

Robert A.G. Monks

**CORPORATE STATE**<sup>[1]</sup>

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“If you put a frog in cold water, and very slowly turn up the heat, it will happily sit there until it boils to death; whereas if you throw a frog into boiling water, or turn up the heat too fast, it will jump out.”

“Nobody rings a bell to tell you when it will start.”

The history of our time will record that the two and some centuries of government “of the people, by the people and for the people” in the United States came to an end in the beginning years of the twenty first century. The empowering ingredients of the corporate state have been evident for years. But we are talking about a change not just in degree, but in kind. Only today does the public, mutely and uncomplaining, accept corporate hegemony. It is as if a power switch had been actuated. What previously was unacceptable is now common place. Corporate interest and national interest is now congruent, corporate personnel guide the nation. It is as if the political arguments of the past have been settled. This is a transformation to corporatism.<sup>[1]</sup> Corporatism has won and the President governs as CEO.

Increasing corporate power and presence has been manifest on many fronts. Interest group influence is nothing new in American politics – what is new is the scale, what is new is the blatancy, what is new is the unchallenged interchangeability of the highest officials weaving between directorships and chief executive jobs and high appointed and elected office.

We will review the current status of corporation and state, some indications of the levels of “corporate welfare”, examples of corporate power over the governing process and, finally, the impact of corporate money in elections, with specific focus on the corporate media. Then, we will review the history of the modern corporation in an effort to explain –how did we get here? This sections ends with a suggestion as to how we can continue to enjoy the benefits of corporate wealth creation without loss of personal liberty. The third segment is an effort to provide illumination of exactly what is “corporate language”. Finally, we conclude by imploring the United States Supreme Court to reverse its holdings that a corporation is a “person” entitled to participation in the American political process. We request that the judicial and executive branches enforce existing laws requiring trustee/shareholders to act as “owner” of portfolio companies and to proscribe appropriate guidance and discipline for management.

***Corporatism – USA – Summer 2003***

- Through the nomination of John Snow to be Secretary of the Treasury, the Administration went out of its way to associate with the “stealth compensation” that enriched CEOs during the past decade. Snow in an earlier incarnation was Chairman of The Business Roundtable, which – on his watch – had masterminded the subjugation of the accounting

profession (and the U.S. Senate) in permitting options to be issued without reflection on the profit and loss statement. This single act through creating destructive incentives is significantly responsible for the corporate defalcations that cost so many Americans so much. Snow took over \$70 million out of the marginally profitable CSX railroad. Charles Grassley, as Chairman of the Senate Finance Committee having jurisdiction over the confirmation of the Snow nomination, declined to bring up the question of his compensation – saying simply (and accurately) that such conformed with the practice of the times.

- There has been much public attention on the non competitive selection of Halliburton, of which Vice President Cheney used to be CEO, to manage reconstruction of Iraq. “Corps officials defended the manner in which the contract was awarded, saying secrecy and speed were essential because then-Iraqi President Saddam Hussein was expected to torch hundreds of oil wells. As it turned out, only a few wells were set on fire, and Halliburton’s mission quickly transformed into evaluating the wreckage caused by the war and the looters.” In considering bids by other companies for new work in Iraq we should appreciate: “Faletti, the Army Corps of Engineers spokesman, acknowledged that Halliburton’s work over the last four months gave it a leg up. ‘Our evaluation teams have been given instructions that will reduce that advantage.’ He said.”<sup>[ii]</sup> Cheney is a fine man, but is there no concern with how this appears? Is not the public entitled to some kind of explanation? Or, at least, a fig leaf?
- Boeing has been awarded a sole source contract to supply tanker aircraft to the military on apparently uneconomic lease terms.
- “[T]he people now running the country seem determined to have private services provided by public corporations, no matter what the circumstances... airport screening in the hands of private security companies...the logistical mess in Iraq isn’t an isolated case of poor planning and mismanagement, it’s telling us what’s wrong with our current philosophy of government.”<sup>[iii]</sup>
- The Senate Government Affairs Permanent Sub Committee on Investigation under the Chairmanship of Carl Levin of Michigan provided the most conscientious and perceptive insights into the Enron volcano of value destruction. Under its current Republican leadership, there are no follow up hearings of corporate misconduct and the loss of value by employees and pensioners,<sup>[iv]</sup> although the press is replete with examples. In a declining economy and stock market, the pay of Chief Executive Officers continues to increase. There is no public outrage, no hearings, no action.
- The level of corporate welfare, defined as direct appropriations and tax breaks, will exceed \$170 billion annually before taking into account the effect of the 2003 “stimulus” bill. “From 1996 through 2000, just ten large profitable companies<sup>[v]</sup> enjoyed a total of \$50 billion in corporate tax breaks.” Not only Republicans are the allies of corporate interests. Corporate welfare has become a bipartisan matter. It would appear to be a core plank in the “New Democrat” program.
- One of the most pernicious aspects of the current system is the suspicion that only those with no choice actually pay taxes. A good example of this pattern is the deteriorating ratio of corporate income taxes paid to the total amount withheld from employees’ checks. Employees have little or no choice about the deductions; corporations have all the lobbying and legal skills to reduce their payments. In 1995, corporate income tax payments were 12.35% of the total collected, while withholding taxes were 36.59%. As of 2002, this pattern has changed markedly – withholding comprising 39.48% of the total, but corporate income taxes have been reduced to 8.35%. Over seven years, a three to one ratio has become a five to one ratio. Pay taxes or hire an accountant.

