Robert A. G. Monks

The Emperor's Nightmare

Copyright 2022. De Gruyter. All rights reserved. May not be reproduced in any form without permission from the publisher, except fair uses permitted under U.S. or applicable copyright law.

EBSCO Publishing : eBook Collection (EBSCOhost) - printed on 2/8/2023 12:49 PM via
AN: 3181074 ; Robert A. G. Monks.; The Emperors Nightmare : Saving American Democracy in the Age of Citizens United
Account: ns335141

The Alexandra Lajoux Corporate Governance Series

Edited by
Alexandra Reed Lajoux

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Robert A. G. Monks

The Emperor's Nightmare

Saving American Democracy in the Age of *Citizens United*

DE GRUYTER

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

ISBN 978-3-11-069695-0
e-ISBN (PDF) 978-3-11-069699-8
e-ISBN (EPUB) 978-3-11-069705-6
ISSN 2629-8155

Library of Congress Control Number: 2021951752

Bibliographic information published by the Deutsche Nationalbibliothek
The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at http://dnb.dnb.de.

© 2022 Walter de Gruyter GmbH Berlin/Boston
Cover image: sharrocks/iStock/Getty Images Plus
Typesetting: Integra Software Services Pvt. Ltd.
Printing and binding: CPI books GmbH, Leck

www.degruyter.com

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Nell Minow

Intelligence   Integrity   Persistence

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Advance Praise for *The Emperor's Nightmare*

A powerful book, with wide-ranging knowledge and fearlessness that make each page a must-read. As I prepare to teach Constitutional Law, at a time when what the courts are doing tends to undo all I had hoped to teach, this analysis will inform me and hence my students.

Martha Minow
300th Anniversary University Professor
Harvard University

In the midst of a pandemic with an economy awash in idle liquidity, marking little difference between fiat currency and cryptos, and with broad acceptance of rigged markets, comes this bright book to pierce the gloom. *Nightmare* awakens us by casting light on a path of universal returns for the different franchises of corporate life.

Dean LeBaron
Former Chairman, Batterymarch Financial Management,
current family investment trustee

The tide of cheap money has started to turn, and I suspect that the coming washout will reveal a great deal of ugliness. The painful deleveraging will have quite an impact on the corporate world, and I suspect on how it is perceived as well. It may make the land fertile for reform. I hope so, and I also hope that the message of this book will be heard when that time comes, as come it will.

Paul Lee
Head of Stewardship, Radington

I just finished *The Emperor's Nightmare*, and feel as if I have been on a fascinating trip. An impressive piece of work and I will be remembering it as I read the news day by day with a better understanding of what is going on. That is the kind of thing one relies on, and I thank you for providing me with a valuable bank of information that I would never otherwise have had access to. This book will raise some hackles but it should be required reading in American history, business, law, and other studies.

Dean Howells
US Senior Executive Service, Retired

Calm, reasoned, factual and terrifyingly relevant, this book is a roadmap for escaping the noxious sleaze into which America is sinking. Incremental tinkering will NOT do. Read it . . . then do *your* part. And recruit your friends.

Bill Russell, Executive Producer *SunOx Syndicate*

https://doi.org/10.1515/9783110696998-202

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

The message of this highly readable book is clear. Corporate owners must take responsibility for their external impact on the world around them. Of all the books written by Bob Monks, this one may have the greatest impact.

Ric Marshall
Governance Analyst

Milton Friedman famously said that businesses could legitimately focus on profits as long as they played by the rules, but Bob Monks' *Nightmare* shows how businesses are using revolving doors and political payments to change the rules—from trade and antitrust to taxes and health insurance.

Jim McRitchie
Corpgov.net

A compelling condemnation of politics hijacked by corporations to the detriment of citizens – in the name of citizens.

Knut A. Rostad
President, Institute for the Fiduciary Standard

"Common Sense" has not had a greater champion since Tom Paine, nor a greater defender of democratic principles than Mr. Monks as he eviscerates today's raging Corpocracy. With a page-turning style rivaling fiction, his *Emperor's Nightmare* is *ours*. It's not inevitable. Mr. Monks' incisive revelations and prescriptions are starting blocks for reversing the carnage and resuscitating our failing democratic experiment.

Paula Gordon
Host, *The Paula Gordon Show*

Bob Monks is a prophet and prince in service to the cause of American democracy. For more than seven decades, he has aimed at the bullseye of self-evident truths, particularly in the realm of capital markets and corporate enterprise where they typically are trumped by profit and personal gain. *The Emperor's Nightmare* is a finely-woven treatise on the moral struggle between the Great and the Good, wherein noble intentions become corrupted by self-interest, affecting not just commerce but democracy and planetary well being. His discussion of America's kleptocratic tendencies — aided and abetted by Wichita, Wall Street, and Washington — walks the reader through the fires of faux-populism and the forces behind the January 6 insurrection. The book is a primer on money power gone bad, essential reading for anyone wishing to save ourselves from ourselves and restore America's representative self-governance in the process. Without succumbing to frothy utopianism, Monks applauds current efforts regarding responsible corporate ownership and accounting (realms he helped to create) but argues that innovations in federal and constitutional

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

law remain our last best hope. Deeply grounded in what he preaches, Monks' voice is both pragmatic and prophetic. Guardians of the public interest, take note: This is a clarion call for muscular civic stewardship, rightly understood.

Dr. Marcy Murninghan
Founder, Equity Culture/Civic Fiduciary Action Labs

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Acknowledgments

This book is in many ways the story of thirty years in a lifetime's journey, so I gratefully acknowledge the involvement of my partners all these years – Dwight L. Allison, Jr., Nell Minow, and my son Bobby Monks.

I am particularly indebted to several persons who have contributed to the intellectual base of the Corporate Governance movement. The two pillars are A. A. Berle and James W. Hurst. Their wisdom has sustained us for most of a century. A leader in virtually every aspect of the impact of corporations on American society is Ralph Nader. His continued commitment has been a sustaining inspiration for us all.

Among the current legal scholars, we all owe perhaps our greatest debt to Lucian Bebchuk, who has fearlessly and effectively confronted the "conventional wisdom" of those whose principal job is to represent large corporate clients and whose publications reflect their interests. Also deserving of recognition are Patti Lynn, leader of Corporate Accountability, by my token the most effective and imaginative "activist" and "accomplisher"; Hazel Henderson, my "favorite economist" as the advocate of holistic values for corporations; and Knut Rostad, the regenerator of the central importance of fiduciary standards. Jack Coffee has published incredibly clear and well-reasoned articles and books on some of the most difficult of the problems in the Governance lexicon. I only wish that he had been on the US Supreme Court. Bebchuk was the founder and intellectual guide of the Harvard Law School Forum on Corporate Governance, perhaps the principal source of modern thinking on governance subjects in the world.

Other people deserve recognition as well. Steven Davis was the founder and principal guide of Global Proxy Watch, the "industry's" newsletter that keeps us all in touch. Jim McRitchie is another important communicator, as the publisher of CorpGov.net, the oldest and longest running website for governance information. McRitchie is also one of the most persistent and insightful authors of shareholder resolutions, raising issues that would not otherwise have been brought to the attention of shareholders. Charles M. Elson for twenty years held the Edgar S. Woolard Jr. Chair in Corporate Governance and was the director of the John L. Weinberg Center for Corporate Governance at the University of Delaware and remains a leader in expounding on current governance concerns. The Chayes, father Abram and daughter Sarah, have uniquely helped me. Abe was my corporations law professor and Sarah has exposed how corruption is the core of corporate failure.

In particular, Gillian Tett and John Plender, writing in the *Financial Times* have been leaders in informing the public on critical governance matters particularly in the United States and the United Kingdom.

Specifically, I acknowledge the continuing excellence of Paul Hodgson's help in creating graphs that I feel explain my message with unmistakable clarity; my once and forever son-in-law Ric Marshall continues as a professional in this "industry"

https://doi.org/10.1515/9783110696998-203

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

and does me the favor of keeping me up to date. John Higgins is my financial reality check, along with Bruce Freed, whose analysis of corporate and political finance is invaluable.

I have again benefited from the superb editing of, father and son, Howard and Nathan Means. Gratefully humble is how I describe my feelings about their improvement of my work as it does my longtime joy in the incredible intellectual range of Alexandra Lajoux's editorial enthusiasm. My assistant, Diane Mulligan, has succeeded in imposing order, thank you!

In closing, I would like to thank Stefan Giesen, editorial director for business and economics at De Gruyter, as well as his colleague Jaya Dalal, content editor and de facto project manager. Thanks also go to copy editor Mary Sudul, project manager Mervin Ebenezer, and indexer and proofreader Denise Pangia.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Contents

Acknowledgments —— XI

Preface: A Beautiful Fantasy —— XV

Chapter 1
The Real World —— 1

Chapter 2
Accountability Decouples from Regulation —— 15

Chapter 3
Powerball —— 30

Chapter 4
$100 Million Here, $100 Million There —— 49

Chapter 5
It's Alive! —— 60

Chapter 6
Masters of the Universe —— 72

Chapter 7
The Wichita Mafia —— 91

Chapter 8
The Storming of Democracy —— 108

Chapter 9
Stepping Out of the Past —— 122

Chapter 10
The American Corporation, and What We Can Do About It —— 133

Epilogue: A 28th Amendment —— 151

Appendix A —— 161

Appendix B —— 169

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Appendix C —— 181

List of Figures —— 193

Bibliography —— 195

About the Author —— 205

About the Series Editor —— 207

Index —— 209

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Preface: A Beautiful Fantasy

A little over twenty years ago, I authored a strangely optimistic book about corporate functioning in American society. "Strangely" for two reasons. First, I have a long history of shareholder activism, have been the scourge of more than a few annual meetings, and am the founder of multiple enterprises meant to hold corporations' feet to the fire, including Lens Governance Advisors, a law firm that advises on governance in the settlement of shareholder litigation; and Institutional Shareholder Services, which counsels shareholders with assets in excess of $1 trillion on how to vote their proxies. Second, and closely related, there was little reason for optimism back then when it came to corporate functioning.

And yet I persisted, again for two reasons: (1) because I found the thought of total corporate capture of this nation too dark to accept, and (2) because I had found a bright ray of hope in the then-emerging science of *complex adaptive systems*.

Corporate life, I came to see, has two different aspects. One is the drive toward limitless life, size, power, and license. This is the corporation's basic programming, its systemic drive, what it wakes up in the morning to do, and why it so frequently is at war with the interests of human beings. This aspect of the corporation makes it a kind of rogue leviathan – a vast mechanistic system with a lifelike force but without the human range of emotions, including compassion, sympathy, even love.

But corporations are also complex adaptive systems open to renewal, and this I saw as their saving grace. This living complexity of corporations – their tendency toward multiplicity, spontaneity, accommodation, adaptability, transformation, and metamorphosis – links them to us humans. It makes them capable of serving our purposes for we, too, are complex adaptive systems, and superior ones at that!

