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Reason of State and the Emergent Constitution of Control†

Arthur S. Miller*

No society in recorded history has ever been able to dispense with political power. This is as true of liberalism as of absolutism, as true of laissez faire as of an interventionist state. No greater disservice has been rendered to political science than the statement that the liberal state was a "weak" state. It was precisely as strong as it needed to be in the circumstances. It acquired substantial colonial empires, waged wars, held down internal disorders, and stabilized itself over long periods of time.

—Franz Neumann1

I. INTRODUCTION

This Article is a speculative essay.2 Its main theme is that the United States is moving, without announcement or fanfare, into government under a fourth constitution, a development that can be appropriately labeled the Constitution of Control. Preceding this emerging fourth constitution were three other fundamental laws, two of which still exist: the Articles of Confederation, the 1787 Constitution of Quasi-Limitations (usually misnamed the Constitution of Limitations), and the Constitution of Powers. Currently, few people pay any attention to the first constitution, the Articles of Confederation, although some who fear the power of the State advocate that the Articles be resurrected and put into effect.3 However desirable that proposal might be in theory, it will not happen. Accordingly, the focus herein will be on the second constitution, the Constitution

† Copyright 1980 by Arthur S. Miller. This Article is based upon the author's work in progress, a book tentatively entitled Democratic Dictatorship: The Emergent Constitution of Control.
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2. My aim is to suggest a way of thinking about the current direction of American constitutional development and to propose a model of the future. The Article is thus an exercise in extrapolation, drawing upon past experience and projecting certain trends as modified by the likely social conditions of the next fifty years. There is, of course, no way at this time to prove the validity of the proposed model.
of Quasi-Limitations—the politico-legal palimpsest drafted in 1787 and amended twenty-six times—and its two overlays, the third and fourth constitutions.

The second constitution was predominant from 1789, when the first government was formed, until about 1937. The first overlay, the third constitution, was added when the Supreme Court constitutionalized the New Deal, permitting a government with affirmative obligations. Professor Edward S. Corwin correctly labelled this overlay a "Constitution of Powers in a secular state." When the Employment Act of 1946 was passed, the new posture of government was clearly evident: the Positive State had emerged. Simultaneously, still another layer was developing, in a process that by 1980 has become clear: a fourth constitution, the Constitution of Control, is emerging. This Article outlines that historical development as reflected not only in judicial decisions, but also in other governmental actions. Following the description of the development of the fourth constitution, is a description of the "climacteric"—the coalescence of crises—in which Americans now find themselves. Finally, an extrapolation of these past trends reveals an emerging constitutional troika, a troika which includes the coexistent second, third, and fourth constitutions, but which also indicates that the fourth constitution, the Constitution of Control, is becoming preeminent.

4. See generally E. Corwin, A Constitution of Powers in a Secular State (1951). Professor Corwin described the replacement of a Constitution of Rights by a Constitution of Powers in these terms: "[T]he Federal System has shifted base in the direction of a consolidated national power, while within the National Government itself an increased flow of power in the direction of the President has ensued." Id. at 2. See also E. Corwin, American Constitutional History (1964).


6. In briefest terms, the Positive State is a label for express acceptance by the federal government—by government generally and thus by the people—of affirmative responsibility to further the economic well-being of all the people. It is a societal undertaking of a duty to attempt to create and maintain minimal conditions within the economy—of economic growth, of employment opportunities, of the basic necessities of life.

Constitutional law and government, as Franz Neumann has observed,7 have always been relative to circumstances. Supposedly constitutional absolutes have a way of being diluted by the crush of the exigencies faced by succeeding generations of Americans. One of the great silences of the fundamental law has thus taken on sufficient substantive content to allow one to assert, with little fear of contradiction, that a concept of "reason of state" (raison d'etat) is now an integral part of the Constitution. My purpose is to examine the development of this principle (constitutional reason of state) and its implications for the future. To put it another way, the discussion focuses on the extent to which certain Machiavellian principles have become, and will become, part of American constitutional law.

First, however, it is necessary to define the concept of reason of state. Not mentioned in the second constitution, it is "the State's first Law of Motion,"8 "the doctrine that whatever is required to ensure the survival of the state must be done by the individuals responsible for it, no matter how repugnant such an act may be to them in their private capacity as decent and moral men."9

Second, it is necessary also to define the term "State." Again unmentioned by the drafters of the second constitution, there is no shorthand definition for this term. The State is not a "thing"; rather, it is an abstraction—a construct that is not synonymous with either government or society. Government is the apparatus of the State and society is that which is governed—in appearance a collective of individuals, but in reality an aggregate of interacting groups. The Supreme Court has not made that careful distinction; the Justices routinely use the three terms—State, government, and society—synonymously.

7. See text accompanying note 1 supra.
8. F. MEINECKE, MACHIAVELLISM: THE DOCTRINE OF RAISON D'ETAT AND ITS PLACE IN MODERN HISTORY 1 (D. Scott trans. 1957) (first published in Germany in 1925 with the title of Die Idee der Staatsraison in der neueren Geschichte). Meinecke writes: "Whatever the circumstances the business of ruling is . . . always carried out in accordance with the principles of raison d'état. Raison d'état may be deflected or hindered by real or imaginary obstacles, but it is part and parcel of ruling." Id. at 25. My purpose in writing this Article is to show that Meinecke's assertion is valid for the United States, even with—perhaps, despite—its written Constitution.

Meinecke's book is indispensable to an understanding of constitutionalism, American or otherwise—Professor Friedrich has expressed the opinion that Meinecke's book is "without doubt one of the most important recent contributions to the history of political ideas." C. FRIEDRICH, CONSTITUTIONAL REASON OF STATE: THE SURVIVAL OF THE CONSTITUTIONAL ORDER 120 (1957).
9. C. FRIEDRICH, supra note 8, at 4-5.
The State has no physical existence. Like the business corporation, it is an artificial being, invisible and intangible, existing only in legal and constitutional theory. Even though it cannot be seen, it is nevertheless as real as a natural person. In fact, the State is even more "real," for whenever its will collides with the wills of natural persons, it always prevails in any matter considered important by those who wield effective power in the nation. Such a conclusion will become more evident through an examination of several historical episodes. Finally, the State is monistic, in Gierke's sense—it is a "super-group-person" created by the joinder of the political government of the nation, states, and localities with the economic government of the giant corporations and other social groups. Public government and corporations coexist in a syzygetic system.

II. THE PAST AS PROLOGUE: TWO MORALITIES IN PUBLIC BEHAVIOR

An understanding of the past is necessary in order to gain an understanding of where we are now and where we are likely to be in the future. Although neither the present nor the future are mere extensions of the past, history cannot be escaped; adherence to it, as Holmes said, is not a duty but a necessity. In order to more fully understand the past, an organizing theory is necessary. The thesis of this Article is derived from Machiavelli: "I claim," he said in The Discourses, "that republics which, in imminent danger, have recourse neither to a dictatorship, nor to some form of authority analogous to it, will always be ruined when grave misfortune befalls them."12

An important caveat, however, must be added to this theory: in the case of the United States, the dangers that have triggered extraordinary responses have not been limited to

10. See O. Gierke, Natural Law and the Theory of Society 1500 to 1800. (E. Barker trans. 1958); text accompanying notes 108-115 infra. See also text accompanying notes 151-154 infra.

11. Syzygy is a biological term, meaning the joinder of two organisms with each retaining its own identity. For a discussion of the syzygetic system of the United States, see generally A.S. Miller, The Modern Corporate State, supra note 6. See also M. Kammen, People of Paradox (1972); The Economy As a System of Power (W. Samuels ed. 1979); A New History of Leviathan (R. Radoosh & M. Rothbard eds. 1972).

12. N. Machiavelli, The Discourses, I, § 34 [hereinafter cited as The Discourses]. This volume, of greater importance than The Prince, was published in 1531. All references to The Discourses are to the Pelican paperback edition edited by Professor Bernard Crick and published in 1970.
"grave misfortune." All types of emergencies, as defined by political officers, have caused the agents of the State to exercise authority derived from raison d'état. Included are wars and rumors of wars (cold wars), internal subversion (actual or supposed), economic depression, labor strife, actions of dissident groups, and natural disasters. Or, as Hannah Arendt said,

Necessity, since the time of Livy and through the centuries, has meant many things that we today would find quite sufficient to dub a war unjust rather than just. Conquest, expansion, defense of vested interests, conservation of power in view of the rise of new and threatening powers, . . . all these well-known realities of power politics were not only actually the causes of the outbreaks of most wars in history, they were also recognized as 'necessities,' that is, as legitimate motives to invoke a decision by arms.

Arendt and Machiavelli speak of violence, but our canvas is wider and deeper. There are weapons other than violence at the command of those who control the State. The series of historical examples set out below constitute some, but far from all, of the situations in which extraordinary political responses occurred (the use of violence being only an extension of politics). The governing principle is that a given situation must be perceived by the ruling elite or elites to be an emergency before extraordinary action is even contemplated. That action when taken is usually in accord with what can be called the Principle of the Economy of Means. An extraordinary response is employed only to the extent necessary to achieve limited objectives.

The possibility of an extraordinary political response in an emergency demonstrates the fact that two moralities of public behavior have always existed in the United States. One is what government officers do in fact; the other is the ideal epitomized in the concept of constitutionalism. Emergency (or crisis) government is a classic illustration. The Constitution contains no express provision for emergency action. Even so, that silence has never been a barrier to any action deemed desirable by ruling elites. The meaning is clear: a dualism runs

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13. The triggering dangers extend far beyond those discussed by Professor Clinton Rossiter, who mentions the Civil War, World Wars I and II, and the Great Depression. See C. Rossiter, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN MODERN DEMOCRACIES. (References in this Article to this seminal work are to the 1963 paperback edition).
15. See pp. 594-612 infra.
17. But see Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579 (1952). The Steel Seizure case, in which the Court rejected President
through American constitutional history. The law in books says one thing, while the law in action says another. Orthodox constitutional theory acknowledges only the ideal—stated, for example, by Justice Davis in *Ex parte Milligan*:18

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.19

That is a nice sentiment, were it true; but it is not. An “evident piece of arrant hypocrisy,”20 the statement was an attempt to bring a single truth to the development of American constitutionalism. Justice Davis and others have failed in this effort. An example is the way in which the Supreme Court neatly avoided the rule of *Milligan* in the later case of *Ex parte Quirin*.21

In distinguishing the two public moralities, Machiavelli is again relevant. Sir Isaiah Berlin, in his brilliant interpretive essay, “The Originality of Machiavelli,”22 argues that the Florentine proposed a radical dualism—“two incompatible ideals of life, and therefore two moralities.”23 The first was the morality of the pagan world, whose values were “courage, vigor, fortitude in adversity, public achievement, order, discipline, happiness, strength, justice, and above all the assertion of one’s

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Truman’s justifications, based on *raison d’état*, for taking over the steel industry, should be seen as an exception. There can be little question that had Congress and the President been in agreement, the seizure would have been upheld. See E. Corwin, THE PRESIDENT: OFFICE AND POWERS 154-58 (4th rev. ed. 1957).

18. 71 U.S. (4 Wall.) 2 (1866).
19. Id. at 120-21.
21. 317 U.S. 1 (1942). This largely forgotten “case of the Nazi saboteurs” is of considerable importance in any analysis of presidential power. Compare F. Biddle, In Brief Authority 325-43 (1962) *with* A. Mason, Harlan Fiske Stone: Pillar of the Law 652-59 (1956). Biddle was the Attorney General in 1942, Stone the Chief Justice. Further discussion of the context in which the case arose may be found in C. Rossiter & R. Longaker, supra note 20, at 6-7, 112-16.
23. Id. at 169.
proper claims and the knowledge and power needed to secure their satisfaction." Machiavelli called this morality *virtù*, not translatable as "virtue" but as "manliness." Much of American history reflects a pursuit of these values. The second morality, of equal importance, is derived from the Judeo-Christian tradition, whose ideals are "charity, mercy, sacrifice, love of God, forgiveness of enemies, contempt for the goods of this world, faith in the life hereafter, belief in the salvation of the individual soul as being of incomparable value—higher, indeed wholly incommensurable with, any social or political or other terrestrial goal, any economic or military or aesthetic consideration."