- The Bush Administration settled the Microsoft anti trust litigation following earlier unfavorable judicial decisions in the previous administration. Even the *Wall Street Journal* has been moved to indignation by the appalling settlement that government agreed with Wall Street corruption: “Perhaps the regulators were engaging in a genteel cover-up for their own lack of oversight. And perhaps the list of Enron’s enablers ought to be made richer still by adding the U.S. Securities and Exchange Commission, the Federal Reserve, the Manhattan District Attorney and New York State banking Department and the Comptroller of the Currency.”<sup>[vi]</sup>
- The long anticipated report on global warming prepared by the Environmental Protection Agency was substantially altered by Administration officials: “The editing eliminated references to many studies concluding that warming is at least partly caused by rising concentrations of smokestack and tail-pipe emissions and could threaten health and ecosystems... In its place, Administration officials added a reference to a new study, partly financed by the American Petroleum Institute, questioning that conclusion.”<sup>[vii]</sup> From its earliest days, this Administration has plainly and unashamedly based its energy policy on industry priorities. Why does Vice President Cheney, plainly an honest man, decline to reveal those with whom he consulted. Is the principal of executive privilege more sacred than openness with the electorate?
- The Comptroller General of the United States is currently investigating the continuing failure of the Department of Labor to enforce the provisions of ERISA<sup>[viii]</sup> respecting fiduciaries’ obligation to monitor portfolio companies in aid of optimizing long term value for plan participants. In theory, corporate directors are elected by and accountable to the shareholders. In practice, they are appointed by the Chief Executive Officer and accountable to no one. Institutions, the scope of whose functioning is subject to interpretation and enforcement under existing laws,<sup>[ix]</sup> own more than a majority of the voting equity in America’s publicly held companies. These trust institutions represent a hundred million American mutual fund holders and pensioners; they are the owners of corporate America. With the exception of a small number of public employee pension plans, none of these institutions have discharged their ownership responsibilities. Since the passage of ERISA in 1974 *there has never been a single instance of shareholder activism by a private pension plan subject to ERISA*. In 2002, the most celebrated merger of the year, Hewlett Packard and Compaq was successfully concluded through the public violation of ERISA by Deutsche Bank – there was no enforcement, there was no protest. Through failure to require enforcement of the law, government has acquiesced – been co-opted – in a corporate system in which management is effectively accountable to nobody.
- The celebrated campaign reform bill of 2002 is subject to continued challenge in the courts, so that no one today has any sense of its ultimate impact. Candidates conspicuously are raising more money than ever before for campaigns for office at every level, taking their lead from the fund raising practices of the President which publicly aimed at building a money mountain to protect re-election in 2004. It is unimaginable that \$150,000,000 could be raised without the involvement (legal) of corporate staffs to co-ordinate contributions from officers and employees. There simply isn’t enough time and energy to raise money one individual at a time. The result has been to make contributions from flesh and blood persons virtually irrelevant.
- Even in the glow of populist heroism and in order to get any Congressional consideration, Senator John McCain had to delete the provisions for donated TV time from his campaign reform bill right at the beginning of the debate in 2001. One of the dirty little secrets of political finance is the importance to their bottom lines of the monopolistic charges TV stations extract from political candidates.<sup>[x]</sup> It is estimated that political ad revenues comprised as much as 8 % of the advertising revenue of NBC, CBS and ABC owned stations in 2000.<sup>[xi]</sup> This statistic is inherently misleading, because these

revenues have no offsetting expenses. The entire cost of production is born by the political organizations buying the time. So, that 8% figure is a direct contribution to the bottom line. Imagine what that figure means in terms of wealth for the owners when multiplied by a p/e ratio.