Through our human ingenuity, I reasoned, we can see what is missing in the corporate system today – accountability, to be exact, plus active and well-informed shareholder-owners to assure it – and by restoring accountability in each and every corporation, one at a time if need be, we can ensure that the corporations in our lives adapt not only to the environment in general, but to us humans as well.

By way of illustration, I wove through Hans Christian Andersen's timeless fairy tale "The Emperor's Nightingale," which tells the story of a Chinese ruler renowned for his vast, highly mannered gardens and many priceless possessions, all maintained with great control and artifice.

In the forest beyond this artificial world lives a nightingale whose song gives comfort and strength to the commoners who toil at the emperor's whim, but he knows nothing of the songbird's existence until visiting dignitaries write books about it. Overcome by jealousy, the emperor seeks out the nightingale and commands it to live and sing in his court, where the nightingale charms the nobles in attendance. All seems well until a rival Japanese emperor presents his Chinese counterpart with a mechanical nightingale, made of gold, who sings the same song time and again, and quickly becomes the new darling of the royal assemblage.

https://doi.org/10.1515/9783110696998-205

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

By the time the emperor pleads with his subjects to listen again to the real bird, it is long gone. Only when the golden bird breaks down and the emperor nears death does the living nightingale return to sing. Revived, the emperor vows to "smash the golden nightingale into a thousand pieces," but the true nightingale urges him to keep it in a place of honor. When the emperor begs the nightingale to stay, it declines. Instead, the bird will live in the forest, returning every evening to sing to the emperor the entire truth of his empire.

"And so," I wrote, "the dynamic and the predictable are reconciled. Both are part of the human experience and always will be."

I named that book *The Emperor's Nightingale* because Andersen's beautiful fantasy was a more than useful metaphor for the corporate system, I then still thought possible, one in which both complex adaptive systems – humans and corporations – could find a middle ground that balanced profit and progress, capital and caring, human endeavor and human needs. I expressed that hope in the subtitle: "Restoring the Integrity of the Corporation."

For both continuity and contrast, this book is titled *The Emperor's Nightmare* because that is what my beautiful fantasy has become. Rather than witness the restoration of integrity to our corporations, the two-plus decades between that earlier book and this one have facilitated the wholesale capture of American democracy by corporate interests, knowingly aided and abetted by the US Supreme Court and unchecked by either of the major political parties, or by popular culture for that matter.

Through Republican and Democratic administrations, by neglect and intent, regulatory authority has been neutered virtually to the point of meaninglessness. In both chambers of Congress and in statehouses across the country, legislators stuff their campaign coffers with corporate largesse, sing from the appropriate hymnal, and rise in veneration to CEOs who are immune from prosecution but not to actions that in a saner time might well have landed them in the witness box.

Corporate boardrooms from sea to shining sea are chockablock with passive, compromised directors happily signing off on executive compensation packages that bear little or no relation to performance, need, or even the barest semblance of decency. Everything from reality TV to the lofty heights of the annual World Economic Conference at Davos, Switzerland, bends a knee to the dominance of wealth over wisdom. Meanwhile, corporations increasingly are setting themselves up as, in essence, self-ruling city-states, effectively beyond the rule and often the taxing authority of the nations that harbor them.

I raised this point at the May 2003 ExxonMobil annual shareholders meeting, in comments addressed to then Chairman Lee Raymond:

> As we speak, the eight great nations are meeting in St. Petersburg. It is not beyond possibility that sometime in the future they would expand this number. If they did so, ExxonMobil could be invited to the meeting, as it is today the 21st largest economic system in the world. And, Mr. Chairman, you have less restraints on the exercise of power than any of the leaders of countries today. The scope of your operations – as you so brilliantly described them to us earlier in

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

> this meeting – is global, and goes beyond the usual language of business into politics and foreign policy. The scope of your power, Mr. Chairman, is truly imperial. You are an Emperor.
>
> In referring to you as Emperor, Mr. Raymond, I meant no disrespect. I use this language to point out the real nature of the problem of governance for ExxonMobil. You have the nature of a country. The board must think more in terms of the mode developed for a national system and stop trying to apply the business precedents which ExxonMobil has grown out of. As Americans, we must think with pride of the care that the Framers of our Constitution organized a system in which the power of the Chief Executive was effectively accountable to that of a Congress and a Supreme Court. ExxonMobil is an empire and the board needs to look at the political model to find a counterforce for the power of the executive. Mr. Raymond, if you don't like what I say, you have only yourself to blame. You are a victim of your own success . . .[1]

That was almost twenty years ago. Emperors were much on my mind back then. They remain so today, although not in the pliant and benign form I once thought possible.

As I write this, the Biden administration is halfway through its first summer. I admit to seeing flashes of hope there, echoes of FDR, an awareness that corporate overreach in America has metastasized into something far more sinister, even regulators who seem intent on actually trying to regulate. *Mirabile dictu!* But actions as ever speak louder than words, and what one administration might do can too easily be undone by the next unless those actions are enshrined in federal law and embedded in our foundational documents.

Those are the two notes this book ends on – not the voluntary exercise of responsibility by corporate shareholder-owners that I once thought achievable but a legal and Constitutional framework that will compel responsibility, limit corporations to specific purposes as was once the case, and rebalance America in favor of those of us who live within its borders, not the increasingly borderless corporations who strive so hard to transfer their externalities like so much recyclable trash.

First, though, a look at how we got here.

---

1 Monks, Robert A.G., speech, Annual Meeting of Shareholders of ExxonMobil held on May 28, 2003, in Dallas, Texas.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Chapter 1
The Real World

> The modern business corporation emerged as the first institutional claimant of significant unregulated power since the nation state established its title in the sixteenth and seventeenth centuries.
> – Abe Chayes[1]

In late 2012, Claire McCaskill, the senator from Missouri, was walking through a hallway in the US Capitol when she passed by Tom Donohue, then in his 15th year as president of the US Chamber of Commerce. The Chamber had just spent millions of dollars on attack ads trying – and failing – to defeat McCaskill in her reelection campaign.[2] According to McCaskill, she collared Donohue to razz him about his poor return on investment. Donohue, she said, turned red and told her not to take it personally.[3]

In fact, targeting McCaskill was not personal, but it also wasn't necessarily about promoting business interests in Missouri. In 2009, Donohue himself had awarded McCaskill a "Spirit of Enterprise" award for her "support of pro-business issues." Three years later, however, he tried to roll her as part of a national, partisan game: locking in another GOP seat in the Senate.

This was not the way the US Chamber of Commerce had always operated. The organization had traditionally maintained a non-partisan veneer – one that reflected the politics of its members. By 2012, however, the Chamber was sending 87 percent of its money to Republican candidates. (This is a continuing trend: in a 2020 Gallup poll, small business owners were split evenly between Donald Trump and Joe Biden,[4] but the Chamber sent 73% percent of its money to Republicans.[5])

Donohue's aggressive efforts to knock off McCaskill not only failed; they also alienated local business leaders, many of whom had strong ties with the senator. The local Kansas City chamber quit the national organization after the attacks on McCaskill.

"What was disheartening," Jim Heeter, the local chamber president said, "was that so much money was being spent in a very negative way." But it wasn't negative

---

1 Abe Chayes, Foreword to Mark J. Green and Ralph Nader, *Corporate Power in America*, p. vii (Grossman Publishing, 1973).

2 https://news.stlpublicradio.org/government-politics-issues/2012-08-03/major-figures-major-money-swoop-into-missouris-hot-gop-senate-contest (accessed October 11, 2021).

3 https://www.nytimes.com/2013/06/02/business/how-tom-donohue-transformed-the-us-chamber-of-commerce.html (accessed October 11, 2021).

4 https://news.gallup.com/poll/284396/small-business-owners-highly-engaged-2020-election.aspx (accessed October 11, 2021).

5 https://www.opensecrets.org/orgs/us-chamber-of-commerce/recipients?id=D000019798 (accessed October 11, 2021).

https://doi.org/10.1515/9783110696998-001

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

just in the sense of serving no end. The Chamber was spending millions of dollars in dark money to tighten the grip of corporations on American politics.

By 2012, Donohue was well into his successful transformation of the Chamber of Commerce, a mission he colorfully described as building "a grass-roots business organization so strong that when it bites you in the butt, you bleed."[6] He had certainly succeeded in creating a more politically aggressive Chamber, but it was hardly a "grass-roots business organization." While chasing corporate money to fund the Chamber, Donohue had veered away from Main Street, transparency, and democratic principles.

Missourians, and the membership of local chambers across the country, could at least track the Chamber's direct political contributions to candidates. But the Chamber's most muscular efforts – it is an unparalleled monster of lobbying – are funded much more opaquely. Between 1998 and 2020, the Chamber spent $1.7 billion funding a small army of well-connected lobbyists, more than twice as much as any other company or interest group spent.

Funding this kind of operation requires the kind of investment only massive corporations and the ultra-wealthy can provide – groups that can give as much as they want anonymously. Investigations show that the Chamber's coffers are largely filled by some combination of the five sources that can afford to consistently contribute over $50,000: (1) publicly held Fortune 500 companies; (2) privately held businesses like Cargill, Koch Industries, and Albertsons; (3) foreign companies eager to plug into the Chamber's well-advertised American political machine; (4) third-party organizations aligned with the Chamber's politics on some issues – the Karl Rove-run American Crossroads Super PAC has contributed $5.25 million to the Chamber while the Koch-controlled Freedom Partners has kicked in $2 billion – and (5) wealthy individuals giving huge sums, such as billionaire media heir Stan Hubbard, who claims to have written at least one six-figure check to the Chamber.[7]

The result of this funding model is that, rather than an interest group for commerce, the Chamber has become a hybrid money launderer/lobbying shop for transnational, ultra-wealthy, and corporate interests. Rather than a feisty voice for businesses of all sizes, it is the go-to place for corporations that want to anonymously lobby on politically toxic issues, from climate change to consumer protections to tax cuts for the wealthy. Rather than being an important stakeholder in a transparent and democratic process, the Chamber has become a sun-blocking behemoth behind which corporations can hide.

In 2018, Donohue even got the last laugh. Claire McCaskill was defeated in an election that attracted over $25 million in reported donations from outside Missouri,

6 https://www.latimes.com/entertainment/la-na-chamber8jan08-story.html (accessed October 11, 2021).

7 Dan Dudis, *The Chamber of Secrets*, p. 18 (Public Citizen, 2017).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

including millions from the Chamber. The total spending may never be known, however, because it included millions more in anonymous dark money.[8] Too often, this is what American democracy looks like.

Of course, as the 1973 Abe Chayes quote at the start of this chapter makes clear, corporate dominance over politics didn't begin or end with Donohue's efforts. In fact, two documents issued within a few years on either side of Chayes' warning – and 50 years before McCaskill's and Donohue's Capitol Hill encounter – worked to embed in American economic, political, and even cultural life exactly the modern business corporation Chayes cautioned against. Both were the work of one man – Lewis F. Powell – and appropriately enough, the first of the two documents was commissioned by the very same US Chamber of Commerce we have just been discussing.