In shorthand terms, the first (pagan) morality values security, both internal and external, which might be called social order. The second morality involves human dignity, that which Felix Cohen called "the good," the notion of legally reified decency, which is a distillation of the Bill of Rights and the ideals of American constitutionalism. In *Milligan*, Justice Davis stated a view of American constitutionality that, at least implicitly, adopted Berlin's second morality. Justice Davis did not, of course, employ the language of Judeo-Christian morality. That ideal finds its clearest statement in political speeches and in the underlying assumptions of American constitutionalism.

In theory, constitutionalism in the United States not only indi-

24. *Id.*
25. *Id.*
26. *Cf.* Dennis v. United States, 341 U.S. 494, 509 (1951) (security is the "ultimate value").
27. *See generally* F. COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS (1933).
28. The second, or Judeo-Christian, morality emphasizes both the value of the individual and limits on the ability of the individual to seek satisfaction of some desires. The individual's salvation and relationship with God is paramount, but the individual is also to act in harmony with a set of materially self-effacing precepts that elevate the worth of others. This is in contrast to the pagan morality, under which the needs of others are necessarily inferior to personal goals.

The Christian tradition was strong among the early settlers of this country and it has remained so; it formed the framework within which American political institutions were created. The formal rules of societal institutions parallel those of Christians. The power of collective society, embodied in government, was under the Constitution to be contained within certain prescriptive rules. The most important of these rules protect the "inalienable" rights of individuals—especially rights to fair treatment and certain basic liberties. Thus, Judeo-Christian emphases on the importance of the individual and on circumscribed prerogatives was embodied in American institutions from the beginning. Nor has our Judeo-Christian heritage been forgotten by those in government. *See Zorach v. Clauson, 343 U.S. 306, 313 (1952)* ("We are a religious people whose institutions presuppose a Supreme Being."). This is not to say that the formal law was, or is, in consonance with the living law.
cates the ideal of the dignity of the individual human being, but is also an articulation of limited government. Due process, broadly defined, is its central core.\textsuperscript{29} The principle of limited government, however, is merely the facade of American constitutionalism. The unpleasant reality is that the actions of public officers often comport with the precepts of the pagan morality; indeed, more frequently than many Americans like to think, public action cannot be justified under either morality. Berlin's point is not that one morality is superior to the other (although Machiavelli, of course, adhered to the pagan), but that there are two goals—two ideals—of human endeavor, both used as norms by human beings, that are incompatible with one another.

This dichotomy causes intellectual confusion and a gap between pretense and reality in official behavior. At times, the goals merge in Supreme Court opinions; when they do, the Court usually chooses the pagan over the Judeo-Christian morality. The Court, however, often attempts to rationalize its decisions (as did Justice Davis) in terms of the latter. So, too, do other government officers.

The unavoidable conclusion is that if there is a single morality in American constitutionalism, it is that of the pagan values as delineated by Machiavelli. That is a harsh accusation. Berlin does not make it, his essay being an analysis of Machiavelli, not an application of the Florentine to any nation. Is there evidence sufficient to buttress such a conclusion? The answer, as will be shown, can only be "yes." Machiavelli is relevant to the United States, despite the popular wisdom about him, because he was the first to make the radical dualism in governmental affairs so plain. In his writings (mainly \textit{The Discourses} and \textit{The Prince}) he plunged a sword "into the flank of the body politic of Western humanity, causing it to shriek and rear up."\textsuperscript{30} The pain of that sword's thrust is still with us, five centuries after Machiavelli. It is a pain, a contradiction, that has never been directly confronted or reconciled in our constitutional history. The dualism is, of course, disturbing to people,

\textsuperscript{29} See N\textsc{OMOS} XVIII: D\textsc{UE} P\textsc{ROCESS} \textit{passim} (J. Pennock & J. Chapman eds. 1977); Miller, \textit{An A\textsc{ffirmative} T\textsc{hrust} to D\textsc{ue} P\textsc{rocess} o\textit{f} L\textsc{aw}?}, in A.S. M\textsc{iller}, S\textsc{ocial} C\textsc{hange} and F\textsc{undamental} L\textsc{aw}: A\textsc{merica}'s E\textsc{volving} C\textsc{onstitution} 97 (1979).

\textsuperscript{30} F. M\textsc{einecke}, \textit{supra} note 8, at 49. Professor Crick, in his \textit{Introduction} to \textit{The Discourses}, \textit{supra} note 12, at 13, 67, quotes Meinecke's assertion then adds, "The pain is still with us and if we ever cease to feel it, it will not be because the conditions that gave rise to it have miraculously vanished but because our nerves have gone dead."
including judges, who are insistent on finding a single truth, or who otherwise evade such an awkward duality. Not that Machiavelli preferred a prince; despite the belief to the contrary, he recognized that "republics are to be preferred if you can get them." But republics must provide for emergency measures; and even "democracies" act, when their leaders consider it necessary, contrary to the Rule of Law. Few will appreciate the proposition that the primary truth to be distilled from our heritage is that pagan virtues prevail, but it cannot be denied, particularly when it is seen that in the past (even if not in the future) extraordinary actions to meet emergencies were limited in time and space in accordance with the Principle of Economy of Means.

Can one, then, distinguish between the circumstances fit for republican—i.e., democratic—rule and those suited for personal rule? That was Machiavelli's central concern. And that, one would think, should be a fundamental concern of American constitutional scholars in the future. It is the crucial question, one that is not yet resolved in theory and seldom even asked.

This Article is a preliminary examination of this question. In what follows, the inevitable conclusion is that there is no middle course between the two moralities. To repeat: one morality—the Judeo-Christian—is the theory of the formal Constitution (it is one way of stating the American Dream); the other (pagan) morality is the guiding principle of the "living" Constitution. The concept of a living Constitution is ambiguous, for it refers to two different phenomena. In its usual sense, it means the way in which specific constitutional terms have evolved through time. Due process, equal protection, and interstate commerce are ready examples. As important as this evolution is, there is another dimension of equal and perhaps greater importance: the Constitution "in operation." Silences of the fundamental law, particularly with respect to executive power, are filled (as in reason of state or executive privilege); "structural" changes in the organization of government occur (as in the system of federalism and separation of powers). The most important aspect of our constitutional law is not what the document says or even what the Supreme Court says; rather, it is what is done by government officers, including the officers of

31. Crick, Introduction to The Discourses, supra note 12, at 22.
the private governments of the nation. They follow the iron law of necessity—necessity as perceived by the effective holders of power of the nation—even though, as Milton recognized, necessity is the plea of every tyrant. Support for this observation is found in an examination of historical examples from several contexts.

A. USE OF VIOLENCE

One option available to American policy makers is the calculated use of violence. As Professor Abraham Sofaer has shown, presidents since George Washington have employed violence, usually without a declaration of war, when they considered it necessary. The second constitution expressly gives Congress the power to declare war, with the Chief Executive being the commander-in-chief of the armed forces. This language could be interpreted to mean that the President has tactical control of troops once they are committed to war by Congress. But that is only partially true. In a clear example of why the second constitution should be called one of "quasi-limitations," presidents have often tacitly invoked the principle of reason of state to take such violent measures as they considered necessary.

It is not necessary to list all of the instances in which the principle has been invoked. Four illustrative examples will suffice to show the pattern: the Civil War, World War II, Korea, and Vietnam. Each illustrates some of the common elements of American usage of raison d'état, including: (a) the President usually takes such action as he deems necessary to meet the threat, whether the threat is actual, as in the case of the Civil War; probable, as in the period prior to World War II; dubious, as during the Korean War; or nonexistent, as during the

34. "[A]nd with necessity, [t]he tyrant's plea, excused his devilish deeds." J. MILTON, PARADISE LOST 41 (1894) (bk. iv, line 393).
37. Another prominent example is the treatment accorded the American Indians under many presidents, both by use of the military and by other means. Until recently, Indians, aggregated into tribes, were "nonpersons" under the Constitution. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16—14, at 1014-15 (1978). That enabled them to be driven from their lands, systematically killed, and otherwise brutally dealt with despite the due process clauses. These actions are too well known to need extensive documentation or further discussion. See generally D. BROWN, BURY MY HEART AT WOUNDED KNEE (1972). No branch of government protected Indians until long after they had been entirely subdued and penned up on reservations.
American involvement in Vietnam; (b) Congress and the President typically act in concert, with Congress serving largely as a rubber stamp for Executive proposals;\(^38\) (c) the courts, including the Supreme Court, generally do not inhibit whatever actions the political officers wish to take; the judges, in effect, either confess a self-imposed impotence or uphold the political actions; (d) except for relatively few persons, civil liberties are not disturbed; the populace at large is not involved; deprivations are usually economic rather than physical (personal); (e) violence is limited in time and space; and (f) violence is employed only to the extent necessary to achieve postulated goals (with some notable exceptions, such as the use of atomic bombs in 1945 and the scorched-earth policy pursued in Vietnam)—this is the Principle of Economy of Means in the use of violence.

1. The Civil War

"Is there in all republics this inherent and fatal weakness? Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?" So asked President Lincoln on July 4, 1861.\(^39\) Historically, the answer is clear: a nation—this nation—can fight a successful total war and still remain a "republic." At best, the Constitution was bent in such circumstances; at worst, it was simply ignored.\(^40\)

Lincoln came to office "with little more than an acute understanding of his obligation to see to the due execution of the laws."\(^41\) But he had also sworn to uphold the Constitution, and in his inaugural address he promised that he would preserve the Union. Congress was not in session when fighting began at Fort Sumter. The President proceeded on his own, without regard to law or constitutional processes. Lincoln described his reasons for assuming broad authority:

> It became necessary for us to choose whether, using only the existing means, agencies, and processes which Congress had provided, I should

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38. See C. Rossiter, *supra* note 13, at 242 (broad delegation of power from Congress to President Wilson during World War I).

39. See *id.* at 1 (quoting a message to Congress by President Lincoln).


41. N. Small, *Some Presidential Interpretations of the Presidency* 31 (1932).
let the Government fall at once into ruin, or whether, availing myself of the broader powers conferred by the Constitution in cases of insurrection, I would make an effort to save it, with all its blessings, for the present age and for posterity.\textsuperscript{42}

The flaw in Lincoln's justification is obvious: these "broader powers" he described do not exist as such in the formal Constitution. Lincoln had to draw up Machiavellian principles of \textit{raison d'état} to justify his actions. Interpreting his task as confronting a gigantic mob and dispersing it (the government being faced "by combinations too powerful to be suppressed by the ordinary course of judicial proceedings"),\textsuperscript{43} the President took the following actions before calling Congress into session: (a) he mobilized 75,000 of the state militia by executive proclamation; (b) he blockaded the ports of the rebellious states, again by proclamations; (c) he added nineteen warships to the navy "for purposes of public defense";\textsuperscript{44} (d) he called for 42,000 volunteers and enlarged both the regular army and the navy in an "amazing disregard for the words of the Constitution";\textsuperscript{45} (e) he spent public money in disregard of the constitutional requirement that "no Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law";\textsuperscript{46} and (f) he authorized suspension of the writ of habeas corpus, again by proclamation.\textsuperscript{47}

When Congress finally convened in July 1861, it speedily ratified President Lincoln's actions. In the leading judicial decision evaluating his authority for such actions, the \textit{Prize Cases},\textsuperscript{48} the Supreme Court held the blockade to be constitutionally warranted, stating:

> Whether the President in fulfilling his duties as Commander-in-chief, in suppressing an insurrection, has met with armed resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided \textit{by him}, and this Court must be governed by the decisions and acts of the politi-

\textsuperscript{42.} 6 \textit{MESSAGES AND PAPERS OF THE PRESIDENT} 78 (J. Richardson ed. 1897) [hereinafter cited as \textit{MESSAGES AND PAPERS}].
\textsuperscript{43.} The language is that of the Militia Act of 1795, ch. 36, § 2, 1 Stat. 424 (current version at 10 U.S.C. §§ 331-334 (1976)).
\textsuperscript{44.} 6 \textit{MESSAGES AND PAPERS}, supra note 42, at 78.
\textsuperscript{45.} C. Rossiter, \textit{supra} note 13, at 226.
\textsuperscript{46.} U.S. Const. art. I, § 9, cl. 7.
\textsuperscript{47.} This is taken from Professor Rossiter's account. \textit{See} C. Rossiter, \textit{supra} note 13, at 225-28.
\textsuperscript{48.} 67 U.S. (2 Black) 635 (1863). \textit{See also Ex parte Merryman}, 17 Fed. Cas. 144 (1861). In \textit{Merryman}, Chief Justice Taney, sitting alone on circuit, held President Lincoln's suspension of the writ of habeas corpus to be invalid. The President soon defied Taney's decision. For an account of the \textit{Merryman} episode, see J. Randall, \textit{CONSTITUTIONAL PROBLEMS UNDER LINCOLN} 118-39 (rev. ed. 1951).
The Constitution had thus been neatly amended, and *raison d'etat* thereafter became an operative principle of our fundamental law. The "imperial presidency" was born.