- Thus, the simple and effective solution of the complex problems of providing a healthy financial framework for elections – providing free TV time in exchange for candidate agreement to limit expenses - will not occur because these local TV stations and their management are a Congressman's "best friends". No federal elected official will take the chance of offending station owners so well positioned to affect his career.
- The consolidation of corporate control over the preponderance of the Television and Newspaper media in the largest conglomerates further inclines the language of the national agenda. Deciding what information is important; editing it so as to emphasize particular elements; and adjudicating what information will get "air time" and how much, provides the framework for corporate influence. *Most importantly, the media is constitutionally protected in whatever activity it takes with respect to elections.* While there are some restrictions on expenditures by and on behalf of candidates and parties, the press can devote limitless space or time to particular campaigns. This is a hugely important factor for elected officials to consider – is there any way in which they can overcome a hostile press? One has to wonder whether this power has anything to do with the recent decision by the Federal Communications Commission to eliminate restrictions on ownership of newspapers, radio and television in a community and with Congress' earlier (1996) "gift" of the ether medium to the incumbent institutions. We have to wonder about the information that each of us processes. In the same sense that small elements of poison in the air or water can have a severe effect on the health of affected individuals, so we must wonder whether the corporate filtering of information has in a very real sense "polluted" the information base of the citizenry.

These are the components of corporatist America – press, corporation and politics ("party"). They are a mutually nourishing system of power. The press can importantly effect elections; party, as the authorized recipient of unregulated corporate contributions, allocates resources to candidates who will protect the interest of donor corporations. The corporations are winning. CEOs can importantly effect elections; elected officials can decide on the legal framework within which the power of CEOs can be challenged by any corporate constituency[xii].

## II

### ***How did we get here? A brief history of corporations***

The modern corporation was created by governments in order to accomplish defined public purposes. Entrepreneurs were encouraged through limited liability, perpetual existence, and transferable holdings to channel their energies through the corporate form in aid of a wide range of policies, spanning trading in the East Indies, India and the American colonies to building bridges and ferry systems in the New World. These roots in the public interest persisted into the nineteenth century. Corporations could only be created by specific act of the sovereign. Over time, incorporation became a right available to all applicants.[xiii] The public purpose component was diluted, although corporations were limited as to size, term and purpose. No one has described the rationale of these limitations as well as Justice Louis Brandeis:

"The prevalence of the corporation in America has led men of this generation to act, at times, as if the privilege of doing business in corporate form were inherent in the citizen, and has led them to accept the evils attendant upon the free and unrestricted use of the corporate mechanism as if these evils were the inescapable price of civilized life,

and hence, to be borne with resignation. Throughout the greater part of our history, a different view prevailed. Although the value of this instrumentality in commerce and industry was fully recognized, incorporation for business was commonly denied long after it had been freely granted for religious, educational, and charitable purposes. It was denied because of fear: Fear of encroachments upon the liberties and opportunities of the individual. Fear of the subjection of labor to capital. Fear of monopoly. Fear that the absorption of capital by corporations and their perpetual life might bring evils similar to those which attended mortmain. There was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations.”[xiv]

Large publicly held corporations passed from the control of owners to control by managers in the early 1930s. Debate about corporate responsibility focused on a rather theoretical question, whether management was responsible in a narrow way simply to owners or whether they were trustees for society as a whole. Both alternatives presupposed an all powerful management that was not meaningfully accountable to anyone. As Allen Sykes put it: “Mega companies are clearly their own masters. As even large governments sometimes seem powerless in the face of mega companies, the lack of management accountability to shareholders or anyone else is a matter of major concern.”[xv] Sykes and I have recently written at some length about the current situation: “More serious doubts have been raised over the last 12 months about the acceptability of the current practices of Anglo-American shareholder capitalism than in any period since the aftermath of the 1929 ‘great crash’ .... The problems to be addressed are rather more complicated and often of a fundamentally different nature from what is commonly perceived. Unlike many quite recent and often reluctant converts to governance reform, we believe in and hope to demonstrate the existence of a significant ‘systemic fault’. ....The key example of the systemic fault is what is now widely recognised to be the excessive powers which have been relinquished to CEOs in both Britain and America, powers which a minority have abused. This gradual, unintended and unconscious transfer of power explains why the interests of a relatively small number of CEOs have prevailed against those of millions of individual and underlying shareholders.”[xvi]

I have recently participated in the Annual Meeting process of a major U.S. corporation, which is the only occasion when the law in the United States requires management to meet – and, hopefully to listen – to its owners.[xvii] The ExxonMobil 2003 Annual Meeting is a milestone which we should not pass without careful examination – the power and ability of the management has effectively focused on nullifying even the slender rights of corporate owners to monitor that which is theirs. In a welcome note of dignity as the time clocks tolled the end of the meeting, the splendid Sister Pat Daly implored the chairman to take note of the “mockery” over which he was presiding – the needless restrictions on shareholder communication, the minatory security apparatus, the anal fixation on the clock, the obvious enlistment of “bought” testimony on particular resolutions. As I walked out of Myerson [the fine hall in where the meeting was held] into the noonday Dallas spring, warm chapters out of Russian history flashed through my mind. Maybe, it was that talk of Emperors [During my allowed four minutes, I had respectfully called the CEO an Emperor.] A hundred years ago the masses respectfully petitioned the Tsar for reform. But the enduring image is – the Show Trials of the 1930s. I felt diminished – no I felt dirty – for having participated in this charade.