Powell was still a corporate lawyer – frequently described as "courtly" because of his southern roots – when, on August 23, 1971, his neighbor and the Chamber's education director, Eugene Sydnor, hired him to write a confidential report to be titled "Attack on the American Free Enterprise System." As was his wont, Powell put his very considerable all into it, producing an anti-New Deal, anti-Communism memorandum that has been shaping America and the Chamber ever since.

Powell's strategic recommendations in particular have been one of the most significant factors in the restoration and elevation of Big Business's position and power to its present institutional dominance. This success, characterized by the monarchical dominance of the Chief Executive Officers in modern society, has been achieved through depriving owners – that is, shareholders – of their traditional and statutory powers of requiring that management be accountable.

Whether it was a *quid pro quo* or coincidence, within scant weeks of Powell's delivering his blueprint for corporate hegemony to the US Chamber, Richard Nixon nominated him to the US Supreme Court to fill the seat vacated by Hugo Black, and Powell, who two years earlier had turned down a similar offer from Nixon, this time accepted. It was in his new capacity as Justice that Powell in 1978 delivered a more direct body blow to those who might curb the power of the corporate juggernaut: the majority opinion in *First National Bank v. Bellotti*.

In his 1971 memorandum, Lewis Powell had written that, "No thoughtful person can question that the American corporate governance system of democratic capitalism is under broad attack." In *Bellotti*, he armed corporations for the combat ahead by conjuring up the concept of "corporate speech" and promulgating as "the law of the land" the First Amendment right of corporations to make political donations to ballot-initiative campaigns, essentially paving the way for the Court's decision more than three decades later in the infamous *Citizens United* case (about which much more in Chapter 5 and beyond).

8 https://news.stlpublicradio.org/government-politics-issues/2018-08-27/missouris-senate-contest-is-favorite-destination-for-outside-money (accessed October 11, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

The repercussions of Powell's double-whammy are everywhere, from the US Chamber of Commerce, which commissioned Powell's memorandum, to the Business Roundtable, formed in 1972 to implement Powell's recommendations specifically to the advantage of CEOs, to think tanks like the American Enterprise Institute and the Heritage Foundation, to the more recent flowering of xenophobic "America First" or so-called "nativist" institutions (usually the work of one person or family), and culminating in the massive commitment of the Koch family across all elements of the social-political spectrum: educational institutions, consulting companies, model legislation for states, selection of candidates, active participation in primaries, and on and on – funded by virtually limitless money and backed by an army of well-paid lawyers, public-relations advisors, and infinitely more lobbyists than were even imaginable when Lewis Powell first sat down to write his seminal blueprint.

United States of Lobbyists

In fact, the changes in "lobbying" over the last half-century almost require a different vocabulary to fully communicate, starting with the definition of lobbyists. Half a century ago, it was generally thought to be bad form in Washington for a former member of Congress to hang a new shingle as a lobbyist. No more. Today fully half of all retiring Congresspersons accept their very satisfactory pensions but don't really retire at all. They simply reposition themselves as Washington lobbyists, where in some ways they can focus even more intently on influencing legislation because their constituents are no longer messy voters but rather laser-focused and deep-pocketed corporations free to spend virtually at will. At the very top end, they sometimes don't even wait for retirement. In 2010, South Carolina freshman senator Jim DeMint nearly tripled his salary in one fell swoop by quitting the Senate mid-term to take over as head of the Heritage Foundation – a partisan lobbyist in effect, but now in the corner C-Suite and wearing a bespoke suit.

Likewise, former Congressional staffers often leave the Capitol in title only. Many rent themselves out as "special lobbyists" for specific pieces of legislation. Over time, the lobbyists to the various committees have a permanence that the members – particularly House members facing every-two-year elections – do not. Look down from 30,000 feet, and it is almost as if the lobbyists are the permanent government, while the members are transient.

What's more, this shadow permanent government only grows and becomes more complex as time passes, so much so that it becomes ever more difficult to discern who truly is a "lobbyist" within the spirit of the regulating legislation. In 1971, about 175 big companies had full-time lobbyists – benignly christened as "public affairs offices" – in Washington. By 1978, five hundred did, and just four years later, in the second year of Ronald Reagan's first administration, nearly 2,500 corporations employed Washington lobbyists.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

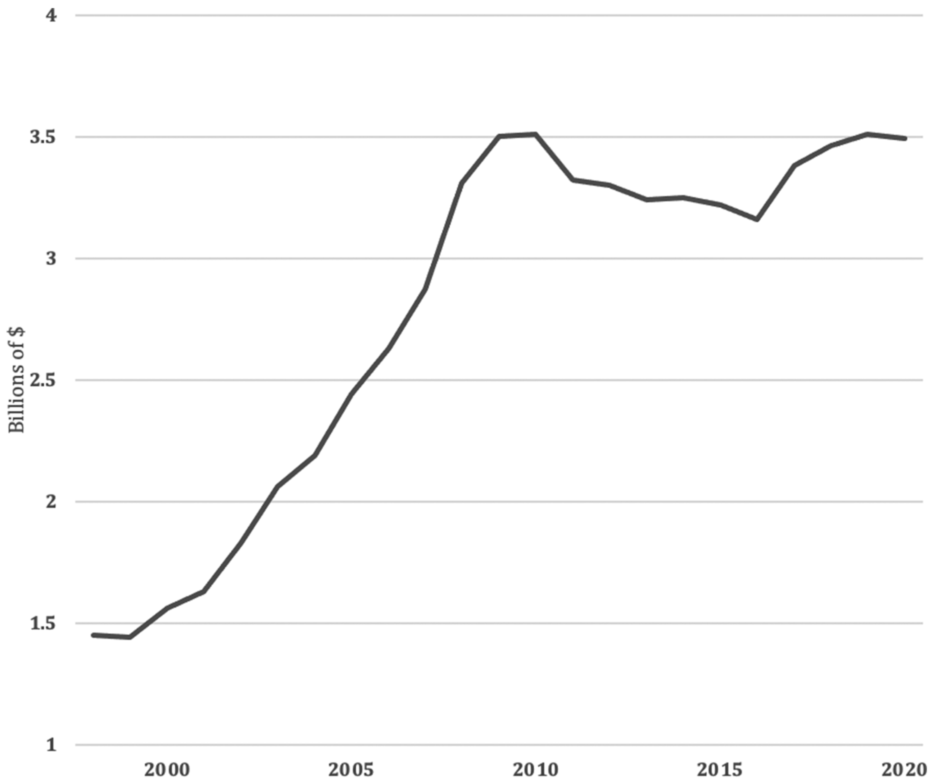


Fig. 1.1: Shadow Permanent Government.
Source: OpenSecrets.org
Note: The total number of Washington-based lobbyists has grown only marginally since the start of the century – from 10,000 to 12,000 – but lobbying spending had more than doubled in the first decade and has held fairly constant (and constantly opaque) ever since.

Jump ahead sixteen years, and one chart (Google) counts 10,000 lobbyists in 1998 at a cost of $1.5 billion. Leap forward another two-plus decades to the current day, and the numbers haven't changed dramatically – from 10,000 to 12,000 in 2020 – but expenditures have gone ballistic: from $1.5 billion to $3.5 billion, an enormous percentage of that "dark money" that need not be publicly accounted for, thanks to the long shadow of Lewis Powell and others (Fig. 1.1). The financial industry alone spends about half a billion a year on Washington lobbying, about a million dollars per member of Congress. As Kurt Andersen notes in *Evil Geniuses*, there's a certain piggishness about it all that fits well with the winner-take-all politics of recent times.[9]

Who are all these lobbyists, registered and otherwise? What do they do? That's almost impossible to say, but their influence is all around us.

9 Kurt Andersen, *Evil Geniuses: The Unmaking of America*, p. 185 (Random House Kindle Edition, 2020).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

In his 1971 memo, Lewis Powell wrote that,

> the most disquieting voices joining the chorus of criticism come from perfectly respectable elements of society: from the college campus, the pulpit, the media, the intellectual and literary journals, the arts and sciences, and from politicians. In most of these groups the movement against the system is participated in only by minorities. Yet, these often are the most articulate, the most vocal, the most prolific in their writing and speaking.
>
> Moreover, much of the media – for varying motives and in varying degrees – either voluntarily accords unique publicity to these "attackers," or at least allows them to exploit the media for their purposes. This is especially true of television, which now plays such a predominant role in shaping the thinking, attitudes and emotions of our people.
>
> One of the bewildering paradoxes of our time is the extent to which the enterprise system tolerates, if not participates in, its own destruction.

It's a clear and present measure of how triumphant Powellism has been over the last half-century that we can use almost his very words above, turned around, to describe our current condition.

The most disquieting voices joining the chorus for corporate hegemony also come from perfectly respectable elements of society: from the nonprofit "think tanks," from charitably endowed institutions, and via the high percentage of graduates of "the best colleges" enrolling in "finance capitalism," to say nothing of their professors. Moreover, much of the media for varying motives and in varying degrees either voluntarily accords unique publicity to high-profile defenders of the corporate status quo – think of the late Rush Limbaugh – or at least allows them to exploit the media for their own purposes. Given that most of the media, including the TV, are owned and theoretically controlled by corporations and their CEOs, this should come as only a minor surprise, if one at all. But counterbalancing voices struggle mightily to be heard.

Indeed, one of the bewildering paradoxes of our time is the extent to which the democratic system tolerates, if not participates in, *its* own dismantling, precisely as predicted by another Supreme Court justice participating, on the dissenting side, in the *Bellotti* decision. "A nation," Byron White once famously wrote, "is not obligated to destroy itself." Perhaps not obligated, but increasingly, this nation does seem hell-bent on doing so, with the Court leading the way.

Elusive Corporations

Americans are taught to look to the US Constitution for guidance on the basic role of key institutions, but when it comes to corporations, the nation's founding document is mute. The First Amendment provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," but there is no guidance, indeed no mention, in the Constitution of the legal and institutional

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

characteristics of corporations. In fact, quite to the contrary: The Tenth Amendment, by default more than anything else, throws the matter up to the individual states when it provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Thus, in the United States, corporation law is a matter of prevailing statutes in the state where a corporation is registered, not necessarily in the states where the corporation does the bulk of its business. If, for example, all the corporations registered in Delaware built their factories and their distributions centers within Delaware's borders, there wouldn't be room for a single residence in the Blue Hen State. In testimony before a California legislative committee in early 1988, I said, "Delaware can make its laws as permissive as it wants because it bears such a tiny proportion of the consequences."[10] Worse, this disconnect between law and consequences creates an enforcement nightmare and drives competition between the states to bow down ever lower to corporate wants, needs, and outright demands in order to secure the tax benefits of their residency. Worse still, it imposes the consequence-free whims of small-state legislatures on the vast proportion of Americans who live in big-commerce states where corporations would never dream of incorporating. This is an inequity on the face of it.