2. **World War II**

The precedent set by Lincoln in the Civil War and given a cachet of legitimacy in the *Prize Cases* presaged the acts of President Franklin Roosevelt before and during World War II. In the period before the war, there is little doubt that Roosevelt actually committed the nation to war on the side of Great Britain two years prior to Pearl Harbor and that he probably knew about Japan's plans to attack an American base yet did nothing about it until after the blow was struck. Not only did the President repeatedly give verbal support to the anti-Hitler forces, he pushed the American people to the brink of war through such actions as the call for the Lend-Lease Act, the occupation of Iceland, the Atlantic Charter, the use of convoys, the September 1941 "shoot on sight" order against Nazi U-boats, and the destroyer deal of 1940. William Stevenson's account of that period, *A Man Called Intrepid*, describes Roosevelt's close cooperation with Great Britain, and how he secretly took certain steps that can only be called acts of war.

As for Japan, American policy makers had access to all secret Japanese diplomatic messages after army cryptologists broke the Japanese code in August 1940. It seems clear that Roosevelt knew in late 1941 that an attack was imminent somewhere in the Pacific. Nevertheless, the commanders of the American military bases were not alerted in time, and the Pearl Harbor attack catapulted the United States into war with Japan. That war quickly expanded to Germany, when Hitler declared war on the United States. Perhaps, as many have argued, World War II was a "just" war if ever there was one.

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49. 67 U.S. (2 Black) at 670. The Supreme Court's deference to the President in times of armed conflict is the norm; the *Prize Cases* are not aberrational. See generally C. Rossiter & R. Longaker, *supra* note 20.


52. See E. Corwin, *supra* note 17, at 227-62 (ch. VI) (summary of President Roosevelt's actions).


55. This is not to say that all actions taken by the Allies were "just." Cer-
That, however, is not the point; the relevant fact is that the President followed pagan principles well in advance of a declaration of war. What Lincoln had done soon after fighting began at Fort Sumter, Roosevelt did before December 7, 1941. The result, for present purposes, is clear: however much judges and others may believe to the contrary, a written constitution is no barrier to the desires of a determined Chief Executive (and a pliable Congress).

Nor was the Constitution a barrier during World War II, as evinced—to cite only one example—by Roosevelt's demand that Congress repeal a provision of the Price Control Act of 1942, asserting that if Congress did not do so he, as President, would be left "with an inescapable responsibility to the people of this country to see to it that the war effort is no longer imperiled by threat of economic chaos." That is as clear a statement of raison d'etat as has ever been uttered by an American President. Other examples of action taken by Roosevelt that evidence raison d'etat include (a) imposing a nondiscrimination-in-employment clause in all war contracts; (b) forcibly removing and incarcerating more than 100,000 people—including many native-born citizens—of Japanese ancestry; (c) hanging General Yamashita for war crimes even though the evidence showed that Yamashita neither ordered nor knew about the actions of his troops in the Philippines; (d) executing several of the so-called Nazi saboteurs even in the face of Ex parte Milligan; and (e) establishing many offices without congressional approval—for example, the Office of War Information. And when President Truman took office, he ordered the use of atomic bombs even though it seemed obvious that Japan was defeated. By the end of the war, presidential action by reason of state had become almost commonplace.

58. These actions were litigated and upheld. See Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944). But see Ex parte Mitsuye Endo, 323 U.S. 283, 297 (1944) (War Relocation Authority held to have no authority to detain "citizens who are concededly loyal.").
60. See Ex Parte Quirin, 317 U.S. 1 (1942).
61. See text accompanying notes 18-21 supra.
62. See E. CORWIN, supra note 17, at 239-50.
3. Korea and Vietnam

It is doubtful whether President Roosevelt could have obtained a declaration of war against either Japan or Germany before the attack at Pearl Harbor. It is thus not surprising that the President took extraconstitutional actions to achieve what he probably would have been unable to achieve through more formal constitutional processes. He perceived a need and acted upon it—in accordance with basic Machiavellian principles. Korea and Vietnam were similar in that the decisions to enter those conflicts were largely made by the President, who also supplied the interpretation that American intervention was necessary. President Truman, for example, introduced American troops into Korea on his own authority and without consulting Congress. Despite President Truman's assessment of the need for American entry into Korea, some doubt exists as to the necessity of that involvement. Reason of state again prevailed. For the first time, a major external conflict was entered into solely on presidential order, a conflict that did not even remotely threaten American lives or property. Congress, of course, approved the action; appropriations and other supportive statutes were routinely enacted.

The importance of Korea for the development of presidential power cannot be over-emphasized. Previous external forays by American military forces in the absence of declarations of war were far smaller and far more localized. The State Department issued a statement arguing that the President's actions in Korea were fully consonant with his legal authority. Relying principally on "inherent" powers of the Chief Executive, but drawing also on the United Nations Charter and a U.N. Security Council resolution, the State Department asserted that the President has full control over the use of the armed forces. "He also has authority to conduct the foreign relations of the United States. Since the beginning of the United States history, he has, on numerous occasions, utilized these powers in sending armed forces abroad." The State Department ne-


65. Authority of the President to Repel the Attack in Korea, 23 DEPT STATE BULL. 173-74 (1950). The State Department also noted that there was a "tradi-
glected to say, however, that the President had never before used such powers to the extent that they were employed in Korea. The scope of the presidential powers took a quantum leap—his prerogative was completed several months later when Secretary of State Dean Acheson told Congress: "Not only has the President the authority to use the Armed Forces in carrying out the broad foreign policy of the United States and implementing treaties, but it is equally clear that this authority may not be interfered with by Congress in the exercise of powers which it has under the Constitution."66 That testimony, in sum, is an assertion of reason of state run riot.

At the same time as its activities in Korea, the United States became involved in Indochina—first by recognizing French sovereignty over the area in May 1945,67 then by providing financial assistance to the French puppet regime beginning in May 1950,68 later by sending advisers, and finally by committing more than 500,000 troops in what eventually proved to be a futile effort. Presidents Johnson and Nixon maintained that presidential power alone was sufficient to support such activi-


67. During World War II, President Roosevelt opposed post-war resumption of French sovereignty over Indochina. On March 15, 1945, he indicated that he would agree to a French trusteeship if the French would promise to promote the eventual complete independence of Indochina. Memorandum of Conversation Between President Roosevelt and Charles Taussig, in 1 Department of State, Foreign Relations of the United States, 1945, at 124 (1967), reprinted in 1 Viet-Nam Crisis: A Documentary History 32-33 (W. Cameron ed. 1971) [hereinafter cited as Viet-Nam Crisis]. See also A. Wedemeyer, Wedemeyer Reports! 340 (1958) (Roosevelt's March 1945 support for independence of French Indochina). Soon after Roosevelt's death on April 12, 1945, the American position seemed to become more passive and was subsequently marked by acquiescence in French exercise of sovereignty, see Telegram from Acting Secretary of State Joseph Grew to Ambassador Jefferson Caffery, in 6 Department of State, supra, at 307, reprinted in 1 Viet-Nam Crisis, supra, at 36 (quoting statement of Secretary of State Edward Stettinius to French Minister for Foreign Affairs Georges Bidault prior to May 9, 1945), refusal to provide active aid, and continued urging of French promotion of Indochinese self-government or independence. See 1 The Pentagon Papers: The Defense Department History of United States Decisionmaking on Vietnam 15-34 (Sen. Gravel ed. 1971) [hereinafter cited as Pentagon Papers].

68. On May 1, 1950, President Truman approved $10 million in military assistance for Indochina. See 1 Pentagon Papers, supra note 67, at 66. Secretary of State Acheson made a public announcement of economic and military aid to Indochina and France on May 8. See Statement by Secretary of State Acheson, United States Aid to the Associated States (May 8, 1950), in 2 Department of State, American Foreign Policy 1950-1955: Basic Documents 2365 (1957), reprinted in 1 Viet-Nam Crisis, supra note 67, at 148.
It is not the purpose of this Article to assess American involvement in Vietnam. That involvement is too recent to do more than suggest several lessons it illustrates for constitutional government.

One such lesson was described by Justice Robert Jackson in his dissent in the *Korematsu* case: "If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their

69. President Johnson, in a news conference on August 18, 1967, claimed that the Gulf of Tonkin resolution was unnecessary: "We stated then, and we repeat now, we did not think the resolution was necessary to do what we did and what we're doing." N.Y. Times, Aug. 19, 1967, at 10, col. 6. See also S. Rep. No. 797, supra note 66, at 21-23.

President Nixon also took a sweeping view of presidential authority to deploy American combat troops. In November 1973, Congress adopted the War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973), over Nixon's veto. See 119 Cong. Rec. 36202, 36222 (1973). One provision of the Resolution generally requires that the President terminate any use of military forces within sixty days if Congress has not authorized continued use of such forces. War Powers Resolution, Pub. L. No. 93-148, § 5(b), 87 Stat. 555, 556 (1973). In President Nixon's veto message, he asserted that this provision was "clearly unconstitutional" because the powers thus restricted—introducing the United States Armed Forces into hostilities or combat troops into foreign countries—were constitutional powers, "which the President has properly exercised under the Constitution for almost 200 years." Message from President Nixon to the House of Representatives, Oct. 24, 1973, H.R. Doc. No. 171, 93d Cong., 1st Sess., 119 Cong. Rec. 34990. Following the adoption of the resolution over Nixon's veto, the White House refused to state whether it would obey the statute. See N.Y. Times, Nov. 8, 1973, at 1, col. 8. In 1976, President Nixon further elaborated his concept of presidential power: "It is quite obvious that there are certain inherently governmental actions which if undertaken by the sovereign in protection of the interest of the nation's security are lawful but which if undertaken by private persons are not. . . . [I]t is naive to attempt to categorize activities a president might authorize as 'legal' or 'illegal' without reference to the circumstances under which he concludes that the activity is necessary." 4 Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, Foreign and Military Intelligence, S. Rep. No. 755, 94th Cong., 2d Sess. 157 (1976) [hereinafter cited as S. Rep. No. 755].

responsibility to the political judgments of their contemporaries and to the moral judgments of history."^{70} I suggest that the war power did indeed fall into irresponsible and unscrupulous hands during the Vietnam "war."^{71}

Another lesson was described by Machiavelli: it is "a sound maxim that reprehensible actions may be justified by their effects, and . . . when the effect is good . . . it always justifies the action."^{72} In Vietnam, however, the American goal was dominion over Southeast Asia—a goal that was bad under both the pagan and the Judeo-Christian morality. The means employed in Vietnam, therefore, cannot be justified, even under Machiavelli's formula.

The significance of Vietnam for constitutional scholars cannot be overestimated. The fundamental law was neatly amended by presidential fiat; that amendment was approved by a supine Congress and determination of its validity was avoided by a timid judiciary. As Professor Richard P. Longaker has correctly observed, "[T]he presidential position was that while any formal support that Congress might wish to extend in a given instance would be welcomed, the independent power of the executive was sufficient."^{74} Such a position means that the Executive Branch considers itself dominant in theory and in fact—not primus inter pares,^{75} but simply primus.