For a long time in America the separation between corporation and state has been so complete that the private sector didn’t bother to learn the language of Washington. President Franklin Roosevelt would inveigh against excessive executive salaries; President Truman would briefly ‘seize’ the steel industry and President Kennedy would recollect his father’s characterization of big business leaders as “SOBs”. But, these were all Democrats, after all. When General Motors was caught hiring private detectives to shadow Ralph Nader, the utter ineptness of the business sector to speak the language, feel the sensitivities or to relate significantly to government was manifest. Business would continue to “lose” frequently – to labor, to Democrat congressional

committees, to federal agencies – until that former Democrat John Connolly in the waning days of the Nixon term began the work that led to the creation of The Business Roundtable (BRT). The BRT was an inspiration. Only Chief Executive Officers were members, only CEOs in person could attend meetings, there was no D.C. office, there was a minimal staff, “operations” were approved by an Executive Committee, responsibility for implementation was assumed by a Committee Chairman or other designated CEO, who undertook all of the staff expense necessary for the project – thus insuring top quality private sector professionals and a small BRT bureaucracy.

At a certain point, business leadership understood that Democrats were real people, who looked forward to a future of golf and legal and consulting fees for lobbying services, and business co-optation became bi-partisan. By the time of Bill Clinton, the United States had a Democratic President who was convinced that his ideal reincarnation would be as a bond trader. President G.W. Bush has staffed his administration from the BRT. Former officials of the highest rank associate themselves with the Carlyle Group which has conspicuously been involved in government dependent businesses. Business domination of government has occurred before in American history – conspicuously at the end of the nineteenth century, but there was never before a time when all the principal elected and appointed federal officials have been personally enriched from big business connections. There was never a time when federal programs focused on business reached such a level as to deserve the Cato Institute’s sobriquet – Corporate Welfare. There was never a time of such brazen disregard of government officials favoring former corporate connections. The government’s prosecutorial zeal has been most manifest in dealing with subordinates – guilty to be sure – while the fate of the “top people” who were ultimately responsible and who made the most money remains uncertain. “Why did the regulators whimp out?” asks the passionately pro business *Wall Street Journal*.<sup>[xviii]</sup> Corporate priorities are accepted as national priorities.

There is no philosophy of corporations. There is no ethic of corporations. Efforts to anthropomorphize corporations are not successful. They simply do not have human characteristics.<sup>[xix]</sup> They are legal assemblages of energy with a profit maximizing dynamic. No one really understands the consequences of unleashing corporate energies on a pluralistic society, although we would be foolish not to recognize the likelihood that corporate values would tend to permeate other realms. We become infused with corporate values – maximizing profits implies constant, indeed perpetual, increase in the scale of operations. At some point, on a planet with finite resources, there must be a limit to infinite expansion. And yet, that seems far enough away that people cannot be bothered to pay more than grudging attention to the theoretical possibility. However, the competition for growth hardwires a continuing Global struggle for entitlement to resources – and this is the DNA of the corporate state in which we now live. As Brandeis so eloquently put it in his *Liggett* dissent, this is not an inevitable state of affairs. It does not have to be. It is not the status in other countries. What is uniquely American is the admission of artificial legal persons into the political process.

When in 1878 the United States Supreme Court (“USSC”) characterized corporations as “persons” entitled to participate in American politics, they countenanced the invasion of political language by corporate concepts.

It is a humbling and sad footnote of American history that our Constitution has so ironically traduced the most basic human decency in its characterization of human and property value. In its early years, the Supreme Court interpreted the Constitution as providing that black persons were property (Dred Scott decision) **and three fifths of a white person** for purposes of political rights. After the Civil War and the passage of the Fourteenth Amendment (1868), the Constitution purported to right this wrong (although it took another “four score and six” years till Brown to

complete the job) only eighteen years later to commit almost as heinous a wrong in concocting a new combination of personhood and property.