Chief Justice John Marshall did write at length about the sanctity of a corporate charter, judging it conformed with the meaning of the "contracts clause" of the Constitution and thus was the subject to the ultimate authority of the US Supreme Court: "The task of interpreting how to treat corporations under the Constitution was left to the court from the very beginning . . ." But although the Supreme Court has decided a range of cases (not all consistent with each other) involving the power of corporations in society, it has never definitively answered the question: What kind of beast is a corporation?[11]

The answer to that question has varied over time from a government charter with a public purpose, to an association of related members, to an amalgam of contractual relationships, to – in most recent times – a kind of non-person person. For practical purposes, a corporation is whatever five justices say it is, but without an agreed definition, it is hard to imagine developed judicial principles informing the continuing relationship of corporation and state.

The absence of developed judicial principles, in turn, sabotages the careful balance of competing interests that in theory underlies all American government and reduces the struggle to contain corporate overreach in our own time from a regulatory

---

10 Testimony of Robert A.G. Monks before McCorquodale Committee, January 20, 1988.

11 For more, see Margaret Blair and Elizabeth Pullman, *The Supreme Court's View of Corporate Rights: Two Centuries of Evolution and Controversy* (Harvard University Press, 2017); and Naomi Lamoreau and Will Novak, Eds., *Corporations and American Democracy*, pp. 245–248 (Harvard University Press, 2017).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

contest, as it once was, to a contest of raw power at a time when the Supreme Court is the most politicized and pro-business in history and when special agencies like the Securities and Exchange Commission, charged with implementing such corporate-restraining federal laws and regulations as do exist, have been dominated by corporate and financial interests and are largely on regulatory life-support.

Four decades ago, Melvin Eisenberg wrote that, "the American economy is a corporate system, in the sense that control of the economic factors of production and distribution is vested largely in the hands of privately appointed corporate managers." The years since have only deepened and hardened corporate capture.

As Eisenberg writes:

> This system is legitimated on three major bases. The first is a belief that the shareholders, as the owners of the corporation, have the ultimate right to control it. The second is that corporate managers are accountable for their performance. The third is a belief that placing control of the factors of production and distribution in the hands of privately appointed corporate managers, who are accountable for their performance and who act in the interest and are subject to the ultimate control of those who own the corporation, achieves a more efficient utilization of economic resources than that achievable under alternative economic systems.[12]

A Taxonomy of Owners

In the fantasy world I posited in my earlier book, and sketched in the Preface to this book, this isn't how things worked out. Just as voters can be said to have supreme authority over not just the elected branches of government but the Supreme Court as well – voters after all elect the executive and legislators who respectively choose and approve the appointment of Justices – so shareholders, who elect corporate directors, might be considered to have final authority over corporate functioning. More than a century ago, testifying before the Senate, Justice Louis Brandeis left no question about the moral responsibilities attendant upon such authority:

> To my mind there is no such thing as an innocent purchaser of stocks. It is entirely contrary, not only to our laws, but what ought to be our whole attitude toward investments, that the person who has a chance of profit by going into an enterprise, or the chance of getting a larger

12 Melvin Aaron Eisenberg, 89 Columbia Law Review {1461, 1523 (1989)}. In *Power & Accountability* (1991), I commented as follows: "There is some serious question as to whether the system actually works in this country in the way contemplated by Eisenberg. What is clear is that the only real alternative to effective ownership involvement is increased government concern. If it becomes readily apparent that the mechanisms of corporate democracy are wholly fictitious, the rationale for the state and federal government not intervening in the private sector will evaporate."

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

> return than he could get on a perfectly safe mortgage or bond – that he should have chance of gain without any responsibility.[13]

But alas, the concept of the informed, motivated, empowered, and morally obligated shareholder as the basis of the legitimacy of corporate power – a concept I clung to for so long – has proven to be more rhyme than reality. Twenty years after his Senate testimony cited just above, Brandeis seemed to recognize as much in his dissent in *Liggett Co. v. Lee*:

> 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.[14]

Another 90 years further on, the elements of ownership, once considered synonymous with shareholding, have been diluted to the point of meaninglessness. To understand why, let us consider the three principal categories of shareholders:

1. *The Elite*, or as they often like to think of themselves *The Great and the Good*, include universities, foundations, family offices, and private-wealth branches of large financial institutions. This group does not participate in shareholder activism as a matter of choice. For them, activism does not pass the cost/benefit test. Further, the corporate executives in the companies they would focus on have power to direct business to them and otherwise to enhance their reputation. The converse is dramatically true: that is, activism would hurt their *entire elite* business dealings.
2. *Conflicted Fiduciary Institutions*, such as mutual and private pension funds, are estimated at 70 percent of stockholdings (including private pension plans) in the form of trusts, the preponderance of which are affiliates of ever fewer and ever larger and more densely packed financial institutions. In recent years, consolidation of investment management companies has resulted in four institutions – Vanguard, State Street, Fidelity, and Black Rock – together owning some 30 percent of the total outstanding shares in US markets. Almost inevitably, the leaders of these companies affirm their unyielding belief and participation in the various manifestos of shareholder good conduct. Yet these institutions can function as active shareholders only at the risk of antagonizing their clients. What's more, their impact on the economy is so great that courts and prosecutors have shown a persistent unwillingness to take action against these juggernauts even when their many conflicts of interest result in provable damages.

---

13 Louis Brandeis, Testimony before the Senate Committee on Interstate Commerce, 62nd Congress, 2nd Session, Hearing on Control of Corporations, Personas and Firms Engaged in Interstate Commerce (December 14–16, 1911).

14 Louis Brandeis, Dissent, *Liggett Co.* v. *Lee*, 288 U.S. 517 (1933).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

3. *Public Employee Benefit Plans*, including most notably teachers' plans. These "white-collar union" trusts have comprised the preponderance of shareholder activism. Their initiative is customarily repelled by allegations that the union movement and trustees have no business experience and, therefore, are not to be trusted as advisers to management.

Further complicating the picture is the estimate that up to half of trustee funds are held pursuant to index or algorithm. This means that no human decision-making process has caused the holding of a particular company security, which rather has appeared in the portfolio as the result of a computer program run by mathematical formula.

A very few aggressive activists do contemplate taking a principal role in the target enterprise, up to the point of acquiring it. Some, like Carl Icahn, seek to acquire as large a stake as possible and press for changes that will enable early profit and are commonly viewed as hostile. Others, like Warren Buffett, are viewed as congenial and understand that the logic of "collective action" means that their work will make profits for the non-participating shareholders – that is, free-riders. But this is a problem well beyond the resources even of a Soros or Buffett.

The upshot is that a very small and often trivialized segment of total shareholding is the reality of the activist movement – and remains so despite recent stirrings by Exxon shareholders and others. With rare exceptions, management simply cannot be convinced of the wisdom of cooperating with today's active shareholders so long as the Great and the Good decline to associate themselves with this mode of ownership involvement. Why should management acquiesce to imprecations of a "radical minority" when the recognized leaders of society's attitude toward corporate responsibility have a contrary attitude?

Lee Raymond, then-CEO and chairman of ExxonMobil, summed up management's point of view very succinctly for me at the company's May 2004 Annual Meeting.

"I have a dream," I told Raymond when I got my chance to speak. "I have a dream of a day when an Exxon chief executive officer can tell this meeting that his company, our company, is the industry leader in openness, shareholder communications, and corporate governance."

Raymond's reply: "It's neither likely, nor could it be estimated."

(Readers might have noticed by now that I was something of a fixture at ExxonMobil annual meetings once upon a time, not always to Lee Raymond's pleasure.)

The shareholder activism movement, in short, has achieved precious little over recent decades, but it might have hit its nadir in a June 23, 2010, letter from Business Roundtable Chairman Ivan Seidenberg to Office of Management and Budget director Peter Orszag. In his letter, Seidenberg complained about the implementation of a provision in Dodd-Frank (the Dodd-Frank Wall Street Reform and Consumer Protection Act) authorizing the SEC to create rules allowing for shareholder participation in the director nominating process on the grounds that it "will reduce

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

efficiency, stifle competition, and deter capital formation." In other words, allowing large long-term shareholders even to *nominate* a minority of the directors fundamentally threatens the capacity of American industry to raise money or compete. Orszag might well have agreed, or would have in his later position as CEO of Financial Advisory at Lazard, but Seidenberg's hyperbole reaches such a level of absurdity as to raise the continuing question: W*hat really is at stake here?*

The easy answer to that, perhaps, is: *Everything*. This is not merely a case of owners standing up and being counted. As John J. Flynn has pointed out, our entire system of corporate statutes is premised on exactly what doesn't and perhaps never has fully existed: shareholder control.

> Our corporate statutes assume that shareholders own the corporation, that the rights and powers of shareholders flow from their providing "risk capital," that directors shall manage the business, and that officers are agents of the corporation under the direction and control of the board, with a duty to manage the corporation for the benefit of all the shareholders. None of these claims is true.[15]

And yet if corporations cannot be regulated and controlled from without, then how will they be controlled at all? Not by self-restraint, certainly, although that is an argument frequently made in corporate circles. Nor by any fundamental tendency toward goodness. The arc of the moral universe may eventually "bend toward justice," as Martin Luther King Jr. contended; but the arc of the corporate universe bends toward profit, whether just or not, as Lewis Powell surely knew when he sat down to write his famous memorandum. How about by Constitutional protections and established principles of law then? No, not those either, at least not in their present tattered form.

We the People?

First Amendment protections for free speech were long understood to apply foremost to the citizenry itself, to the "People" of "We the People." Then in the mid-1970s the Supreme Court, now including Justice Powell, invented the idea of protected "commercial speech." Today, according to law professor John Coates, "nearly half of First Amendment legal challenges now benefit business corporations and trade groups, rather than other kinds of organizations or individuals."[16] Surely, the Founding Fathers did not envision that their very first amendment would be so employed or that such bizarre arguments would be mounted in the name of Freedom of Speech.

15 John J. Flynn, *Corporate Power in America*, Chapter VI, "Corporate Democracy: Nice Work If You Can Get It," p. 96 (New York: Grossman, 1973).
16 John C. Coates IV, "Corporate Speech & The First Amendment: History, Data, and Implications," 30 Const. Comment. 223, 224 (2015).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

As I write, ExxonMobil is involved in a suit filed by multiple California cities, accusing the company of exaggerating its efforts to combat climate change. Exxon's defense relies in large part on its contention that the cities are violating the corporation's First Amendment rights to engage in the debate over climate change – even when that debate is based on demonstrably false information. Were the case ever to rise to the attention of the Supreme Court as currently constituted, Exxon might well carry the day.

ExxonMobil and the Supreme Court, though, are only the whipping boys here for a far greater problem. Gordon Gecko caught the rising zeitgeist of the 1980s when he launched into his famous speech in the movie *Wall Street*:

> The point is, ladies and gentlemen, that greed – for lack of a better word – is good.
> Greed is right.
> Greed works.
> Greed clarifies, cuts through, and captures the essence of the evolutionary spirit.
> Greed, in all of its forms – greed for life, for money, for love, knowledge – has marked the upward surge of mankind.

