1943, in a case involving the exclusion of Japanese-Americans from areas on the West Coast, citizenship has its duties as well as its rights; and therefore the Japanese-Americans should not (and could not, constitutionally) complain about being deprived of their homes and, at times, penned up in concentration camps.²¹ The sordid history of treatment of the Indians by government, with systematic violations of solemn treaties upheld by the Supreme Court, is another example of the triumph of the societal corporate entity over the individual.

At no time, in fact, when the interests of government or society are really at issue does the individual prevail. As President Kennedy said, the public interest is a little more than the sum of the private interests of the nation. That, in brief, is another way of saying that the state in the modern era has become an anthropomorphic superperson whose reality is as real as that of human beings. American constitutional law, as well as other law, recognizes this; even when the Supreme Court issues decisions that appear to further individual rights, the Court has in fact been talking about individuals as members of groups. And even group rights have to give way to the rights of "society."

The net result is that the state is some sort of group-person. Not only are groups, such as corporations, real persons in the eyes of the law, but so too is the national state. The constitutional problems posed by that are discussed in Chapter 7.

OTHER CHARACTERISTICS

Two other attributes of American corporatism require only brief present mention. First is the idea of citizenship as attaching as much to the corporation as it does to the nation-state. It is becoming more and more obvious that the identifications and loyalties, the reciprocal

rights and duties, of natural persons run to and from the corporate entity to a degree that times equals and even surpasses those to the nation. Government (society) seeks to counteract such tendencies, to be sure, by making nationalism a secular religion and by creating a congeries of symbols and myths about the nation and its heritage. But the steady growth of the corporation and its place both as a unit of "functional" federalism and of a "new" separation of powers means that, much as sovereignty is being eroded, so too is the ancient concept of citizenship as attaching only to the nation-state. The development has reached its apex in the managers of the multinational corporations.

Second, there may be seen definite and significant changes in the individualist categories of law—contract and tort and property, the bedrock of a laissez-faire theory of government and of society. Each is being fundamentally altered—away from a basis in individual volition (contract) or individual responsibility (tort) or even individual ownership (property) to "contracts of adhesion," liability without fault, and a new form of property in the promises made by corporate enterprises (including government). Adolf A. Berle put the matter well some time ago: "We are seeing the gradual transition (in historical time not gradual at all) of our vast country from a system of individual possessory property (the norm a century ago) to a system of non-individual, non-statist, non-possessory economic and social power (a system of corporations, corporate insurance companies, and pension trusts, of labor unions, professional guilds, and voluntary associations) which has concentrated economic power to a degree unknown in recorded history."²² Berle chronicled the alteration in property; implicit in his analysis are concomitant changes in contract and tort. Most contracts are at best only partially volitional. And most civil wrongs (torts)—those that revolve around the automobile—have now produced a movement toward no-fault insurance.

That adumbration of the elements of American corporatism will serve to provide a basis for thinking about what is said below. In Part II, the argument is further elaborated. The corporate state has arrived, unsung and unheralded, and is now an essential aspect of American constitutionalism.