The court has moved to apply the constitutional protections of “due process” in 1890, freedom from unreasonable search and seizure (1906), jury trial in a criminal case (1908), compensation for government taking (1922), freedom from double jeopardy (1962), jury trial in a civil case (1970), to protection of commercial speech (1976), protection of political speech (1978), and the right of negative speech (the right to abstain from association with the speech of others) in 1986. At the moment, the right of “freedom to lie” is under consideration in the federal system in the *Nike* case.

As, the noted author Scott Turow has written of the 1973 decision extending corporate personhood into the financing of federal elections:

“But my view is that Buckley may well have come to be regarded as a sort of twentieth century stepchild to *Dred Scott*, the case that held the property rights of Southern slaveholders in their slaves had been recognized in the North. To our eyes, Buckley appears far less iniquitous. But as in *Dred Scott*, the Court used formalist reasoning to find constitutional protection for economic interests at the cost of fundamental notions of equality. We can only hope that the long-run damage to the Republic is not as severe.”[\[xx\]](#)

There has never been an overarching theory to the court’s extension of bill of rights protections to corporations. As Ted Nace poetically puts it: “[T]he process has been a perfect illustration of the Orwellian ability of large unaccountable institutions to bend even ordinary language into a tool to serve their own needs – the gravitational force exerted by power. Far from laying ordinary tracks, that force of power seemed to operate between the cracks of reason, leaving in its wake only muddled, blurry traces.”[\[xxi\]](#)

### III

#### ***The Language of ‘Corporatism’***

Corporate power and its impact on society is a much discussed subject. We need to inquire further in order to understand the increasing domination by corporate energy of the civil agenda. There is a corporate language.

Corporations are about making a profit. While the limitations on corporate scope initially were whatever public objective occasioned their creation, this has evolved with the process of free incorporation during the last century and a half into a loosely defined boundary of profit pursuit. Hayek has argued persuasively that corporations must be held strictly within this boundary at the risk of chaos for the political and social state. As we will discuss below, Milton Friedman’s formulation of corporate purpose as maximization of profit *within the rules* assumes that corporations will not importantly influence – to say nothing of dominate – the process and administration of those rules. I have elsewhere[\[xxii\]](#) compared the design of a corporation with that of a shark, each perfectly conceived to accomplish its mission. Profit means literally to sell something for more than you pay for it. The critical questions are – what costs do you count and who pays for them? Take the case of a bituminous coal mine operation which involves all manner of physical and psychological injuries, premature death, and adverse impact on ground, water and air. The question as to how much of these costs is born by the operator is the subject of many laws and more lawsuits. The scope of the corporation’s liability is – at the end of the day – knowable and finite. We need only mention here the relative capacity of the focused mining corporation and the diffuse affected constituencies effectively to be involved in the passage and

enforcement of laws. Ultimately, there are costs that are not born by the operator. Who pays for these? Sometimes, it is the employees, sometimes their families, sometimes society at large. By encouraging corporations, we are accepting a society with unallocated costs, the nature and amount of which are largely unknowable. Society through the democratic political system concludes that these costs are more than offset by the wealth generating properties of corporations.

The language of corporations informed by specificity and limitation is different from the language of politics where the parties have to contend with the actual consequences of their decisions. The goal of corporate society is to maximize the size of gross national product (“GNP”); corporations seek the removal of trade barriers (except ones that protect themselves); globalization provides greater scope and alternatives; privatization allows for greater profits – sometimes only through externalizing new costs; the sanctity of property rights threatens to transcend the rights of individuals. “Hidden in these principles...are a number of questionable assumptions. First, there is the assumption that humans are motivated by self-interest, which is expressed primarily through the quest for financial gain.... Second, there is the assumption that the action that yields the greatest financial return to the individual or firm is the one that is more beneficial to society.... Third, is the assumption that competitive behavior is more rational for the individual and the firm than cooperative behavior.... Finally, there is the assumption that human progress is best measured by increases in the value of what the members of society consume, and ever higher levels of consumer spending advance the well-being of society by stimulating greater economic output.”<sup>[xxiii]</sup> As corporate influence increases in a society, these assumptions become the premises on which education, employment and the commitment of human energy is based. For many decades the hopes and aspirations of a free people have been channeled through a vocabulary that recognizes but a single, though powerful, element of their nature – greed, and which eliminates all of those elements that human beings possess that loan dignity, beauty and wisdom to the human condition. This perversion of America’s political vocabulary by corporate imperatives is a wrong that must be addressed before our traditional political citizen based government can be restored.