Greed was a titillating concept in 1987 – for individuals, for corporations, for everyone. The gloves were off. It was "come and get it" 24/7 in Ronald Reagan's America. Only now can we begin to fully see the cost: the wanton selfishness and all-consuming recklessness that continues to drive the financial sector; the collapse of fairness everywhere, even in politics, as an honored social metric; the drastically lowered bar for acceptable conduct within Big Business generally; the adoration of money not only as a measure of business acuity but as an index of character; and a tone deafness to anything not measurable in wealth that overlays it all.

That tone deafness extends even to much-admired public figures like Barack Obama. The 44th president has every right to spend his money as he pleases, and he and Michelle Obama have plenty of it to spend thanks to their multiple best-selling books. But to even conceive of a 60th-birthday party for 500 on their sprawling Martha's Vineyard estate at a time when many Americans are struggling day-to-day to deal with the dislocations caused by a sixteen-month pandemic suggests a former president taking his cues from the Wall Street and banking billionaires he helped rescue after the 2008 financial crisis, not from the earnest political supporting cast in off-the-rack suits who helped him attain the highest office in the land. The latter were apparently the first to go when a surging Covid Delta variant caused the guest list to be trimmed to a mere 200 celebrants.

Worst of all, though, is how the currency of truth itself has been debased in the process of this corporate-mindset capture. In the aftermath of the January 6, 2021, invasion of the US Capitol, numerous American corporations vowed to withhold funding from all 147 Republican members of Congress who voted to overturn the November 2020 presidential election results. More than a few of them, though, were just kidding.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

According to an on-going tally by the website and newsletter *Popular Information*, as of the end of August 2021, more than 100 companies that vowed to cut off support for all 147 Republicans have continued to do so. Nor have they donated to leadership PACs controlled by those members or multi-candidate committees that primarily support those members.

Another fourteen companies openly violated the spirit of the pledge by making donations to groups like the National Republican Congressional Committee, which backs the re-election campaigns of 130 of the 147 Republican objectors. Among this group: AT&T, Comcast and NBC Universal, General Electric, Google, Home Depot, and Intel.

Then there are the 34 corporations, heavy on defense contractors, that pledged to suspend all PAC donations but continued to donate directly to the 147 objectors – Abbott Laboratories, Boeing, GM, Lockheed Martin, Northrop Grumman, Raytheon, and so on. And finally come the four companies that signed the pledge and then just said “the Hell with it”: Cigna, eBay, Eli Lilly, and PricewaterhouseCoopers.

All praise to those who kept their word, but look at the names of those who didn’t, of those who found sneaky workarounds to their solemn vows at a time of dire national emergency, and of those who clearly never meant what they said. What is “truth” to these bastions of corporate life? A convenience to be employed as needed? Another fungible commodity? Something closer to Stephen Colbert’s “truthiness” – the feeling that something is true despite all evidence to the contrary?

The list of abuses could go on and on, but the key point is that all of what was launched by Lewis Powell and the US Chamber in the early 1970s, pushed forward by the Supreme Court once Powell had joined the Sacred Nine, and came to full fruition with the Reagan years in the 1980s definitely didn’t stay in the 1980s, just as black mold doesn’t stay in the basement.

Historical Shortfall

Given Lewis Powell’s pivotal role in shaping the corporate-dominated America of today, one might think that he would have wanted his official biography to reflect as much. Supreme Court justices come and go, but few have left a greater mark on the nation. Yet when Powell’s biography appeared in 2001 – three years after his death and with the full blessing of his family and others who presumably knew his wishes – it focused on six areas of commanding interest: desegregation, abortion, Watergate, the death penalty, affirmative action, and sexual equality, which author John C. Jeffries, Jr. concluded collectively show “the surprising impact of one Supreme Court Justice on the nation’s history.”

Puzzled, I called the author shortly after publication to inquire about such matters as *Bellotti* and the famous memorandum to the Chamber of Commerce.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

The *New York Times* had praised *Justice Lewis F. Powell, Jr.*, as “one of the finest judicial biographies ever written.” Yet why was there no mention of either, in the main text or even a footnote? The Chamber memo alone, one could easily argue, is among the most important strategic and tactical documents ever compiled in American history, and *Bellotti* laid the groundwork for the Court’s decision in *Citizens United*.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Chapter 2
Accountability Decouples from Regulation

> The capitalist process, by substituting a mere parcel of shares for the walls of and machines in a factory, takes the life out of the idea of property. It loosens the grip that once was so strong – the grip in the sense of the legal right and the actual ability to do as one pleases with one's own; the grip also in the sense that the holder of the title loses the will to fight, economically, physically, politically, for "his" factory and his control over it, to die if necessary on its steps. . . . Dematerialized, defunctionalized, and absentee ownership does not impress and call forth moral allegiance as the vital forms of property did. Eventually there will be nobody left who really cares to stand for it – nobody within and nobody without the precincts of the big concerns.[1]
>
> – Joseph Schumpeter

In the immediate decades after World War II, expanded regulatory authority accomplished through state and federal power what the actual owners of corporations were both unwilling and increasingly incapable of providing: accountability. The major pieces of legislation from that time – the Civil-Rights Act of 1964 and the Voting Rights Act a year later, both passed by Democratic-controlled Congresses during the Lyndon Johnson administration – tend to dominate historical memory, but for corporate America, the regulatory onslaught that followed was by far the more serious threat. God as ever is in the details, and the regulatory details spread like a prairie wildfire under Richard Nixon, by contemporary standards a Republican in Name Only.

Nixon not only abandoned his ardent red-baiting of the 1950s by opening up diplomatic relations with Mao Zedong's China, he also trimmed military budgets while the war in Vietnam was still ongoing and finally ended the military draft. To the surprise of his Wall Street backers, Nixon also hiked the capital-gains tax, imposed a minimum tax to seal off loopholes, and did away with investment tax credits that favored business. In an even greater slap at Corporate America, Nixon also launched multiple new regulatory bureaucracies including the Consumer Product Safety Commission, the Occupational Safety and Health Administration, and the Environmental Protection Agency.

Congress, in turn, cooperated mightily with the EPA by empowering it with two expansive new laws: the Clean Air Act of 1970, which limited emissions by both stationary sources (industrial ones, most prominently) and mobile ones, as in cars and trucks; and the Clean Water Act of 1972, which amended and greatly expanded the reach of the Federal Water Pollution Control Act of 1948, the first US law to directly address environmental degradation. Suddenly, the federal government was charged

---

1 Joseph Schumpeter, *Capitalism, Socialism, and Democracy*, p. 142 (Harper & Brothers, 1950).

https://doi.org/10.1515/9783110696998-002

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

not only with monitoring water degradation but also setting wastewater standards for American industry.

On the domestic front, Nixon also dramatically enlarged the federal welfare state, adding automatic cost-of-living increases in Social Security and new benefits for disabled workers as well as enlarging the food stamp program. He often attacked federal programs for the poor – they engaged in "paternalism, social exploitation, and waste" of a "seemingly inexhaustible flood" of money – but it was mostly lip service. During his five and a half years in office, federal spending on social services doubled.[2]

All of that alone would have been enough to give Lewis Powell and the US Chamber of Commerce apoplexy – and make them regret even more deeply that Barry Goldwater hadn't been their party's standard-bearer in 1968 – but Dick Nixon wasn't operating in a political vacuum. He also had a public wind at his back, as Rick Perlstein details in *Reaganland*:

> In 1966, 55 percent of Americans had a "great deal of confidence in the leaders of major companies." Five years later, the percentage had plummeted to 27 percent. Between 1968 and 1970, the portion of Americans believing "business tries to strike a fair balance between profits and the interest of the public" fell from 70 percent to 33 percent. Wrote pollster Lou Harris: "People have come to be skeptical about American 'know-how,' worried that it might pollute, contaminate, poison, or even kill them."[3]

It wasn't just American know-how that was on the wane. The nation's post-war economic boom also seemed to have come to a grinding halt. America's share of the world economy plummeted from 40 percent in the years just after World War II to 11 percent a little over twenty years later. The nation's once miniscule trade deficit was fast approaching $30 billion. And the shocks kept coming. The fall 1973 Arab oil boycott spilled over into a 17-month recession, the worst economic dip since the Great Depression. By the mid-1970s, with inflation and unemployment both approaching 10 percent, few had faith that their nation would always have the world's highest standard of living, and it was hard to see corporations and their leaders in a rosy light.

By then, arguably, the leaders of GM, Dupont, US Steel, AT&T, and other stalwarts of the Dow Jones Industrial Average combined had less credibility with the American public than a single, scrawny, combative Princeton and Harvard Law graduate named Ralph Nader and his Public Citizen crusaders. Indeed by the mid-1970s, Nader's non-stop advocacy for consumer rights seemed well on its way to realizing Walter Lippman's 1914 prediction that consumers themselves would ultimately hold

---

2 Kurt Andersen, *Evil Geniuses: The Unmaking of America*, pp. 48–49 (Random House Kindle Edition, 2020).

3 Rick Perlstein, *Reaganland: America's Right Turn 1976–80*, p. 192 (Simon & Schuster Kindle Edition, 2020).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

the balance of power in the eternal struggle between the working and moneyed classes:

"The real power emerging today in democratic politics is just the mass of people who are crying out against the 'high cost of living,'" Lippman wrote in *Drift and Mastery*. "That is a consumer's cry. Far from being an impotent one, it is, I believe, destined to be stronger than the interests of either labor or capital. With the consumer awake, neither the worker nor the employer can use politics for his special interest. The public, which is more numerous than either side, is coming to be the determining force in government."

Nader himself seemed ready to buy into the premise. In a 1975 interview with *Rolling Stone*, he acknowledged that

> consumers don't control any economic institutions – with the exception of a few cooperatives, like food co-ops – and yet there is no reason why consumers can't control their own insurance companies, their own banks, their own food stores – for starters. . . . The best economic system, I think, is one where it's broken down into as small parts as are economically possible, and those parts are run by the constituency for whom they were supposed to operate; and where, if anything happens that is harmful or corrupt, the victims have nobody to blame but themselves.

The manufacturing sector, for example, "could be organized in one of two ways. You could divide the economy into two areas: retail and manufacturing. And the workers should run the manufacturing and the consumers should run retail. And that is a nice sort of countervailing power. Another way would be to have the retail organizations – the consumer cooperatives – own the manufacturers."[4]

Meanwhile, efforts to upgrade consumer protection from a five-person commission to a full-scale federal agency sailed through the House of Representatives only to be blocked by filibusters in the Senate. The measure was reintroduced the next year. Expectations were even higher this time around, despite opposition from Gerald Ford, who was serving out Nixon's second term. Nader had his Congress Watch working overtime. Jimmy Carter joined the fight once he had replaced Ford in the White House; labor unions pitched in their support as well. But while public support for the measure held mostly firm, something had changed in the calculus of political power on Capitol Hill.

Forewarned and inspired by Lewis Powell's memo, the US Chamber of Commerce went whole-hog into the fight to stop the bill as did the National Federation of Independent Business. The Business Roundtable – the lobbying group for CEOs formed in 1972 in the wake of the Powell Memo – went one step further, hiring former Watergate prosecutor Leon Jaworski, who opined that the proposed agency

---

4 https://www.rollingstone.com/politics/politics-news/ralph-nader-the-rolling-stone-interview-161376/ (accessed October 11, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

"would be vested with authority so broad it could easily be turned to the political advantage of those who control it."