John Locke, in his *Second Treatise of Civil Government*, de-

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71. Compare M. Walzer, *supra* note 55, with W. Shawcross, *Sidewrench: Kissinger, Nixon and the Destruction of Cambodia* (1979). Shawcross demonstrates that the bombing of Cambodia was not a mistake but a crime. Professor Stanley Hoffmann of Harvard University concludes: "Among the casualties of the disaster we must count not only the Cambodians but America's own constitutional order. Shawcross reminds us that the original bombing was not merely concealed but falsified in the official records. Efforts by journalists to 'leak' the truth led to the wiretapping of top officials. Spying and dissimulation between government agencies became routine. Attempts by the staff of the Senate Foreign Relations Committee to investigate in Cambodia were sabotaged. And yet the House Judiciary Committee refused to include Cambodia among the articles of Nixon's impeachment." Hoffmann, *The Crime of Cambodia*, N.Y. Rev. of Books, June 28, 1979, at 3, 4. For arguments in support of the Nixon-Kissinger policy in Indochina, see H. Kissinger, *White House Years* (1979), critically reviewed by Hoffmann in N.Y. Rev. of Books, Dec. 8, 1979, at 14.
72. *The Discourses*, *supra* note 12, bk. I, § 9. The word "justified" might better have been translated as "excused."
73. The oft-announced goal of bringing democracy to that area is sheer nonsense and mere propaganda.
75. The first among equals.
fended use of the "prerogative" through the ancient principle salus populi suprema lex:76 "This power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it, is that which is called the prerogative . . . . There is a latitude left to the executive power, to do many things of choice, which the laws do not prescribe.”77 Well and good, one might say, were it not for two stubborn facts: the Constitution of 1787 contains no provision for such discretion; in Vietnam the essential interests of the American people were not in jeopardy. No crisis existed except one that was manufactured by American policy makers. Although it is unquestionably true that presidents must act in the face of actual crisis, they also labor under the obligation of correctly distinguishing between actual and chimerical crises. Their analyses must be accepted, as Justice Jackson said, both by their contemporaries and by posterity. A president who wishes to avoid serious challenge to the legitimacy of his acts must take care that his acts produce successful results. He labors under the obligation to succeed. Machiavelli maintained that "reprehensible actions" could be justified by "their effects.”78

Presidential actions in Vietnam were thus widely condemned because the consequences of the American involvement were bad by any criterion. It is instructive to compare Vietnam with two other military episodes of dubious propriety: the war against Mexico and the Spanish-American War. Both wars were perceived as successful and, even though many people firmly opposed such imperialistic adventures, they are not currently viewed with great opprobrium.

B. OTHER HISTORICAL EXAMPLES

Enough has been said about the use of violence, in declared wars and otherwise, to validate the existence of Berlin's two moralities—one of pretense and the other of action—and to show that at times even the pagan morality is transgressed. Other examples help complete the argument that raison d'etat is indeed a viable principle of American constitutional law.

76. The welfare of the people is the supreme law.
1. Economic Depression

Throughout its history, the United States has experienced cyclical economic fluctuations. The economic system, loosely called capitalism, is based primarily on private ownership and control of production and distribution. For whatever reason, those who control private enterprise have never been able to achieve a stable economy. Destitution has periodically swept the country. Not until the 1930s did the government attempt to systematically remedy the causes of economic distress. In the view of President Roosevelt, the Great Depression called for crisis (warlike) techniques to meet a critical danger to the nation. He proposed "not prudence, but the deliberate assumption of risks in the hope of great gains."\textsuperscript{79} Roosevelt pursued such a policy by acting as economic dictator in the early days of his first administration. During that period, he was the government of the United States. \textit{Raison d'\^etat} was introduced to economic affairs.

In his first inaugural address, Roosevelt asked for broad emergency powers: "as great as the power that would be given to me if we were in fact invaded by a foreign foe."\textsuperscript{80} This was a request for delegated powers. But the President did not wait for Congressional authorization. On March 6, 1933 (two days after his inauguration and three days before Congress was summoned in emergency session), Roosevelt, referring to the existence of a national emergency, ordered a "bank holiday,"\textsuperscript{81} forbade the export of gold and silver, and prohibited transactions in foreign exchange. His purported authority was a dubious reading of the Trading with the Enemy Act,\textsuperscript{82} a World War I measure aimed at foreign exchange matters. His authority in fact was reason of state. Congress' speedy ratification of these actions (on March 9), which gave the President even greater authority, does not belie the fact that Roosevelt's actions were contrary to the law.

During the famous "Hundred Days" following March 4, 1933, Roosevelt and Congress acted so closely together that Congress appeared to merely rubber-stamp executive actions. Separation of powers was all but forgotten. The chasm be-

\textsuperscript{79}. G. JOHN\textsc{son}, \textsc{Roose\textsc{velt}: Dictator or Democrat?} 214 (1941).
\textsuperscript{80}. 2 \textsc{The Public Papers and Addresses of Franklin D. Roosevelt} 65 (1938).
\textsuperscript{81}. \textit{Id}. at 24-26. \textit{See Watkins, The Problem of Constitutional Dictatorship}, in \textsc{1 Public Policy} 324 (C. Friedrich & E. Mason eds. 1940).
\textsuperscript{82}. Ch. 106, 40 Stat. 411 (1917) (current version at 50 U.S.C. App. §§ 1-44 (App. 1976)).
tween the two political branches of government was bridged, but only for a short time. By 1935 there was growing opposition to Roosevelt’s policies in Congress, fed by the antagonism of various interest groups. Finally, the Supreme Court began to invalidate New Deal legislation. Prominent among the statutes that were found unconstitutional was the National Recovery Act,83 which had declared a national emergency and had overtly delegated governing power to industrial groups. As is common knowledge, however, the Court “rewrote” the due process and interstate commerce clauses in 1937,84 thereby permitting the political branches to freely manage the economy. The abdication of judicial control over the economy, however, is only operative when the President and Congress agree. That is the lesson to be drawn from the Steel Seizure Case85 of 1952, and AFL-CIO v. Kahn,86 a case in which the D.C. Circuit found that Congress had impliedly granted the President power to deny government contracts to companies that do not comply with presidentially promulgated voluntary wage and price standards. When, on July 2, 1979, the Supreme Court denied certiorari in the Kahn case,87 the lesson became even more clear.

2. Dissident Groups

The dissident, notwithstanding the mythology to the contrary, has never been easily accepted in the United States. Only when dissent takes innocuous forms—for example, Thoreau at Walden Pond—is the person tolerated. The dissident has usually been controlled through purposive use of law and the legal system. Radicals and deviants, with some exceptions, are seldom shot down, and they are rarely victims of “emergency” legislation. The process is much more subtle: they are enjoined by judges appointed always from among the

Establishment, congressional and state legislative committees inquire into their actions; and at times they receive an outwardly lawful, but actually political, trial and are convicted of criminal activity. Examples are abundant. In 1920 a man in Connecticut was jailed for six months for saying that "Lenin was 'the brainiest' or 'one of the brainiest' political officers in the world." In North Carolina during the 1970s several civil rights advocates were arrested, convicted on trumped-up charges, and given lengthy prison sentences. "[T]he hidden underbelly of American politics," says Professor Murray Levin, is "[t]he deeply felt intolerance that springs from our intense commitment to Americanism, the irrational and compulsive need to defend the assumptions of John Locke and Adam Smith, the anti-Semitism, the nativism, the antiintellectualism, the vigilantism, the racism, the Xenophobia, the pursuit of self-interest under the guise of superpatriotism, and the profound antiradicalism that can be observed 'in extremis' during the hysteria [of such matters as the Red Scare of 1919-20 and McCarthyism,] have always been and are today the working assumptions of millions of Americans." Repression of dissidents is not an aberration; it is as American as apple pie.

When repression is challenged in court, the result is likely to be similar to the result in *Barenblatt v. United States*. Barenblatt, a witness before the House Un-American Activities Committee, was sentenced to six months in prison for refusal to answer questions about his association with the Communist

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90. This is the case of Rev. Chavis and the civil rights advocates.


92. 360 U.S. 109 (1959). Justice Harlan's opinion for the Court is demonstrably faulty. As Dean Roscoe Pound said: "When it comes to weighing or valuing claims or demands with respect to other claims or demands, we must be careful to compare them on the same plane. If we put one as an individual interest and the other as a social interest we may decide the question in advance in our very way of putting it." Pound, *A Survey of Social Interests*, 57 *Harv. L. Rev.* 1, 2 (1943). That is precisely what Harlan did in *Barenblatt*: he balanced Barenblatt's interest in remaining silent against a public interest in Congress' knowledge about subversive activities. Correct answers require correct questions. The proper comparison in *Barenblatt* would have been between the common interest in a society free from harassment of individuals because of their associations and a society in which possible subversion is more readily detected.
Party. In his majority opinion, Justice Harlan found that "the balance between the individual and the governmental interests here at stake must be struck in favor of the latter." "In the last analysis," he explained, Congress' power "rests on the right of self-preservation, 'the ultimate value of any society[.]' . . . Justification for its exercise in turn rests on the long and widely accepted view that the tenets of the Communist Party include the ultimate overthrow of the Government of the United States by force and violence, a view which has been given formal expression by the Congress." That is an example of raison d'état solidified into constitutional doctrine; moreover, Barenblatt and Dennis v. United States are forms of officially sanctioned thought control. The aim, no doubt unarticulated, is to purify people's thoughts; or, at the very least, to discourage people from associating with those whose thoughts are considered to be impure. In sum, the Supreme Court is not now, nor has it ever been, a barrier to the use of reason of state against dissidents as determined by the political officers of government.

3. Alleged Espionage

Two recent governmental actions involving foreign espionage further illustrate the magnitude of the power exercised by the State. The first example is the District of Columbia Circuit Court of Appeals decision in Halkin v. Helms, in which Judge Roger Robb held that the "state secrets" privilege is absolute and, therefore, that American citizens cannot complain to courts about their overseas telephone and telegraph messages

93. 360 U.S. at 113-14. Barenblatt refused to rely on his privilege against self-incrimination. Id. at 114 & n.3.
94. Id. at 134.
95. Id. at 127-28 (citation omitted).
96. Justice Harlan, wittingly or not, was adopting a Machiavellian principle: "It is not the well-being of individuals that make cities great, but the well-being of the community." The Discourses, supra note 12, bk. II, § 2. Further: "the common good can be realized in spite of those few who suffer." Id. The history of reason of state in the United States is one of a relative few suffering for the putative common good.
97. 341 U.S. 494 (1951). The petitioners in Dennis were convicted under the Smith Act, 18 U.S.C. § 2385 (1976), for conspiring to organize the Communist Party to teach the overthrow of the government of the United States by force and violence.
being intercepted and read by American intelligence agencies. The second example is President Carter's Executive Order of January 24, 1978, concerning the intelligence community. "The order contains the most explicit and far reaching claim of an inherent presidential right to intrude without a warrant into areas protected by the Fourth Amendment ever stated by an American President." Section 2-201(b) of the Order reads:

Activities described in sections 2-202 through 2-205 for which a warrant would be required if undertaken for law enforcement rather than intelligence purposes shall not be undertaken against a United States person without a judicial warrant, unless the President has authorized the type of activity involved and the Attorney General has both approved the particular activity and determined that there is probable cause to believe that the United States person is an agent of a foreign power.

The term "agent of a foreign power" is not defined, and the Executive Order specifically permits implementing directives to be classified "because of the sensitivity of the information and its relation to national security."

Carter's Executive Order has not yet been tested in the courts. The few decisions that have dealt with foreign intelligence, however, have not sustained warrantless searches. If the President prevails here, an exponential jump in executive power will have occurred. The import of Halkin v. Helms and the Executive Order is clear: in matters concerning alleged foreign espionage, reason of state prevails. Again, the Constitution will have been neatly amended. The cost, however, is high: individual rights and liberties are diluted. Nevertheless, the incantation of the magic words "national security" has thus far usually been enough to justify these extra-constitutional actions. One can hope, with little expectation that the hope will be fulfilled, that the Supreme Court will cut through this mass of verbiage and enforce the Constitution.