Looking at questions of public policy with a corporatist vocabulary very much changes the political resolution of difficult issues. The legal use of violence is uniquely the domain of government. How and when the citizens are to be asked to risk and lose their lives for purposes defined as within the national interest must be the most precious piece of the electoral franchise. By “professionalizing” the military, the United States has created a more efficient fighting force and has significantly reduced the political dialogue as the only people risking their lives are “volunteers” and no mother’s son has been compelled to be at risk. Like so much to do with the corporate realm, the benefits are clear and undeniable and the costs are subjective and not omnipresent. We can only speculate on the long term costs of diminished restraint on the unleashing of destructive power. The *Financial Times* has recently editorialized: “But no species of private soldier can ever be a substitute for international political will.”<sup>[xxiv]</sup>

“Consider the decision to go to war with Iraq. In its public statements justifying the attack, the Bush administration cited the heightened national security concerns since September 11, 2001. Yet ideas such as ‘regime change’ and ‘preemptive war’ had actually been developed by corporate-supported policy development groups even before the 2000 elections. The founders of one such think tank, the Project for a New American Century (PNAC) included a number of men who later became top members of the Bush Administration: Donald Rumsfeld, Dick Cheney, Paul Wolfowitz... One investigator of the relationship between the Bush administration and the defense industry described it as a ‘seamless web’. Yet aside from a few allegations of conflict of interest, that web did not appear to depend on any actual illegalities. In that regard, the defense industry followed a pattern that can be seen in any number of other areas where corporate

influence has an overriding effect on public policy: energy, finance, pharmaceuticals, telecommunications, media, agriculture, tobacco, high tech, criminal justice...."[xxv]

The influence of business is nothing new. What is new is the blatancy of business power and the lack of shame or any other restraint in its public manifestations. As the *New York Times* put it following the 2002 Congressional elections: "Having spent more than \$30 million to help elect their allies to Congress, the major drug companies are devising ways to capitalize on their electoral success by securing favorable new legislation and countering the pressure that lawmakers in both parties feel to lower the cost of prescription drugs, industry officials say." [xxvi] This is an outrageous statement, utterly insensitive to democratic myth. Political contributions are viewed as relevant only in empowering industry. The public interest is not worthy of serious consideration. And yet, this statement is just one of many that appear daily in the American press.

Leslie Wayne has written of "...the considerable dismay, and some outright consternation, over sweeping 'Buy America' provisions that Mr. Hunter inserted into the House version of legislation authorizing the coming year's Pentagon budget." [xxvii] House Armed Services Committee Chairman Hunter points out, "If the American worker is going to pay for the defense of the free world, he should participate fully in the manufacture of military goods." This is the traditional language of political concern. It has encountered strenuous opposition in the executive branch. "An internal Pentagon analysis said Mr. Hunter's proposal would have 'catastrophic effects'...machine tools ... cost \$7 billion to \$10 billion." The ultimate reality is the "We do it where there is superior quality, a better price and better delivery terms." What more could you ask of the managers of a business? The elected rulers of a democratic country have not traditionally preferred global considerations over those of their constituents. That corporatist imperatives could defeat not only local jobs claims but also the national security consideration of outsourcing vital components is a measure of the strength of this language at the top levels of the United States today.

The United States does not have a retirement policy. Encouragement of employers to provide "real" pensions – that is to say post retirement payments bearing a relationship to final income – required both companies and government to bear substantial risk that assets could be invested to yield returns commensurate with the actuarial liabilities. Ultimately, the costs became too high, so a corporate solution has been adopted. Shift the risk away from the corporation (and the government)... to the employee. Corporate profits have advanced accordingly. Again, one must reflect on our own values where we – seemingly unquestioningly – transfer responsibility for retirement income to those least able to earn it – the seniors. There has been much talk in recent years about investing a portion of the Social Security funds in common stocks. Economically, there is much to recommend this as investment returns over the long term with which the Social Security program is concerned have always been greater from equity securities than from any other available alternative. The question must be raised – who should bear the risk that this happy cycle will persist? The reliability of Social Security payments is most important – indeed, it is life saving – for precisely the poorest people in society. What kind of government countenances their being put at ultimate risk of stock market movements. One could go on to point out that the noisy national debates about the increasing costs and decreasing quality of educational and medical services seem eternally focused on which corporate entity will profit the most from the proposed solution. The critical question – what is the best alternative for the consumer – has dropped from the political vocabulary. The perspective of the flesh and blood individual has disappeared.

The language is the language of power. Power ultimately means the capacity to allocate resources in society. There has been much attention to the increasing division between rich and

poor and the separation of the richest people from all the rest. CEOs, who were satisfied with salary levels of thirty to forty times that of entry level employees twenty years ago now think nothing of a one thousand times multiplier. These levels and distinctions were not part of the message God gave to Abraham on Mount Ararat, they were not divinely ordained, they are the result of the exercise of power. Disney, Viacom and GE, the controllers of the Press, are aggregations unimagined in more populist times. \$150 Million spent on an uncontested primary campaign for President compels the question – what is being bought? Corporatism creates its own vocabulary of scale; the individual becomes barely measurable.