In the end, it was all too much. Moderate Democrats defected broadly, and in February 1978, the proposed consumer protection agency went down to final defeat by a decisive 189 to 227 vote in the House.

A Man with a Plan

Among those who celebrated the defeat of the consumer protection agency bill was a former pitchman for GE and 20-Mule Team Borax.[5] Ronald Reagan's two terms as governor of California had come to an end in 1975. His upstart bid to seize the Republican presidential nomination the next year from Jerry Ford had been squelched, but Reagan and his pack of long-time advisors – John Sears, Lyn Nofziger, Martin Anderson, Ed Meese, and others – were already planning for the 1980 election cycle, and forming alliances with the likes of Richard Viguerie, Roger Stone of the Young Republicans National Federation, Paul Weyrich and Howard Phillips, representatives from the National Republican Congressional Committee and the House Republican Study Committee, leaders from the American Conservative Union, and on and on. Increasingly, too, this circle coalescing around Reagan's 1980 bid for the presidency came to include corporate lobbyists and representatives of trade organizations, as well as business groups like the US Chamber of Commerce and the Business and Industry Political Action Committee.

The rising princes of Corporate America were fast coming to the consensus that they had found their man, and Reagan didn't disappoint them in the aftermath of the defeat of the consumer protection measure. Consumerism, he wrote in his newspaper column, was "swimming upstream." Ralph Nader would "no doubt come back thundering on one issue or another, but will anybody listen?" Reagan turned out to be more right than anyone could have known, and of course, he had much to do with the success of his own prediction.

Ronald Reagan didn't shrink government. Just as it had under the previous full-term Republican president, Richard Nixon, the federal government expanded dramatically under this president who had vowed practically before God Almighty to contract it. Nor did he dominate the field anywhere near so thoroughly as history seems to recall. Reagan's effort to dismantle Social Security failed in the Senate, by a vote of 96 to 0. Medicare resisted repeal, too. Together those two programs make up almost half of the federal budget. Meanwhile military spending soared – by 54 percent to $551.9 billion during Reagan's first term alone – and the "trickle-down" of Reaganomics came nowhere near stimulating sufficient growth to justify

5 I'm indebted here to Rick Perlstein's *Reaganland*.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

his tax cuts and the subsequent lost revenue. Almost of necessity, the federal debt mushroomed from $1 trillion when he took office to $2.8 trillion when he departed.

Indeed, the Reagan era produced a true governance paradox: the free market was glorified, while the federal government grew unabated. When it came to defanging government, though, Ronald Reagan scored a near perfect ten, as Sarah Chayes notes in her history of American corruption.

> Beginning in the Reagan administration came the sabotage of oversight on banking. By law and by willful inaction, by rewritten rule and by instructions to focus enforcement efforts on some criminal behaviors and not bother with others, constraints on the type of bank that is closest to American communities were disabled. Such establishments were offered a potent cocktail of the new "What the fuck freedom" . . . Alongside such moves "emancipating" thrifts to engage in foolish lending and to falsify their books came one that shielded them from likely negative consequences . . . federal insurance deposit coverage was increased. No member of Congress votes on that change . . . the change shifted most of the risk for what banks did with depositors' money onto taxpayers.[6]

Banking was only the beginning. Over his eight years, Reagan cut the EPA's budget by 28 percent. He cut funding for transportation by 12 percent, siphoning money away from the federal highway system. Where he couldn't easily cut regulations, Reagan sought to privatize key pieces of government. His War on Drugs and "tough on crime" rhetoric, for instance, led to huge increases in the American prison population during his time in office – to 627,000 in 1988 – which in turn fueled the demand for more prisons, which in turn created a rapid demand for more prison space, and led to the creation of a new and highly profitable sector of the service industry, the private-prison system.

Logic tells us there are only two reasons why government would want to privatize an enterprise that has traditionally been a public responsibility, at least since the late 1800s. The first is the one most often alluded to – the private companies can do a better job, and "bang for the buck" represents a better result for the public. The second is that business simply wants another revenue source with accountability vastly less intrusive than by public shareholders or by government agencies. Given that private prisons have proven consistently less effective and more expensive than public ones, we can assume the latter motivation, but private prisons are also a way of confusing the levels of government expenditure. Rather than a direct cost to an agency which is publicly available, a privatized venture – the subsidiary of a large corporation – only needs disclose its disaggregated results as part of the parent company.

An idea that good was bound to prosper, especially with the various "wars on crime" and minimum sentencing requirements that quickly took hold, and prosper

6 Sarah Chayes, *On Corruption in America and What is at Stake*, pp. 158–159 (Penguin/Random House, 2020).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

it did. Over the twenty years beginning at the start of this century, the number of inmates housed in private prison grew by 32 percent, while the overall prison-system population grew by only three percent. Profits grew accordingly. Al Gore and George W. Bush both benefited from the prison-industry's generosity in the 2000 election. On this front, at least, there seems to be some reform at work. Abandoning private prisons has been one of President Biden's top priorities.

Midstream in Ronald Reagan's presidency, on June 6, 1984, in a speech at the National Press Club, Ralph Nader summed up Ronald Reagan's deregulatory efforts to date as a "wholesale repudiation of the historic role of the American government's duty to protect and expand the public's health and safety."

The Federal Communications Commission, under Chairman Mark Fowler, was working to eliminate viewer's rights under the Fairness and Equal Time Doctrines and repeal limitations on how many radio and TV stations are allowed under a single owner. The Office of Management and Budget was cozying up to business lobbyists and ignoring the public's right to know and respond under the Administrative Procedures Act.

Worse, the Reagan government was shutting Americans out of its decision-making processes by ending legal aid for poorer petitioners before regulatory agencies such as the Federal Trade Commission and by giving early preferential notice of proposals to their industrial and commercial friends. "If there is any company on the Fortune 500 list that objects to these anti-democratic powerplays, it has kept a very low visibility," Nader added.

Worse still, health and safety laws were going unenforced or under-enforced below even the laggard levels of the past. "The Food and Drug Administration's enforcement level is down about 50 percent, as are the enforcement actions against dirty meat and poultry plants and violators of motor vehicle regulations." Meanwhile, the enforcement record at OSHA was "a disgrace made worse by Reaganite reductions in serious inspections and redrawing what constitutes sanctionable violations."

Nader's deepest contempt, though, was reserved for the unholy alliance between the president and corporate America in thwarting environmental controls:

> The sordid behavior of Reagan's Environmental Protection Agency in bowing to corporate polluters on demand has been reported many times. But Mr. Reagan's responsibility needs to be made clearer. EPA Chief Ann Gorsuch did the president's bidding. It was the Reagan White House that stopped the new EPA Chief William Ruckelshaus from doing anything to reduce the sources of acid rain. It is Mr. Reagan and the corporate polluters who oppose overdue implementation of stricter safety standards for America's drinking water-now contaminated with heavy metals and cancer-causing chemicals. The corporate polluters want the air and water pollution laws severely weakened, the majority of people want them strengthened. Ronald Reagan joins with his corporate patrons on these issues as well.[7]

7 Ralph Nader, Talk at National Press Club, Washington, DC, June 6, 1984.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

You get the idea.

By the end of Ronald Reagan's presidency, more than four years after Nader spoke at the National Press Club, the assault on regulation and thus accountability was still at full throttle, but it was far from a solely Republican crusade. For Corporate America, bipartisanship was alive and well.

Six of One, Half Dozen of the Other

Jimmy Carter did lend his political weight to the cause of a consumer protection agency, but he was only too ready to compromise on other regulatory fronts. On the campaign trail in 1976, Carter had repeatedly called the American tax code a "disgrace to the human race," but the tax "reform" package he eventually signed conferred nearly all its benefits on the upper half of taxpayers while upping the baseline for inheritances subject to estate taxes by $14,000, to $161,000. Hardly progressivism in practice.

At the other end of Carter's four years in office and facing an uphill battle for reelection, not to mention a spirited primary against Ted Kennedy simply to be renominated, the Georgian was widely expected to embrace his party's penchant for reining in big business, including Big Banking. Instead, Carter inked a massive *deregulation* package, allowing banks to operate across state lines and phasing out a key part of the Banking Act of 1933 known as "Regulation Q," which banned banks from paying interest on checking accounts and capped interest rates on savings accounts.

Unable to compete for customers by bidding for them, the banking business had stayed modest and conservative under Regulation Q's thumb, and Americans enjoyed a decades-long run of stability unprecedented in the history of modern capitalism. A win-win it would sound like, but Big Banking, which had the resources and expertise to compete in a wider market, despised the regulation, precisely because it kept them from getting bigger still.

According to Rick Perlstein, Citibank CEO Walter Wriston had been so passionate for financial deregulation, he fantasized about Citibank buying its own nation so it could write its own laws.[8] Now Wriston could get back to asset building and leave nation seizing to invading armies, juntas, and the like.

Big Banking had been leaning on reluctant presidents to strike Regulation Q from the books for decades, and now, in Jimmy Carter, they finally found one who would. He signed the bill in a public ceremony, handing out signing pens to a number of banking CEOs.

By 1980, keepers of the liberal flame were quick to dismiss Jimmy Carter as barely a Democrat at all, but by then the party itself had begun to drift rightward –

8 Perlstein, *Reaganland*, pp. 762–63.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

more skeptical of unions and government oversight of business, open to lower taxes on the rich, and increasingly ready to disavow its New Deal past to reclaim some share of the Reagan future. By the time Democrats finally regained the White House in 1992, neo-liberalism had been born, and its poster-boy was in the catbird seat.

For a full century, the White House had flip-flopped between pro-labor and pro-business administrations. William Jefferson Clinton put an end to that. After an initial term dedicated to traditional Democratic initiatives, Clinton concocted a re-election strategy of "triangulation" that amounted to an adoption of Wall Street – although one suspects Clinton, with his capacity for self-justification, considered it a co-opting of same.

No visual evidence communicates the spirit of the times better than President Clinton's joyously signing the repeal of Glass-Steagall Act, surrounded by a covey of confederates. And no words can possibly express the spirit of the moment better than the president saying that the signing pen should be given to Sandy Weill, the charming CEO of Citicorp, who personified the super bank of the future.[9] (The same Sandy Weill ten years later repudiated this decision in the wake of the 2008 economic implosion, but as they say, you can't put the toothpaste back in the tube.)

Beyond that, it is almost superfluous to note that the Treasury Secretary at the time Glass-Steagall disappeared, allowing banks and investment houses to intermingle assets and treat deposits like casino chips, was Robert Rubin, formerly co-chairman of Goldman Sachs and later rewarded by Sandy Weill with a $136-million employment-and-directorship package.

All the while, the overall size and burden of the federal government continued to grow for most Americans and small businesses, and the *Federal Register*, which records rules and regulations, continued to thicken. Having grown chubby under Richard Nixon, as we saw earlier, and rotund under Ronald Reagan, the register under Bill Clinton grew morbidly obese, swelling from 47,000 pages in 1986 to 67,000 pages by 1995. As ever, the burden of these rules fell disproportionately on smaller companies.