100. Id. at 8.
103. Id. § 4-106, 3 C.F.R. at 133.
4. Evacuation of People

Still another example of raison d’État may be seen in the forced evacuation of people. The internment of Japanese-Americans during World War II has been previously noted.\textsuperscript{105} Two other instances—the removals of the residents of the islands of Bikini and Diego Garcia—indicate that such activity was not an isolated episode.

When the United States decided in the late 1940s to test atomic weapons, one of the testing sites chosen was the atoll of Bikini, far from American territory. The residents of Bikini were forcibly removed and relocated hundreds of miles away; all this was done under the pretext of national security. To this date, lasting radioactive after-effects prevent these people from returning to their homes.\textsuperscript{106} The Diego Garcia incident is less well known. A spit of land in the Indian Ocean, once under British sovereignty, Diego Garcia became a military base for the United States in the 1970s. First, however, the people who lived there had to be evacuated and relocated against their will. Those former residents who are still alive now reside in miserable slums on Mauritius.\textsuperscript{107}

\textsuperscript{105} See note 58 supra and accompanying text. An additional example is the series of forced removals of American Indians, see note 37 supra. In the 1838 removal of the Cherokee Nation to Oklahoma, 4,000 of 17,000 Cherokees died. See L. Tribe, supra note 37, § 16—14 at 1013-14. See generally G. Fleischmann, The Cherokee Removal, 1838 (1971); G. Foreman, Indian Removal (1932).

\textsuperscript{106} See generally N.Y. Times, Apr. 1, 1979, at 47, col. 1; id., Oct. 17, 1975, at 70, col. 1.


A 1966 agreement between the United States and the United Kingdom made the islands of the British Indian Ocean Territory, including the Chagos Archipelago, available to both countries for defense purposes. See Agreement on the Availability of Certain Indian Ocean Islands for Defense Purposes, Dec. 30, 1966, United States-United Kingdom, 18 U.S.T. 28, T.I.A.S. No. 6196. When the United States decided to establish a facility on Diego Garcia, an island of the Archipelago, the British, pursuant to the Agreement, carried out the evacuation that was considered necessary. The inhabitants of the island were contract workers on a coconut plantation, some from families that had resided on the island for generations. In 1964 there were 483 people on the island, about half of whom were considered to be “Ilois”—oriented more towards the Chagos Archipelago than their ancestral Mauritius or Seychelles. See U.S. Dep’t of State, Report on the Resettlement of Inhabitants of the Chagos Archipelago, 121 Cong. Rec. 33124, 33124 (1975) [hereinafter cited as State Depart-
The conclusion is clear: when considered desirable, the United States government will remove people against their will in order to further "national security." Again, that is *raison d'état*. Whether it was in fact indispensable to our security to explode atomic weapons at Bikini or confiscate the property of the people on Diego Garcia is doubtful, and does not appear to have been adequately considered by American officials.

5. *Raison de Groupe*

It has been suggested above that the United States is a form of corporate State, a syzygetic order in which corporations and government coexist.\(^{108}\) If that is indeed so, then *raison d'état* must also encompass a dimension of *raison de groupe*.\(^{109}\) Several examples illustrate this point.

The involvement of the United Fruit Company (U.F.) in Central America shows that the company was the *de facto* government of several nations for years—with the full knowledge and support of the United States government.\(^{110}\) U.F. won its

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way by force, bribery, and political subversion, all with the ac-
quiescence and often with the cooperation of the State Depart-
ment and the United States' military forces. In effect, the U.S.
and U.F. acted in concert. The Central Intelligence Agency
even used U.F. ships in the Bay of Pigs fiasco. Major General
Smedley D. Butler (Commander of the Marines) put the situa-
tion in colorful terms in 1935:

I spent thirty-three years and four months in active service as a mem-
ber of our country's most agile military force—the Marine Corps. . . .
And during that period I spent most of my time being a high-class mus-
cle man for Big Business, for Wall Street, and for the bankers. In
short, I was a racketeer for capitalism. . . . Thus I helped make Mexico
and especially Tampico safe for American oil interests in 1914. I helped
make Haiti and Cuba a decent place for the National City Bank boys to
collect revenues in. . . . I helped purify Nicaragua for the international
banking house of Brown Brothers in 1909-1912. I brought light to the
Dominican Republic for American sugar interests in 1916. I helped
make Honduras “right” for the American fruit companies in 1903. In
China I helped see to it that Standard Oil went its way unmolested.111

The bitter fruit of those decades of American intervention on
the behalf of totalitarian regimes and their American corporate
supporters is now being reaped in Nicaragua and other Latin-
American nations.

Domestic industry in the nineteenth century, like interna-
tional business, grew increasingly powerful and was able to ac-
quire government protection against the rising demands of the
working class. Corporate managers, aided by their minions in
government, took advantage of an oversupply of labor. At the
time, they were able, through both fair and foul methods, to de-
feat the growing labor movement. One historian, Richard Lester,
concluded in 1947: “During the depression from 1873 to
1879, employers sought to eliminate trade unions by a system-
at ic policy of lock-outs, blacklists, labor espionage, and legal
prosecution. The widespread use of blacklists and Pinkerton
labor spies caused labor to organize more or less secretly, and
undoubtedly helped bring on the violence that characterized la-
bor strife during this period.”112 When labor was able to per-
suade legislatures to pass minimum wage and maximum hour
legislation, most of those laws were promptly struck down by a

an article by Major General Butler in the November 1935 issue of Common
Sense). Corporations often define the axioms of American foreign policy. It is
axiomatic, for example, for government to protect American property abroad.
That is what General Butler was doing—protecting the property of American
corporations.

112. R. LESTER, ECONOMICS OF LABOR 545 (1947) (emphasis added), quoted
The Supreme Court that operated as “the first authoritative faculty of political economy in the world’s history.” The Court not only discovered that the corporation was a person under the Constitution, but it also invented the concept of substantive due process.

Since this conduct is familiar enough, it needs no elaboration. The point is simple: Corporations pursued selfish goals and were aided by government. The brutal repression of the Industrial Workers of the World, by both federal and state officials, supplies ample testimony to that point. So, too, does the decision of In re Debs, which upheld federal intervention in the Pullman strike.

C. SUMMARY

Machiavellianism has indeed been a consistent part of American public policy since the beginnings of the republic. Franz Neumann was correct; government in the United States has always been as strong as conditions required, conditions that are perceived by those who wield effective power in the nation. The conclusion should be clear: (a) the Constitution in the nineteenth century was distinctly not one of limitations, despite the popular wisdom to the contrary; (b) it is not hyperbole to apply the term “constitutional dictatorship,” or “democratic dictatorship,” to the government of the United States during circumstances it perceives as emergencies—within the limits imposed by the Principle of the Economy of Means; (c) two divergent moralities—pagan and “Christian”—have always existed in the United States; (d) when conflicts occur between those two moralities, the pagan usually prevails, making the dualism in constitutional law more apparent than real; (e) some actions are evil under either morality, giving some credence to Lord Acton’s comment that “[w]eighed in the scales of Liberalism, the instrument of the Constitution, as it stood, was a monstrous fraud”; (f) the United States grew powerful and prosperous because extraconstitutional adjustments were made in the second constitution; and (g) people generally do not object to exercises of raison d’état; rather, they tend to applaud such activities, thus lending

113. J. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 7 (1924).
115. 158 U.S. 564 (1895).
support to the view that the American people favor the pagan morality.

III. THE CLIMACTERIC

Is the United States currently in a crisis or in a climacteric—a coalescence of crises? I suggest that we are in the latter. As a result, the future will not be a calm and ordered existence, and there will be no steady progression toward a better society or group of societies. The idea of progress, born out of the Enlightenment, is dead.118

Humans face several vulnerabilities. Energy shortages are currently the most obvious of these. But several others exist, each one of such significance to be a crisis in itself. The vulnerabilities of an industrialized nation such as the United States include, but are not limited to, the following: the threat of thermonuclear warfare, nuclear proliferation, radiation health hazards from widespread employment of nuclear technologies, the population “bomb,” food shortages, dependence on nonfuel minerals, terrorism, inflation, unemployment (structural, because of the imminent application of microprocessing), social disruptions,119 and the psychological problem of a failure of nerve—an inchoate belief that things are in a mess and will not get better. Taken together, as they should be because of their increasing coalescence, these vulnerabilities mark one of the great turning points in human history.

Since we live, as Dr. Harrison Brown put it, “in a largely synthetic ecological system, new in human experience and inadequately understood,”120 belief systems and behavior patterns that are the products of eons of history must now be employed in wholly novel situations. It is thus not surprising that this is the “me generation,” the “age of narcissism,”121 and that the politics of selfishness are all-pervasive. But it does no good to ask, as some have: “What has posterity done for me?” For because of extraordinarily rapid social change, a recent development, we are our own posterity. It is also not surprising

120. Id. at 227.
that "Micawberism"—the notion that sooner or later something will turn up to rescue man from his follies—is so prevalent.

In a previous Article, I suggested that this country "has survived and prospered thus far, not because of the Constitution but in spite of it." Rufus E. Miles, Jr., stated the same point in other terms: "The extraordinary affluence of the United States has been produced by a set of fortuitous, nonreplicable, and nonsustainable factors." If that is true, then surely Micawberism is a pathetic fallacy, and the politics of selfishness will lead to disaster. The Constitution, even as a politico-legal palimpsest, is not necessarily able to cope with increasingly evident needs, as the multifarious facets of the climacteric of humankind press harder and harder against American institutions. The obvious requirement is for constitutional change that will both enable people to deal effectively with the burgeoning problems of the human condition and preserve as many of the values of historical constitutionalism as possible.

What those constitutional changes might be is one question; what they should be is another. Neither issue, however, is the subject of this Article. Rather, I should like to suggest that, in the words of Dr. Lester Brown, "[t]here can be little doubt that humanity is on the verge of a profound social transformation, at the edge of a new social frontier," and that this has immense significance for the Constitution. As a result, Americans are moving into the era of the Constitution of Control.

IV. THE EMERGENT CONSTITUTION OF CONTROL

Any document that exists through time and is still considered to be an authoritative text takes on such a gloss of interpretation, custom, and usage that its modern version has only a tenuous relationship to the original. Exegesis, however, is not confined to theological documents, such as the Bible. The Christian religion has been able to absorb the insights of Co-
pernicus and Darwin and Freud without outward alteration of the ancient language—but with considerable change in its application. In law and politics, even Soviet theoreticians have had to apply a concept of "living Marxism" in order to explain and justify new doctrine.\textsuperscript{126} It is not surprising, then, that the second constitution has undergone immense alterations. Specific clauses have been interpreted in different ways at different times; even structural changes have occurred—as in the demise of "dual federalism" and the rise of executive hegemony in government. As noted above, Professor Corwin's label of a "Constitution of Powers," which we have called the third American fundamental law, is a translucent layer of doctrine and practice, which has been developed in the past fifty years.\textsuperscript{127} The Constitution of Control—the fourth constitution—exists as still another overlay. More emergent than complete, its contours are becoming obvious. This section outlines its development.

The text for what follows is taken from Justice Holmes's dissenting opinion in \textit{Abrams}. The Constitution, he said, is an experiment, "as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge."\textsuperscript{128} A comprehensive discussion of the theory of the Constitution of Control is not within the scope of this Article. Instead, some of its more prominent features are discussed, with reference to some of the relevant literature.

\section*{A. Law as a Memorandum}

Law, including constitutional law, is not \textit{a priori}. Rather, it is a reflection of the society in which it operates: \textit{a posteriori}. Or, as Emerson said, law is "only a memorandum."\textsuperscript{129} But of what is law a memorandum?