“The mass media, think tanks, public relations firms, and the education system deliver the corporate message into mainstream thinking. Lobbyists influence politicians. Think tanks and foundations influence teachers and students. Advertising influences consumers. The corporate construction of reality ridicules economic and political alternatives (public ownership, proportional representation) while promoting views and choices (corporate financing of political campaigns, dependency on international trade) which come to seem inevitable. As people cease to notice that some issues aren't discussed, their desires and beliefs are manipulated in an “engineering of consent” and eventually the entire society (including the powerless who would gain from political change) internalizes a truncated agenda which favors existing power relations.”<sup>[xxviii]</sup> There is a seeming inevitability about this progression of value change due to the absence of an effective countervailing force.

#### **IV**

##### ***Resolution – A Slender Suggestion***

Where to begin the road back? We must start with Court made law. Twenty-five years ago, the United States Supreme Court significantly changed the nature of corporate personhood in the bitterly divided 5-4 decision in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1977). In holding that business corporations have a constitutionally protected liberty to engage in political activities, the Court did not base its judgment on the rights of the business enterprises, but posed a new rationale: "The Constitution often protects interests broader than those of the party seeking their vindication." This holding completes the transformation of corporations from parties entitled to some of the liberties conferred on "persons" to entities having "organizational prerogatives." Corporate "speech" has been stipulated to be a commodity of which the corporation cannot be denied and the public cannot be deprived. *Bellotti* by its terms validates the expenditure of corporate funds for political referenda that management – in its business judgment – considers relevant.

American history has been embellished by the Supreme Court famously reversing itself – *Dred Scott*, *Plessey v. Ferguson*, and *Lawrence* are conspicuous examples. The *Bellotti* vote was 5-4 and it is an open question whether the findings on which the majority based opinions would be valid today. Chief Justice Rehnquist, in dissent gives a place to start:

“There can be little doubt that when a State creates a corporation with the power to acquire and utilize property, it necessarily and implicitly guarantees that the corporations will not be deprived of that property absent due process of law.... A State grants to a business corporation the blessings of potentially perpetual life and limited liability to enhance its efficiency as an economic entity. It might reasonably be concluded that those properties, so beneficial in the economic sphere, pose special dangers in the political sphere. Furthermore, it might be argued that liberties of political expression are not at all necessary to effectuate the purposes for which States permit commercial corporations to exist. So long as the Judicial branches of the State and Federal Governments remain open to protect the corporation's interest, in its property, it has no need, though it may have the desire, to petition the political branches for similar protection. Indeed, the States

might reasonably fear the corporation would use its economic power to obtain further benefits beyond those already bestowed.” *Bellotti v. First National Bank of Boston*, 435 U.S. 765,826,827 (1977).

If the Chief Justice can persuade his present colleagues to follow his Bellotti conclusions, there would be a beginning.

We can take some comfort that there is a scenario in which corporate energy and wealth making capacity can be made available to a free society at an affordable cost. In most recent times, Milton Friedman has sharpened the discussion with insistence that the purpose of corporations is the maximization of profit for owners, within the rules, period. David Engel<sup>[xxix]</sup> has painstakingly pointed out that managers have no legitimate authority to redefine their own responsibility beyond profit optimization. Then, of course, the question must arise – who makes the rules? And, are the rules a legitimate expression of the public interest by fully informed democratically elected representatives? There is much evidence of the substantial involvement of corporations in the processes of setting standards for their conduct of business – and indeed there should be – but where is the limit of public good?

Engel articulates a useful Corporate “Bill of Rights” as being comprised of three parts:

- Full disclosure, at least to government, of all information that the corporation possesses respecting the impact of its functioning on society;
- Restraint in dealings with the electoral, political and administrative process; and
- Obedience to the law. This latter point is surprisingly necessary as law obedience today is usually just another cost effectiveness calculation by corporate management. In the Engel world, law is the legitimate expression of an informed and uncoerced democratic process.

Friedman/Engel provides a theoretical structure within which corporations can co-exist harmoniously in a democratic society.<sup>[xxx]</sup> Friedman<sup>[xxxi]</sup> mandates rigorous discipline to an economic agenda within politically formulated rules, Engel with infinite care proscribes the permissible mode of corporate involvement with these rules – full disclosure by corporations of all information having to do with their impact on society, moderation in their impact on the governing and electoral processes; and obedience to the law. Law obedience under the Friedman/Engel is a precondition of corporate existence.

Following from this, the owners of America's public held corporations will need to take on the responsibility of implementing the Friedman/Engel paradigm. Fortuitously, as mentioned above, fiduciary shareholders own a majority of the equity in America's public companies. Enforcement of the laws requiring these trustees exclusively to act in their beneficiaries' interests will provide a practical and legitimate basis for shareholder capitalism.