To top things off, Clinton ended his presidency by signing a law bestowing permanent normal trade relations on China and opening the gates yet wider for companies to shift jobs overseas. In some ways, it turned out, neo-liberalism looked a lot like neo-conservatism, especially where corporate interests were concerned.

Ardent Democrats tend to remember the eight years of the George W. Bush administration as a dismal interregnum between two beacons of light. 9/11, the exaggerated claims fed to the United Nations about Saddam Hussein's "weapons of mass destruction," the subsequent war with Iraq, the almost endless one in Afghanistan, barbarous interrogation methods, and the like – they unfold like a slow-motion horror film in a locked theater from which one can't escape.

9 "Charming" is my personal opinion, based on a number of business transactions.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Regulation cratered; standards crumbled. Madness (in both senses of "mad") ensued. Bush 43's proposal to privatize Social Security was so unpopular with voters that one almost has to assume its real purpose was to drive huge sums of money out of government hands and into the hands of Wall Street, with not a shred of evidence of a superior return and abundant evidence of widespread looting via multiple hidden fees and commissions.

For background music, there was always the absolute inability of the Government Accountability Office to drag out of Vice President Dick Cheney even the identities of his Energy Task Force, much less their agendas – ample testimony to the fact that by then our national energy policy was being created not by the national government but by the major oil companies.

In critical ways, though, the Bush 43 years were only a passthrough from Bill Clinton to Barack Obama, and nowhere more so than in the 2008 financial debacle that had America teetering on the edge of the unknown.

In the late 1990s, Brooksley Born, then head of the Commodities Futures and Trading Commission, dared to propose that derivatives should be regulated by her commission and traded on transparent exchanges. Born's credentials were impeccable – she had previously been a partner at Arnold & Porter, one of DC's leading law firms, and was the first woman to be on the *Stanford Law Review* – but she was no match for the triad that quickly arose in opposition: Robert Rubin, Clinton's Treasury secretary, with deep roots in Goldman Sachs; Rubin's deputy secretary, Larry Summers, later president of Harvard University; and Federal Reserve chair Alan Greenspan, to whom in those days it seemed all deference was given.

Brooksley Born, they argued, didn't have the bandwidth for this – she was playing above herself, out of her league. Instead of acceding to Born's demand for openness, the Clinton administration pushed and Congress passed the Commodity Futures Modernization Act of 2000, which specifically exempted derivatives from CFTC oversight – with predictable consequences: In 1992, the total value of derivatives contracts stood at roughly $11 trillion worth. By 2001, that number had exploded to $69 trillion; by 2007, it had grown seven-fold to $445 trillion.

Christopher Leonard takes the story from there:

> In late 2008, nobody knew what liabilities had been accrued by anybody else. People were making derivatives bets over the phone and being left to guess what other bets their counterparty might also be making. A derivative bet removed a certain kind of risk called price risk – it gave you a kind of insurance against wild price swings in the market. But it introduced a deeper kind of risk that people overlooked, called counterparty risk, meaning the risk that whoever took your derivatives bet might go broke before they could pay their obligation.
>
> This is what led to the panic. Counterparty risk became an unquantifiable and lethal force that detonated randomly across the globe. The most spectacular detonation happened inside the opaque trading structure of the Wall Street firm Lehman Brothers. That company had amassed enormous holdings in CDOs and other mortgage debt. But that wasn't even the worst of it.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

> Lehman was using the CDOs and other mortgage products as collateral to borrow huge amounts of money. This debt was in the form of overnight loans, called repurchasing agreements, or repo loans. Wall Street firms like Lehman counted on repo loans to stay in business; they used the borrowed money to keep the lights on. Companies felt comfortable making these overnight loans because there was collateral to back it up. But panic set in when people realized the collateral might be worthless. The overnight loan market froze up, and Wall Street investment banks didn't have money to stay open.
>
> Lehman Brothers declared bankruptcy on September 15, 2008. And then the true panic began. The overnight repo loan market froze. The value of CDOs plummeted, which triggered billions in credit default swap payments that companies didn't have the cash to meet.[10]

Short Arm of the Law

Suddenly, America was in free-fall just as the White House was being handed over to Barack Obama and a new era in government, but when the dust had settled and his people had surveyed the wreckage and assigned blame for the multiple kinds of criminal behavior and neglect involved in the Great Recession that had nearly sent the nation reeling back to the 1930s, not a single charge was brought against any financial giant CEO. Accountability and regulation, it turned out, didn't exist in the same universe any longer.

To note just the most prominent example, in June 2009 the SEC, which lacks the authority to pursue criminal prosecutions, brought a civil action against Countrywide Financial Corporation's three most senior executives – Angelo Mozilo, David Sambol, and Eric Sieracki – accusing them of intentionally misrepresenting the quality of Countrywide's mortgage-backed securities over a period of several years. Four days before the case was scheduled to go to trial, the defendants settled, with Mozilo agreeing to pay $67.5 million.[11] Although, in accordance with the SEC's policy at the time, the defendants were permitted to settle "without admitting or denying" the allegations of fraud, one is left to wonder why the Department of Justice did not bring a parallel criminal case.

But one doesn't have to wonder for long. Obama's Attorney General Eric Holder told us exactly why. "Responsibility remains so diffuse, and top executives so insulated," Holder said, "that any misconduct could again be considered more a symptom of the institution's culture than a result of the willful actions of any single individual."

10 Christopher Leonard, *Kochland: The Secret History of Koch Industries and Corporate Power in America*, pp. 348–350 (Simon & Schuster Kindle Edition, 2019).
11 Gretchen Morgenson, "Lending Magnate Settles Fraud Case," *New York Times*, October 15, 2010.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Lanny Breuer, Holder's assistant attorney general in charge of the Justice Department's criminal division, echoed his boss in a *Frontline* appearance, contending that the department looked "hard" at potential cases but couldn't prove intent.

Really? Why does this feel more like an exercise in what used to be called "situational ethics" than the application of clearly articulated laws regarding criminal behavior? As Federal Judge Jed Rakoff pointed out in a January 2014 letter to the *New York Review of Books*, "At the federal level alone, there are numerous statutes that criminalize the intentional making of false statements regarding the creditworthiness of mortgage-backed securities, including the mail fraud statute (18 U.S.C. § 1341), the wire fraud statute (18 U.S.C. § 1343), the bank fraud statute (18 U.S.C. § 1344), the securities fraud statute (15 U.S.C. § 78ff), and many more." Rakoff's takeaway: "The failure to prosecute those responsible must be judged one of the more egregious failures of the criminal justice system in many years."[12]

Deregulation had not only freed big corporations and their executives from accountability, it had also become a useful device for managers to decide exactly what level of safety regulation was appropriate for their company. Witness the March 23, 2005, explosion at the BP oil refinery in Texas City, Texas, that killed fifteen workers and injured another 180. The 300-page report ultimately issued by the US Chemical Safety and Hazard Investigation Board blamed the tragedy on safety cost-cutting, the poor condition of the refinery infrastructure and processing equipment, and management deficiencies at all organizational levels. OSHA added in another 301 violations and imposed a fine of $21 million. But that, of course, was paid by BP stockholders. No company employee was ever found guilty of the neglect.

Jump ahead five years to the April 2010 Deepwater Horizon explosion and oil spill, and the tally is in some ways even worse – eleven killed this time, not fifteen, but nearly 5-million barrels of oil released into the Gulf of Mexico off the coast of Louisiana, the largest oil spill ever and arguably the worst environmental disaster in American history. But in many ways, the story is basically the same. Same industrial giant: BP. Same jumble of causes: neglect of basic features, cost cutting, lousy management. Yes, charges were brought this time – 11 counts of manslaughter, two misdemeanors, and a felony count of lying to Congress – but they were brought against the company, not individuals. And yes, the fines this time were huge: $18.7 billion, the largest corporate settlement in US history. But again, shareholders paid it, not those in any direct line of command.

12 Jed S. Rakoff, "The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?" *The New York Review of Books*, January 9, 2014.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Fox in the Hen House

To its credit, the Trump administration had an easier way of dealing with regulatory hegemony: It consistently put the fox in charge of the hen house. The Environmental Protection Agency – an Orwellian name under Trump – fell into hands of former coal-industry lobbyist Andrew Wheeler. Also at EPA, David Dunlap, former policy director for Koch Industries, took over as Deputy Assistant Administrator for Research and Development. As part of his portfolio, Dunlap played a role in determining (as in gutting) regulatory policy toward formaldehyde – never mind that one of America's largest producers of formaldehyde is a Koch Industries subsidiary, Georgia-Pacific.

The list at EPA goes on and on, too depressingly to recite, but EPA is at least accustomed to death by a thousand blows. In 1978, eight years after its creation, the agency's annual budget authority stood at just about $5.5 billion, equal to about $22 billion in current dollars. In 2020, the final year of the Trump presidency, its allotment was just a shade over $9 billion, 40 percent of what it had been 42 years earlier in inflation-adjusted dollars – appropriately enough for an administration that regarded environmental protection as an inefficiency that impeded profit.

Over at the Labor department, Eugene Scalia, son of the late Supreme Court Justice Antonin Scalia, took over as head of OSHA, and almost immediately dismantled its regulatory function and senior workforce. Roughly 40 percent of OSHA's top career-employee slots went unfilled, and inspections dropped dramatically, especially complex, time-gobbling, critical ones.

Ditto at the Interior Department, where the top legal position went to Daniel Jorjani, former general counsel for the Koch-backed Freedom Partners, a major supporter of ditching the Paris Climate agreement. But ditto elsewhere, in fact all through the administration. Wherever and whenever the interests of a particular company or industry were threatened by existing or proposed regulations, President Trump appointed administrators charged with the sole mission of overruling them.

The Spring 2019 determination by Jeanne Klinefelter Wilson, Trump's Acting Assistant Secretary of Labor and head of the Employee Benefits Security Administration, is a case in point, and proof that almost no issue was too small or obscure to avoid capture by the industries it was meant to regulate. A long-standing Department of Labor ruling known as the "Avon Letter" simply set forth a requirement that fiduciaries need to act as owners, including in voting, with respect to securities held in ERISA portfolios. This would appear to be unexceptionable and hardly even threatening. The Labor Department has never actually prosecuted a trustee for failing to live up to the standards of the Avon Letter. Nonetheless as the Trump administration advanced along, increasingly active shareholders had begun to raise issues – in particular having to do with executive compensation – that threaten corporate management teams. The fear that this might spill over into the behavior of ERISA fiduciaries apparently drove the EBSA's Wilson to action.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Known by the bland shorthand RIN 1220-AB91, her proposed ruling was both bland in the extreme and deeply Orwellian in its language:

> This deregulatory action would modernize fiduciary practices related to the voting rights associated with ERISA plan investments and harmonize those regulations with the requirements of other regulators. The goal of this proposal would be to protect the interests of participants and beneficiaries by: (1) addressing practices that could present conflicts of interest associated with proxy advisory firm recommendations; (2) ensuring that proxy voting decisions are based on best information; and (3) ensuring that proxy voting decisions are solely in the interest of, and for the exclusive purpose of providing plan benefits to, participants and beneficiaries.