We are living in the Technological Age, an obvious fact, but

\begin{itemize}
\item \textsuperscript{126} See Kolakowski, \textit{Permanent and Transitory Aspects of Marxism}, in \textit{The Broken Mirror} 157, 158-59. (P. Mayewski ed. 1958), \textit{quoted in C. Frankel, The Democratic Prospect} 189 (1962); V. Lenin, \textit{Marx, Engels, Marxism} 385-86 (4th English ed. 1951) ("[T]he incontestable truth is that a Marxist must take cognizance of actual events, of the precise facts of reality, and must not cling to a theory of yesterday, which, like all theories, at best only outlines the main and general, and only approaches to an inclusive grasp of the complexities of life."). \textit{See also A.S. Miller, Social Change and Fundamental Law: America's Evolving Constitution} 343, 382 (1979) (reprinting Lenin's quote).
\item \textsuperscript{127} See notes 4-6 supra and accompanying text.
\item \textsuperscript{128} Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
\item \textsuperscript{129} R.W. Emerson, \textit{Politics}, in \textit{The Complete Essays and Other Writings of Ralph Waldo Emerson} 423 (Atkinson ed. 1940) (Modern Library edition).
\end{itemize}
one too little considered in legal thought. Humankind is in the midst of the greatest environmental changes in its history. “There is little of importance in the world which does not depend in some measure on technology, even in its most restricted sense as man’s mechanical means to his ends.”130 Our interest in technology lies not in what is accomplished in the laboratory or production plant, although what happens there is significant. Rather, we are interested in what effect the technological revolution has on politico-legal mechanisms—on law, on constitutions, and on economic systems. Thus, attention must be given to the following aspects of advanced technology:

1. The art of invention has itself been invented;
2. What is technologically possible will be done, sooner or later;
3. Technology works toward the consolidation of political power; it is centripetal, not centrifugal;
4. Technology has accelerated time;
5. Change is a social constant; and
6. A variety of techniques of control over human beings now exist and are being used.

These self-evident factors should be common knowledge, part of the “given” of ordinary discourse. Unfortunately, however, this is not so. Even though the United States is the technological society par excellence, Americans, generally speaking, unthinkingly accept the benefits (and suffer the detriments) of technology without noticing technology’s subtle effects on the quality of life; nor do they perceive the effects of technology on the nature of the constitutional order. In briefly examining some conclusions drawn from the impact of technology, two of the above factors will be emphasized. First, as Franz Neumann said, “[t]he higher the state of technological development, the greater the concentration of political power.”131 And, second, technology now permits mass control measures to be employed.

The first point requires little discussion. No doubt exists that political and legal power in the United States has tended to be consolidated almost from the beginnings of the Republic. Chief Justice John Marshall’s “nationalizing” decisions laid the early groundwork for that development. Later, in the period after the Civil War, the influences of economics and technology

131. F. NEUMANN, supra note 1, at 10.
combined to create, in Galbraith's terms, "the new industrial state." A national economic system of giant corporations was superimposed on a decentralized political system with nexuses in each of the several states. Something had to give—and it did. That "something" was traditional federalism, which changed from "dual" to "cooperative" with the arrival of the New Deal. The giant corporations began to supplant the states in the federal system—their role became as important as, or even more important than, that of the allegedly sovereign states in providing a counterbalance to the power of Washington. Simultaneously, growth in the number and complexity of the tasks of government led to the dominance of the Executive (including the bureaucracy) within the tripartite division of powers in the national government. Each branch might have been, in Chief Justice Roger Taney's terms, "equal in origin and equal in title," but the Constitution of Powers meant that the Executive Branch was, and will remain, preeminent.

At about the same time, something important happened in the jurisprudence of the Supreme Court of the United States. Rather than pursuing a "principled," conceptualistic approach to decisionmaking, the Court overtly began to adopt a pragmatic methodology of "interest-balancing"; in the resulting balances, the State's interest was always weighty. This had one important consequence: the interests of the State became avowedly dominant at precisely the time that government (the apparatus of the State) began an exponential growth. The individual was submerged in a congeries of bureaucracies, public and private.

The rise of the bureaucratic State means that the balancing system developed by the drafters of the Constitution of 1787 has gone awry. Far from "keeping power within tolerable boundaries, the American system has encouraged power to go underground." The surface is one thing; there the formal institutions of public life block each other. The reality, however, is different: beneath the surface are the "subgovernments" of Washington, the informal methods by which important governmental decisions are in fact reached. Political power is becoming increasingly centralized in the executive bureaucracies,

independent fiefdoms, which operate within the Executive Branch but which have close connections with industries that they ostensibly regulate and with influential members of Congress. There can be no doubt that power centralization exists. The rise of the bureaucracy to power has made the agencies, as Justice Jackson said in 1952, "a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking."\[^{137}\]

A second, and quite different, consequence of technology is the control of humans through ostensibly benign measures. There can be little doubt that such control is already taking place. In 1978, Peter Schrag observed:

> In the past generation, there has been a fundamental shift in the way government and other organizations control the lives and behavior of individuals. No single method and no single phrase adequately describe it—it is both too subtle and too pervasive—but it represents a radical change in the way people are treated and in the relationship between the citizen, his employer, the state, and the state's institutions. In general, it is a shift from direct to indirect methods of control, from the punitive to the therapeutic, from the moralistic to the mechanistic, from the hortatory to the manipulative. More specifically, it is reflected in the replacement of overt and sometimes crude techniques—threat, punishment, or incarceration—with relatively "smooth" methods: psychotropic drugs; Skinnerian behavior modification; aversive conditioning; electronic surveillance; and the collection, processing, and use of personal information to institutionalize people outside the walls of institutions.\[^{138}\]

The ideologist for this development is B.F. Skinner.\[^{139}\] The goal is "predictable" man—a person who conceives of freedom in Hegelian terms: doing what one is supposed to do.

My point, again, is not to document extensively such assertions, but merely to indicate that the means of technological control of people are not only present but they are being used, and further, that there is a considerable body of respectable thought that believes that those means should be used. Schrag tells us that they are being used, thus exemplifying the notion that whatever is technologically possible will be done.

The meaning for law and constitutions should be obvious. Science and technology are slowly, subtly, and "humanely" re-


\[^{139}\] See, e.g., B. SKINNER, BEYOND FREEDOM AND DIGNITY (1971).
pealing the Constitution. Millions of Americans are being subjected to behavior modification and control through the use of law and the legal process for the newly emergent highest good: the welfare of society.

An example is the use of computer technology to quietly encroach upon fundamental rights such as privacy. Recently, the "third industrial revolution" of microprocessing—the "silicon chip revolution"—has enhanced the potential of computers to be used as a means by which the behavior of people can be monitored and controlled. Modern society is the "information society"; he who controls the data controls society. Privacy, no matter how much it may be desired, is becoming a wasting asset and is disappearing in the new era of microelectronics.

Microprocessing will provide cheaper, smaller computers. As a result, the use of computers in modern society will greatly accelerate, simultaneously accelerating the danger to personal freedoms inherent in a widespread capacity for interchangeable data storage and retrieval. Increasingly, a person's record follows him closely throughout life. In a large, continentally sized nation such as the United States, developments such as the National Crime Information Center and computerized criminal history files can have many social benefits. But the cost is high: use of such information systems leads to loss of privacy and, of more importance, diminution of human dignity.

The question for constitutional lawyers in the Age of Tech-

140. See P. Schrag, supra note 138, at 252-55. Aldous Huxley put the matter in pungent terms:
We have had religious revolutions, we have had political, economic, and nationalistic revolutions. All of them, as our descendants will discover, were but ripples in an ocean of conservatism—trivial by comparison with the psychological revolution toward which we are so rapidly moving. That will really be a revolution. When it is over, the human race will give no further trouble.

A. Schefflin & E. Opton, supra note 138, at 10 (quoting Aldous Huxley).

141. In his opinion for the Court in Griswold v. Connecticut, 381 U.S. 479 (1965), Justice Douglas described privacy as a penumbral constitutional right, implicitly emanating from the Bill of Rights. Id. at 484-85.


144. To a great extent, a person's name has become a number—his social security number.

145. The Office of Technology Assessment, which services Congress, is conducting a systematic and comprehensive analysis of the National Crime Information Center (NCIC) and computerized criminal histories (CCH).
nology is whether the values of constitutionalism can be preserved. On this question, the jury is still out, but the means for control of people are available and if it is true that what is technologically possible will be done, then we will move into a Skinnerian world, one in which Americans "will no longer know, or care, whether they are being served or controlled, treated or punished, or whether they are volunteers or conscripts. The distinctions will have vanished."146 This is a grim scenario, to be sure, but one toward which technological imperatives are taking the nation and, indeed, people everywhere. If, in sum, law is a reflection of society, then it cannot escape being vitally affected by the scientific-technological revolution even more than it has been in the past.

B. The State as "Group-Person"

The major prophet for the emergent Constitution of Control is Thomas Hobbes, who in his classic Leviathan both gave a name to the modern State and set forth its philosophy. Those who would understand the United States under the Constitution of Control must first understand Hobbes, who was surely as influential as Locke and Montesquieu were upon those who wrote the Constitution of 1787. The framers were well aware of the dark side of man. "[T]he theme of man's irrationality," Arthur O. Lovejoy maintained, "and especially of his inner corruption was no longer [during the seventeenth and eighteenth centuries] a specialty of divines; it became for a time one of the favorite topics of secular literature."147 European and American political theorists came to emphasize the dangers rather than the advantages of government. If a man was depraved and antisocial, then he required control; but those who controlled, themselves human beings, would mercilessly exploit their subjects unless there was some way to limit their power. In the words of James Madison: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place oblige it to control itself."148 Control over the

148. The Federalist No. 51 (J. Madison) (emphasis added).
CONSTITUTION OF CONTROL

The answer is fast becoming “no.” As it has been shown, it was also “no” in the past, but only when certain extraordinary situations obtruded, situations in which political officers considered it necessary to draw upon the reserve powers of the State.149

“Leviathan,” says William Ophuls, “may be mitigated, but not evaded.”150 Hobbes advocated complete domination by the State to prevent internal disorder and to protect against external threats. Today, the Hobbesian world is fast emerging: Leviathan is being created—in Gierkian terms, a “super-group-person” with drives and interests of its own that transcend the sum of the private interests of the nation.151

Little attention has been accorded the nature of “the State” in the literature on American constitutionalism.152 Judges and commentators alike have slid over analysis of the concept, often blithely, but erroneously, equating the State with government or with society. The terms are not synonymous, and should not be considered as equivalents. Constitutional scholarship is flawed by the failure to probe deeply into the meaning of the three terms—how they are used, by whom, and for what purposes. The question, to be sure, is one of political theory, but that should not inhibit legal analysis because it is widely conceded that the Supreme Court, in its constitutional decisions, articulates juristic theories of politics.

It has earlier been suggested that the United States has become a “corporate State.”153 The overarching social reality in this nation is the State, an anthropomorphic group-person with drives and interests of its own—an “organism,” as Holmes said.154 Of course, the State cannot be seen; it is a method, not

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149. One of those reserve powers, of course, is reason of state. Another reserve power is the degree of presidential confidentiality recognized in United States v. Nixon, 418 U.S. 683, 708 (1974).

150. W. Ophuls, supra note 146, at 163.

151. See the discussion in A.S. Miller, The Modern Corporate State, supra note 6. See also note 154 infra.


153. See A.S. Miller, The Modern Corporate State, supra note 6.

a thing. Like the business corporation, in law an artificial person, the State exists in constitutional theory even though it has "no anatomical parts to be kicked or consigned to the calaboose; no soul for whose salvation the parson may struggle; no body to be roasted in hell or purged for celestial enjoyment."\(^{155}\) The State, a legal fiction, does no act, thinks no thought, speaks no word, but exists both to the extent that those who wield the power in government speak for it and to the extent that men may die and property may be seized in its name.