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[i] There is no settled terminology. Corporatism inevitably evokes Mussolini; corpocracy, although onomatopoeic, is not a recognized word, so I will make do with ‘corporate state’ in the hope that others will improve on it.

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[i] Bill Emmott, A Survey of Capitalism and Democracy, the *Economist*, June 28, 2003, p. 16.

[ii] David Streitfeld, New Iraq Contracts Offer Just Scraps, *Los Angeles Times*, August 14, 2003, Business Page 1, 11.

[iii] Paul Krugman, Thanks for the M.R.E.'s, *New York Times*, August 12, 2003, p A 21.

[iv] Republicans are, however, interested in comparable abuses by union leaders in Ullico.

[v] Microsoft, General Electric, Ford, Worldcom, IRM, General Motors, Enron, El Paso Energy, Colgate-Palmolive and Navistar

[vi] Susan Lee, The Enron Report, *Wall Street Journal*, August 15, 2003.

[vii] Andrew Revkin and Katharine Seelye, Report by the E.P.A. Leaves Out Data on Climate Change, *New York Times*, June 19, 2003

[viii] Employees' Retirement Income Security Act of 1974

[ix] This includes employee benefit plans regulated by the Department of Labor under ERISA, mutual funds regulated by the SEC under the Investment Company Act of 1940, and bank trusts regulated by the Federal Reserve and the Comptroller of the Currency.

[x] The "Lowest Unit Charge ("LUC") provision was adopted in 1971 as Section 315(b) of the Communications Acts and is observed in the breach. See Taylor, *infra*.

[xi] Paul Taylor, Gouging Democracy: How the Television Industry Profiteered on Campaign 2000, Appendix 1; Oregon Follow the Money: Money in Politics Research Action Project; BIA Financial Network, Inc.

[xii] The shareholders of American corporations have virtually no power to effect control by incumbent managements. Note, *supra*, the implications of government failure to enforce ERISA.

[xiii] In 1980, President Carter and the Congress effected a rare federal incursion into the private sector by authorizing \$82 billion for the United States Synthetic Fuels Corporation. Congress had been persuaded that the market place could not be relied on to develop alternatives to oil and natural gas soon enough to liberate the country from its dependence on Middle Eastern sources. By creating a special purpose corporation to meet a specific public need the government was returning to the origins of Anglo Saxon corporation history.

[xiv] Brandeis, dissenting in *Liggett v. Lee*, 288 U.S. 514, 458 (U.S. Sup. Ct. 1933).

[xv] Sykes, Allen, Capitalism for Tomorrow – Reuniting Ownership and Control, (Capstone, 2000) p.55.

[xvi] Monks, Robert and Sykes, Allen, Capitalism without Owners will Fail, (Center for the Study of Financial Institutions, November 2002), Introduction.

[xvii] See <http://www.ragm.com>

[xviii] *Wall Street Journal*, *op.cit.supra*.

[xix] This conclusion adds to our impatience with the legal classification of corporations as "persons".

[xx] Scott Turow, "The High Court's 20-Year-Old Mistake", *New York Times op-ed* Sunday, October 12, 1997.

[xxi] Ted Nace, *Gangs of America*, (Berrett-Koehler 2003), p. 170.

[xxii] *Monks and Minow, Power & Accountability*, (Harper Business, 1991)

[xxiii] Richard H. Robbins, *Global Problems and the Culture of Capitalism*, (2d, Ed, 2002) p. 90 quoting noted author David Korten.

[xxiv] *Financial Times*, August 14, 2003

[xxv] Ted Nace, *Gangs of America – the rise of corporate power and the disabling of democracy*, (Berrett-Koehler, 2003) p. 185,186.

[xxvi] Robert Pear and Richard A. Oppel, Jr., *Election Gives Drug Industry New Influence*, *New York Times*, November 21, 2002.

[xxvii] Leslie Wayne, *Butting Heads with the Pentagon – Old Friend in House for Military Wants to Force it to 'Buy America'*, *New York Times*, July 23, 2003, at p. C1.

[xxviii] George Draffan, *The Corporate Consensus: A Guide to the Institutions of Global Power*, (November 2000) at <http://endgame.org/corpcn1.html>

[xxix] 32 *Stanford Law Review* 1 (1979)

[xxx] Hopefully, this may answer the implicit question with which Charles E. Lindbloom concludes *Politics and Markets*; "The large private corporation fits oddly into democratic theory and vision. Indeed, it does not fit."

[xxxi] And, perhaps, more importantly, Friedrich Hayek.