A little-noted, but important, court of appeals decision in 1978 illustrates this point. In *Halkin v. Helms*,\(^{156}\) opponents of the Vietnam "war" filed suit against several officials of the intelligence community, alleging that the National Security Agency (NSA) conducted warrantless interceptions of their international wire, cable, and telephone communications. Judge Roger Robb, speaking for the panel, framed the issue in these terms: "[S]hould the NSA be ordered to disclose whether international communications of the plaintiffs have been acquired by the NSA and disseminated to other federal agencies?"\(^{157}\) NSA services the intelligence community by electronically monitoring overseas communications. "Watchlists"—words and phrases identifying communications of intelligence interest—are employed to isolate communications of

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\(^{155}\) said that judges "called upon to pass on a question of constitutional law . . . must be aware of the changing social tensions in every society which [make] it an organism." Hand, *Sources of Tolerance*, 79 U. Pa. L. Rev. 1, 12-13 (1930). Such an organismic conception of the State (often with the word used synonymously with government or society) is fundamental to an understanding of American constitutional law. Compare these statements: "[G]overnment is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life. It is accountable to Darwin, not to Newton. It is modified by its environment, necessitated by its tasks, shaped to its functions by the sheer pressure of life." W. Wilson, *Constitutional Government in the United States* 56 (1908); President John F. Kennedy, in answering a question about a "public interest" in collective bargaining negotiations: "These companies are free and the unions are free. All we [the Executive] can try to do is 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.*" N.Y. Times, Mar. 8, 1962, at 14, col. 5 (emphasis added).

\(^{156}\) W. Hamilton, *On the Composition of the Corporate Veil* (1946), quoted in R. Eells & C. Walton, *Conceptual Foundations of Business* 132-33 (1961). Hamilton was speaking about the corporation, but surely his remarks are also applicable to the State.

specific intelligence interest from the enormous numbers of foreign communications. Thus, in actuality, everyone's overseas wire, cable, and telephone messages are monitored by the NSA. Copies of all cables are sent to NSA by Western Union, RCA, and ITT.

One would think that message interceptions of all "communications having at least one foreign terminal" and watch-lists of "approximately 1200 Americans"\(^\text{158}\) would present an obvious instance of police-state tactics wholly inimical to the American system of government. After all, the Supreme Court has never authorized warrantless wiretaps, even for foreign intelligence purposes, and lower federal courts that have dealt with the question are split. The panel of judges in *Halkin* saw it otherwise. In the words of Judge Robb:

> A ranking of the various privileges in our courts would be a delicate undertaking at best, but it is quite clear that the privilege to protect state secrets must head the list. The state secrets privilege is absolute. However helpful to the court the informed advocacy of the plaintiffs' counsel may be, we must be especially careful not to order any dissemination of information *asserted* to be privileged state secrets.\(^\text{159}\)

The court accepted the untested assertion of the Secretary of Defense that "[c]ivil discovery or a responsive pleading . . . would severely jeopardize the intelligence collection mission of NSA by identifying present communications collection and analysis capabilities."\(^\text{160}\) Not even *in camera* proceedings are to be permitted. Paying "utmost deference" to the Executive,\(^\text{161}\) the court found that the interests of the State overrode any interest of the individual. Even though "[t]he" United States,\(^\text{162}\) as such, was not a party to the lawsuit, it nonetheless was able to prevail. When *Halkin* is added to President Carter's executive order authorizing sweeping presidential use of warrantless wiretaps,\(^\text{163}\) it becomes clear that an organismic conception of the State is being reified by a series of official actions.\(^\text{164}\)

This conclusion is buttressed by Judge Warren's prior-restraint injunction in *United States v. The Progressive, Inc.*\(^\text{165}\) There, for the first time in American history, a judge enjoined

\(^{158}\) *Id.* at 4.

\(^{159}\) *Id.* at 7 (emphasis added).

\(^{160}\) *Id.* at 4-5.

\(^{161}\) *Id.* at 9.

\(^{162}\) See Miller & Bowman, *supra* note 152.

\(^{163}\) See note 102 *supra* and accompanying text.


\(^{165}\) 467 F. Supp. 990 (W.D. Wis. 1979).
the publication of an article for reasons of national security. Judge Warren swept aside prior law in order to reach the decision. In addition, he did not require the government to produce evidence sufficient to fulfill the very heavy burden that any attempt at prior restraint must meet. And to cap it off in Kafkaesque style, Judge Warren's opinion was kept secret. 166

Two lessons may be drawn from the Progressive case: first, the mere assertion of "national security" is enough to make some judges run for cover; and second, Judge Warren saw the State's asserted interests as preeminent and simply refused to enforce the plain language of the first amendment and first amendment case law that has existed since Near v. Minnesota. 167 Judge Warren apparently did not even attempt to balance the interests involved; or if he did, he incorrectly identified the interests of the defendants. In the Progressive case, the publishers, editors, and writers posed an issue beyond that of a tiny (40,000 circulation) magazine; what was involved is not merely their interests, as important as they are, but the interests of the entire nation—all of the people, who fall within the ambit of the first amendment. The magazine in this litigation was a surrogate for all Americans. The government speaks for the State, not for the disparate congeries of individuals and groups that make up "society." Once that fact is understood, a federal district judge should be able to discern that censorship of a magazine article, the contents of which were taken from the public record, cannot comport with the Constitution.

These illustrations are merely present-day instances of what has long been true but has seldom been asserted: the State wins in constitutional litigation in all cases in which it—the State, speaking through government—considers its interests to be in jeopardy. In other words, the State is a group-person with drives and interests of its own, which do not necessarily coincide with the interests of Americans, either as

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166. See 5 MEDIA L. REP. (BNA) at page opposite 1113 (June 26, 1979) (On June 15, Judge Warren continued his earlier preliminary injunction against publication and issued a one-sentence public statement and a seven-page secret opinion in support of his action.). The Progressive appealed to the Seventh Circuit, but, in September, the government dropped its efforts to enjoin publication after the sensitive information (relating to construction of nuclear devices) was published elsewhere. See id. at page opposite 1545 (Sept. 25, 1979). The Seventh Circuit then vacated the injunction and remanded all unresolved issues to Judge Warren. The Progressive is still seeking to have the opinion and in camera district court proceedings declassified. Telephone interview with Erwin Knoll, Editor of The Progressive (Feb. 1, 1980).

individuals or in their collective capacity as society—the arith-
metical sum of the private interests of the nation. As the
Constitution of Control slowly emerges from its chrysalis, this
conclusion will become more evident. The greatest good in this
dangerous situation is defined as the survival of the collectivity
known as the United States. Machiavelli probably would have
approved; that is, the Machiavelli who wrote *The Prince* rather
than Machiavelli the statesman of *The Discourses*. “Many,” he
said in *The Prince*, “have dreamed up republics and principal-
ities which have never in truth been known to exist; the gulf be-
tween how one should live and how one does live is so wide
that a man who neglects what is actually done for what should
be done learns the way to self-destruction rather than self-pres-
ervation. The fact is that a man who wants to act virtuously in
every way necessarily comes to grief among so many who are
not virtuous. *Therefore if a prince wants to maintain his rule he
must learn how not to be virtuous, and to make use of this or
not according to need.*** Substitute “a State” for “a prince,”
and much of American constitutional history unfolds—particu-
larly the history of recent vintage. The teachings of *The Prince*
may be repulsive, but the harsh fact is that most people, includ-
ing politicians, follow those teachings in practice.

Machiavelli frankly admitted that in practice those who
govern (formally or tacitly) are always willing to act ruthlessly
to achieve their ends. He knew that a ruler should be both
loved and feared, but he also saw that if it appears to be diffi-
cult to have both, then “it is far better to be feared than
loved.” But, he cautioned, a ruler should escape being hated,
not because of moral scruples, but because it is in his best in-
terests (*vide* Batista of Cuba, the Shah of Iran, and Samoza of
Nicaragua). Finally, so long as the ruler “does not rob the great
majority of their property or their honor, they remain content.
He then has to contend only with the restlessness of a few, and

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168. President Kennedy’s statement, see note 154 supra, evidenced (per-
haps unwittingly) pure Machiavellianism. What the President called “the pub-
lic interest” may be equated with the State. See also Barcelo v. Brown, 478 F.
Supp. 646 (D.P.R. 1979). In *Barcelo*, Judge Torruella denied an injunction
against the Secretary of Defense and the Navy, even though defendants admit-
tedly were in violation of two federal statutes and an executive order. This
case is a clear example of how national defense considerations can override
even the letter of the law, an example of “judicially recognized Reason of
State.”

1961) (emphasis added).

170. Id. ch. XVII.
that can be dealt with easily and in a variety of ways."\textsuperscript{171} Thus, so long as the confrontations in \textit{Halkin v. Helms} and \textit{United States v. The Progressive} are perceived as being between a few discrete individuals and the State, such "restlessness . . . can be dealt with easily."

\section*{C. Instrumentalism in Law}

Despite outward appearances to the contrary, a decline in \textit{interdictory} constitutional law is fast becoming apparent. When the third Constitution (of Powers) edged aside and overlapped the second Constitution (of Quasi-Limitations), a process began in which the actions of government were limited less by prohibitory rules of law than by technical considerations and the political system. Thus, the question for policy makers today is not: Do the rules permit the proposed action? Instead, it is: Is the action physically and politically possible? The limitations promulgated in 1787, 1791, and 1868 still exist, to be sure, but they are applied as limitations only in situations in which the State has no overriding interest. Neither the fundamental law nor the Supreme Court will stop the drift of public policy from the direction in which political officers want it to go. Constitutional law, in sum, has become \textit{instrumental}.

This important jurisprudential development did not spring forth full-blown, like Aphrodite, in the past few decades. The beginnings of the development may be seen in early American history. What Professor Morton Horwitz has concluded about the common law is equally true for constitutional law:

\begin{quote}
By 1820 the legal landscape in America bore only the faintest resemblance to what existed forty years earlier. While the words were often the same, the structure of thought had dramatically changed and with it the theory of law. Law was no longer conceived of as an eternal set of principles expressed in custom and derived from natural law. Nor was it regarded primarily as a body of rules designed to achieve justice only in the individual case. Instead, judges came to think of the common law as equally responsible with legislation for governing society and promoting socially desirable conduct. The emphasis on law as an instrument of policy encouraged innovation and allowed judges to formulate legal doctrine with the self-conscious goal of bringing about social change.\textsuperscript{172}

This statement reads remarkably like what the Supreme Court and other courts have been overtly doing for at least a generation, an action for which they have been severely criti-
\end{quote}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{171} \textit{Id.} ch. XIX.
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cized.\textsuperscript{173} Since as early as the time of \textit{Cooper v. Aaron},\textsuperscript{174} the Court has occasionally, but not always, viewed a lawsuit as more than a dispute to be decided "by a body of rules designed to achieve justice only in the individual case."\textsuperscript{175} The Court has issued norms of "general applicability."\textsuperscript{176} Indeed, it does have "the self-conscious goal of bringing about social change." Consider, in this connection, the valedictory of Chief Justice Earl Warren, in which he said: "We, of course, venerate the past, but our focus is on the problems of the day and of the future as far as we can foresee it."\textsuperscript{177} He went on to say that in one sense the Court was similar to the President, for it had the awesome responsibility of at times speaking the last word "in great governmental affairs"\textsuperscript{178} and of speaking for the public generally. "It is a responsibility," he continued, "that is made more difficult in this Court because we have no constituency. We serve no majority. We serve no minority. \textit{We serve only the public interest as we see it, guided only by the Constitution and our own consciences.}"\textsuperscript{179}

That remarkable burst of candor merits careful attention. It acknowledges that the Court follows an instrumentalist concept of their function. Twenty years ago, a colleague and I suggested that the time had come for an avowedly teleological jurisprudence, "one purposive in nature."\textsuperscript{180} Enough has occurred since then to conclude that our suggestion should not have been a \textit{call} for teleological jurisprudence but a \textit{description} of what the Supreme Court and other courts were already


\textsuperscript{174} 358 U.S. 1 (1958). This was the Little Rock school desegregation case.

\textsuperscript{175} See text accompanying note 172 supra.

\textsuperscript{176} These are "legislative" norms that purport to state law for the entire nation. Little attention has been accorded this development in scholarly circles. \textit{But see P. Kurland, Politics, the Constitution, and the Warren Court} 170-206 (1970); Miller & Barton, \textit{The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry}, 61 Va. L. Rev. 1187 (1975), reprinted in A.S. Miller, \textit{The Supreme Court: Myth and Reality} 253 (1978) (ch. 8).

\textsuperscript{177} 385 U.S. viii, x (1969).

\textsuperscript{178} Id. at xi.

\textsuperscript{179} Id. (emphasis added).

doing and a *prediction* of what they would continue to do. We are now witnessing "the growth of systematic participation of the judiciary . . . in the travail of society."\(^{181}\) There can be no doubt that law is instrumental under the Constitution of Control.

D. **Some Specific Doctrines**

The generalized statements about the Constitution of Control set forth above can be supplemented with a brief enumeration of specific doctrines. These observations will be stated as conclusions, with little documentation. Each, however, can easily be verified by readily accessible literature: The citations to the statements below are merely illustrative.

1. **Presidential government has come to stay.** Despite the popular wisdom to the contrary, Watergate and its aftermath have created only the appearance of a renascent Congress.\(^{182}\)

2. Despite the recent Supreme Court decisions in support of states' rights,\(^ {183}\) *federalism as it has been known is fast becoming moribund.* A national income tax, technological imperatives, immersion of the nation in world affairs—these and other factors mean that the several states are political anachronisms.\(^ {184}\)

3. **Overt economic planning has come to stay.**\(^ {185}\) Although some primitive forms of planning have always existed in the United States, the steady and inexorable trend since the 1930s has been toward more and more governmental planning. Taxing and spending powers are now used to further economic planning objectives. The result, in Professor Kenneth Dam's terminology, is the creation of "the fiscal constitution."\(^ {186}\)

4. The commerce clause has been broadly interpreted to permit extensive exercise of powers at the national level; for example, it provides constitutional warrant for economic plan-

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182. Cf. R. Pious, The American Presidency 419-20 (1979) ("The only certain forecast about the presidency is that no forecast is certain.").


184. Currently, a national economic system is superimposed on a decentralized political order. Politics and law tend to follow economics; the inexorable result is that the states will become even less important in the future. See A.S. Miller, Social Change and Fundamental Law, supra note 126, at 43-95 (1979) (ch. 3, "The Constitutional Law of the 'Security State'").


ning. Of equal importance, federal power over interstate commerce is the constitutional justification for a growing number of social regulations.187

5. Freedoms of speech and the press are receiving less protection.188

6. Paradoxically, certain liberties not considered to be inimical to the State now receive the highest degree of protection ever enjoyed by Americans.189

7. When the State's fisc is threatened, the fourth amendment gives way.190

8. The constitutional command of equal protection of the laws is more fantasy than fact. Concentration upon what judges say about equal protection, rather than upon what other governmental officials do, hides a harsh reality.191

9. The Nixon Court is chipping away at the protections of


191. Granted, equal protection law has advanced significantly since Holmes attacked it as the usual last resort of constitutional arguments. Buck v. Bell, 274 U.S. 200, 203 (1927) (upholding compulsory sterilization of an allegedly mentally defective person). Indeed, the civil rights movement of the 1960s was, in large part, a by-product of judicial willingness to reinterpret the equal protection clause. My point, however, is that although the formal law has greatly changed, the same is not true of law as applied to individuals. The law in action—how people are actually treated by public officials, including judges (as in sentencing)—fails to measure up to the promise of the formal, positive law. See, e.g., W. Wilson, supra note 33, passim; Miller, Brown's 25th: A Silver Lining Tarnished with Time, 3 Dist. Law., April-May 1979, at 22 (Journal of the District of Columbia Bar). In other words, the teaching of Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886), should be the basic standard for all legal analysis. What matters is not what officials, including legislators and judges, say, but what they do. See J. Auerbach, Unequal Justice 79-80 (1976).

Legal educators have forgotten the teachings of Underhill Moore and others, who, forty to fifty years ago, sought to determine how legal precepts were in fact applied. Most law professors still consider the appellate court opinion to be the ne plus ultra of scholarship—a sad commentary on legal education. But even appellate opinions are given only cursory scrutiny. Little or nothing is said, for example, about how judges inform themselves, about their predilections, and about how they weigh (if they do) the societal impacts of their decisions. Thus, the adversary system is never subjected to rigorous examination. See generally A.S. Miller, The Supreme Court: Myth and Reality (1978); Miller, Reductionism in the Law Schools, or, Why the Blather About the Motivation of Legislators?, 16 San Diego L. Rev. 891 (1979); Miller, Legal Education as a Form of Brain Damage (forthcoming).
Miranda and other decisions. In the "administrative State," discretion is the norm, and judicial review of public administration is largely ineffectual.

E. SUMMARY

It is dubious, at best, whether institutions created prior to 1790—despite nearly two centuries of adaptation—are adequate to meet the needs of the present and the emergent future. The Constitution of Control has arisen to strengthen a government faced by continuing crises. "There is no escape from politics. As a consequence of ecological scarcity, major ethical, political, economic and social changes are inevitable whatever we do." Legal education and constitutional law as formulated by lawyers reveal little or no appreciation of that dialectic. Public dialogue should focus on the precipitant question of whether Americans will be able to escape the impact of Arnold Toynbee's doleful forecast: "In all developed countries," he was quoted in 1975 as saying, "a new way of life—a severely regimented way—will have to be imposed by a ruthless authoritarian government."

The outlines of the Constitution of Control are becoming clearly visible, a process that will accelerate as fast-moving technological and economic changes press ever harder on ancient political institutions. I do not, however, wish to unduly accentuate the transition. The fourth fundamental law coexists with the second and third: We still have some limitations on government. Moreover, the Constitution of Control is simply a radical version of the Constitution of Powers. The effective exercise of burgeoning governmental powers necessarily implies increasing limitations on personal freedoms and liberties. Those liberties that remain may be likened to Aldous Huxley's

196. See generally W. OPHTS, supra note 146.
"soma" pills—a means by which discontent can be siphoned off.\textsuperscript{197}

V. CONCLUSION

This Article, a speculative essay, is intended to raise questions rather than to proffer answers. If I am correct—and I think that at least a prima facie case can be made for the new fundamental law, thus shifting the burden of proof to those who dispute the thesis—then a challenge to constitutional scholarship is both obvious and unmet. That challenge is to determine whether politico-legal (constitutional) changes will enable Americans (and others) to escape from the ecological trap.

Such an inquiry must have at least two facets. First, it must encompass an analysis of the extent to which law, however and by whomever articulated, can be an instrument of social change. The ancient wisdom, per Sumner, is that "stateways" cannot change "folkways."\textsuperscript{198} I have suggested elsewhere, in an as yet unpublished paper, that the Supreme Court can and indeed does help promulgate national goals.\textsuperscript{199} Acting as an "oracle in the Marble Palace," the Court tries to operate as a modern version of Plato's philosopher-king. In making such a statement, I do not mean to suggest that "the universe will obey the judicial decree."\textsuperscript{200} I agree with Brooks Adams, who observed that "[n]o delusion could be profounder and none, perhaps, more dangerous."\textsuperscript{201} Constitutional change comes not only by amendment and judicial decision but also by certain acts of Congress and the President.\textsuperscript{202} The parts of the system interact. Judges have some, but not much, direct political power. Their greatest influence comes through stating standards toward which Americans can aspire; they can alter the "mix" in political debates. Although our reach, as in all things, may exceed our grasp, a carefully chosen group of judges who realize that decisions can, at times, be logically arbitrary and at the same time sociologically nonarbitrary can help in the endless pursuit of justice—of what Felix Cohen called "the good."\textsuperscript{203} Of course, judges are far from omnipotent; they are,

\textsuperscript{197} See A. HUXLEY, BRAVE NEW WORLD 70-71, 121-23 (1932).
\textsuperscript{198} See W. SUMNER, FOLKWAYS (1906).
\textsuperscript{199} Miller, The Case for Judicial Activism, supra note 173.
\textsuperscript{201} Id.
\textsuperscript{202} See A.S. MILLER, SOCIAL CHANGE AND FUNDAMENTAL LAW, supra note 126.
\textsuperscript{203} See F. COHEN, supra note 27.
however, best suited not only to make other governmental officials take a sober second thought before implementing decisions, but also to assist in the establishment of national values. The Constitution, in itself, is not a self-defining instrument that sets forth such values. Only as a patina of interpretation is added do those values emerge.\textsuperscript{204}

The second facet of the constitutional reexamination must be to redraft our constitutional text. The ancient words of 1787 need substantial alteration. Built-in roadblocks frustrate efficiency in government and do not prevent despotism. The orthodoxy tells us, usually quoting Brandeis and at times Warren, that separation of powers was designed not to promote efficiency but to prevent the misuse of power.\textsuperscript{205} That, however, is only a half-truth. The framers in 1787 wanted to separate the executive from Congress in order to have a more effective government.\textsuperscript{206} The institutions have worked for nearly two hundred years largely because of extra-constitutional techniques devised to supplement what the framers created and, as we have said above, because the silences of the original document were filled by principles (except for judicial review) common to all governments.

Constitutional revision by custom and usage, however, is no longer adequate to meet the manifest needs of the nation. Americans are now hampered by the terms of a written instrument drafted for different times and conditions. Among possible constitutional changes, at least the following require serious consideration: (a) pluralizing the presidency; (b) making Congress a unicameral body of not more than 100 members; (c) making the entire bureaucracy responsible to the President and to Congress; (d) eliminating the fifty states and creating not more than ten to twelve regional governments; (e) constitutionalizing the giant corporations\textsuperscript{207} and other pluralistic social


\textsuperscript{206} See, e.g., L. Fisher, President and Congress: Power and Policy 1-27 (1972). Dr. Fisher has been the leader in modern reinterpretation of separation of powers. He asserts that it was because Congressional government under the Articles of Confederation was ineffectual that a separate executive—the President—was created. In other words, the founding fathers wanted to prevent despotism and promote efficiency in government.

\textsuperscript{207} See Miller, A Modest Proposal for Helping to Tame the Corporate Beast, 8 Hofstra L. Rev. (1979); Miller, Toward "Constitutionalizing" the Corporation: A Speculative Essay, 80 W. Va. L. Rev. 187 (1978).
groups; (f) allowing the Supreme Court to issue advisory opinions at the request of other organs of government and standards of national purpose as well; (g) constitutionalizing the political party; (h) establishing a "devil's advocate" within government; (i) requiring a social audit of all governmental programs; (j) enlarging the environmental impact statement requirement to mandate "social impact statements" for all proposed governmental actions; and (k) establishing an ecological planning unit in the federal government.

The listing of such changes points up the staggering dimensions of the constitutional crisis in which Americans are now deeply immersed. Whether such fundamental alterations can help achieve a good society is an unanswered question. However glorious the past may have been, stolid adherence to concepts developed by people long dead—the Founding Fathers—will not serve the pressing needs of the modern era. Those people—the saints in America's hagiology—should not be ignored. Indeed, they cannot be. But their answer for the climacteric of humankind may be simply stated: solve your own problems. The drafters of the Constitution of 1787 left it up to each generation of Americans to write its own fundamental law. That has been done in the past by making the written Constitution in large part an unwritten one. Such an approach, however, is no longer adequate.

Finally, those who think about American constitutionalism should begin with Machiavelli. As Sir Isaiah Berlin puts it: "In the famous fifteenth chapter of The Prince he [Machiavelli] says that liberality, mercy, honour, humanity, frankness, chastity, religion, and so forth, are indeed virtues, and a life lived in the exercise of these virtues would be successful 'if men were all good.' But they are not; and it is idle to hope that they will become so. We must take men as we find them, and seek to improve them along possible, not impossible, lines. . . . [H]uman societies in fact stand in need of leadership, and cannot become what they should be, save by the effective pursuit of power, of stability, virtù, greatness."208 Anyone who wishes to think seriously about constitutionalism in the United States today must come to terms with the challenges laid down by Machiavelli nearly five centuries ago.

208. Berlin, supra note 22, at 175-76 (footnote omitted).