What the ruling in fact says is that, if approved in the form above, all bets will be off when it comes to regulating fiduciary behavior and that the interests of participants and beneficiaries of ERISA-held pensions will hereafter best be served by the owners of companies – that is, its shareholders – being as ill-informed and uninvolved as humanly possible. As a former administrator of ERISA, I felt obliged to respond, in a letter cosigned by my long-time business partner Nell Minow.

The full text of that letter can be found in Appendix A, for those who want to pursue that matter further. A few brief excerpts will suffice here, I hope, to capture its flavor:

> In the long, dismaying history of regulatory capture, when agencies set up to provide oversight instead issue rules entrenching and subsidizing corporate insiders, disregarding the public interest in transparency, accountability, and robust market forces, it is hard to think of an example as discreditable as this proposal on proxy voting by ERISA fiduciaries. . . .
>
> EBSA, like the fiduciaries it regulates, is charged with acting for the sole benefit of pension plan participants. This shoddy, last-minute, unsubstantiated proposal, rushed through in the middle of a pandemic and at the end of a Presidential term without any evidence of adequate research, no public hearings, and a truncated comment period, is contrary to the interests of plan participants, the capital markets, and the economy as a whole. . . .
>
> This proposal subverts the interests of both plan participants and fund manager fiduciaries for the benefit of the corporate insiders at portfolio companies. The proposed rule is bad for plan participants, bad for fund manager fiduciaries, and obstructs the market forces that are the foundation of a robust economy. It does not benefit corporate employees or their shareholders. Its only beneficiaries are entrenched, entitled CEOs. These are the people who love to rhapsodize about the purity of the free market until they feel its effects. They get weak in the knees over a non-binding, advisory proxy vote on their pay or on climate change risk or disclosure of the very kind of dark money expenditures that are clearly responsible for this proposal. The millions of dollars from the corporate treasury spent on lobbyists and political contributions that led to this proposal should have been used for employees, R&D, marketing, and other expenditures that contribute to sustainable growth. This proposal will perpetuate and increase these diversions of corporate assets contrary to shareholder value.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

"Mutual Looting Society"

"Whether government is a 'government of laws' or a 'government of men' is debatable," Peter Drucker wrote in *The Age of Discontinuity*, "but every government is, by definition, a 'government of forms.'" Regulations are prime among those forms – they fill the *Federal Register*. They yield still more forms to prove compliance. They demand accountability. Of course, corporations chafe at them. But Drucker also warned that "any government that is not a 'government of forms' will deteriorate rapidly into a mutual looting society."

This is the corporate world Joe Biden inherited on January 21, 2021, and vowed to bring to heel, but the ongoing regulatory emasculation of the Food and Drug Administration coupled with the massive financial clout of the pharmaceutical industry gives one reason to question if this hurdle is simply too high for even a well-intended presidency.

The drug-testing requirements created by the FDA in the early 1960s quickly became the global gold standard – and have been under attack by Big Pharma almost ever since, for their "inefficiencies," naturally.

New drugs are too costly to develop; the timeframe is ridiculous; there's such a thing as "too much safety" – the arguments don't vary much from decade to decade, or administration to administration. But the listeners do, and in recent years there has been a steady erosion of safeguards, according to Harvard School of Medicine professors Aaron S. Kesselheim and Jerry Avorn.

"New drugs are now more likely to be supported by fewer studies and less adequate clinical trial designs than in the past," they wrote in a June 15, 2021, *New York Times* op-ed. "Worse, more than half of new drugs are now approved based on what's called surrogate endpoints – changes in the body measured by lab tests that may not reflect clinical benefit – rather than requiring that the drug affect how a person feels, functions or survives."[13]

The drug they particularly cite is aducanumab, a treatment for Alzheimer's disease that has shown little evidence of halting cognitive decline but can cause brain swelling and hemorrhage. An outside advisory committee studied the drug intensely and ruled unanimously against approval . . . and the FDA, of course, ignored all that and okayed the drug anyway. (Kesselheim, who served on the outside committee, resigned in protest.)

Meanwhile, Emergent BioSolutions, the manufacturer of this potentially dangerous $56,000-a-month non-effective treatment for a dire and horrible disease, was enjoying the most profitable year in its two-decade existence thanks to the $628-million contract it had earlier landed, with no competitive bidding, to produce

---

13 Aaron S. Kesselheim and Jerry Avorn, "The FDA Has Reached a New Low," *New York Times*, June 15, 2021.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

a Covid-19 vaccine and despite manufacturing pratfalls that rendered 75 million doses of the vaccine useless and forced a two-month shutdown of operations. To celebrate such a track record, the board approved $8 million in cash and stock to the company’s five top executives.[14]

In the new regulatory world, it’s almost impossible to lose for winning, but not necessarily if you are a patient.

14 https://www.nytimes.com/2021/06/16/us/emergent-biosolutions-covid-vaccine.html?smid=em-share (accessed October 11, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Chapter 3
Powerball

> The rise of the modern corporation has brought a concentration of economic power which can compete on equal terms with the modern state. . . . The state seeks in some aspects to regulate the corporation, while the corporation, steadily becoming more powerful, makes every effort to avoid such regulation. Where its own interests are concerned, it even attempts to dominate the state.[1]
>
> –Adolf A. Berle and Gardiner Means

Casual followers of the ebb and flow of corporate history are to be excused for finding the quote above strikingly modern. In fact, Adolf Berle and Gardiner Means wrote those words in 1932, at the bottom of the Great Depression, in their visionary masterpiece *The Modern Corporation & Private Property*. For the past four score and ten years, Big Business has been working overtime to turn Berle and Means into old-school prophets.

Five years before *The Modern Corporation* appeared in print, Justice Louis Brandeis, in his decision in *Myers v. United States*, captured eloquently both the Founders' intent and their parallel concern with regard to power sharing within the federal structure:

> The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but by means of the inevitable friction incident to the distribution of the government powers among three departments, to save the people from autocracy.[2]

What Brandeis failed to reckon with, however, and what Berle and Means saw so clearly, was the evolution of a fourth branch of power that would deeply embed itself within the federal structure while functioning outside it and increasingly beyond its checks and balances. As Big Business stripped away constraining regulatory authority, declared itself essentially self-accountable, and proceeded to co-opt, by unbridled spending, the three contestants for power that the Constitution and its writers originally envisioned, the modern condition took root: Corporate power free of corporate responsibility.

1 Adolf A. Berle and Gardiner C. Means, *The Modern Corporation & Private Property*, p. 357 (Harcourt, Brace & World, 1932).
2 US Supreme Court, *Myers v. United States*, 272 U.S. 52, 293, 47 S. Ct. 319, 71 L. Ed. 580 (1927).

https://doi.org/10.1515/9783110696998-003

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Let's Play Monopoly!

The struggle between monopolistic and anti-monopolistic forces is as old as America, and for much of the nation's history has moved in a sine-like curve. The desire to concentrate economic power, to restrain trade, to thwart competition before it can ever get a toe-hold – not only to get the biggest share of the pie, but to be the only diner at the table – is basically constant. Through World War II, though, and even through the 1960s, monopolistic over-reach was for the most part met by countervailing legislation and, where legislation failed, court decisions.

The 1792 Post Service Act established a US Post Office, in large part to keep mail delivery out of private hands that would both favor and profit from high-population centers. Forty years later, Andrew Jackson declared war on the Second Bank of the United States, a private, for-profit institution (despite its name) that monopolized all federal government fiscal operations. The 1866 National Telegraph Act sought to insure a competitive telegraph industry. The 1890 Sherman Antitrust Act attacked the cartels through which large, interlinked companies sought to choke out nascent competition.

So it went through the first half of the 20th century as well. Food Regulation acts in the first decade introduced competition into food and drug markets. The Supreme Court's 1911 decision in *Standard Oil Co. v. the United States*, trimmed concentration in the oil industry. The Federal Reserve Act two years later sought to democratize access to capital, while the Glass-Steagall Act of 1933 circumscribed the reach of financial speculators by constructing a wall between commercial and investment banking. The following year, the Securities Exchange Act of 1934 created the Securities and Exchange Commission and required listed companies to disclose financial information.

By then, most observers of the economy agree that corporate overreach had led to the Crash of 1929. The various regulatory forays of the Franklin Roosevelt administration aimed at corporations were an attempt, in Adolf Berle's words, "to balance 'a variety of claims by various groups in the community' – not just its managers or shareholders – and assign 'to each a portion of the income stream on the basis of public policy rather than private cupidity.'"[3] Cupidity, though, can be a cruel mistress.

Not all of these measures and court decisions across the first century and half of America's existence worked exactly as planned – nothing does. John D. Rockefeller was worth an estimated $300 million in 1911 when his Standard Oil was splintered into 34 separate companies. Two years later, his worth had grown threefold to $900 million, about $24 billion in current dollars. Never, probably, has a man been more beneficently punished by his government. Collectively, though, the monopoly/

3 Richard Parker, "The Crisis Last Time," *New York Times*, November 9, 2008.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

anti-monopoly tug-of-war was pretty much a stand-off, even with the large swings in one direction or the other.

The post-war years appeared to end that. Economics became a science with its own arcane language and abstruse theories heavy with constants and variables; more than simple social scientists, economists became shamans. As Barry Lynn has written, “Rather than describe the interaction of people in our economy as a function of law and politics, [economists] preferred the languages of mathematics and mysticism.”[4]

Simultaneously, America emerged as the world’s capitalist superpower – the dominator (and sometimes dominatrix) of the global economy. Rather than shrink back to pre-war size, the defense industry grew fat on Cold War federal budgets and spread its tentacles through the halls of Congress. Steel, the automotive industry, airline giants – they all had something to gain from acting as if a new world war was imminent.

Give Dwight Eisenhower credit, he saw the handwriting on the wall. In his 1961 “Farewell Address,” Ike famously warned that “In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military industrial complex. The potential for the disastrous rise of misplaced power exists and will persist.” As we saw in the last chapter, the 1960s gave cause to hope that Ike had been heard. Regulatory agencies blossomed; CEOs sank into disrepute.

Profit Imperative

At first glance, General Motors’ May 1970 annual meeting would suggest that stasis had been reached once again. Shareholders overwhelmingly rejected a demand by a group known as Campaign GM that the company expand the board to include three new “public-interest directors” and create a committee to study the company’s performance in a variety of fields including auto safety and pollution control. Par for the course, but the company did throw a bone to the dissidents by naming five of the existing directors to a new “public-policy committee.”

That bone is what University of Chicago economist Milton Friedman choked on when he lambasted GM and chairman James Roche in a broadside attack that appeared in the September 13, 1970, *New York Times* “Sunday Magazine.”

Corporate leaders who believe that businesses should exhibit a social conscience and promote desirable social ends are “preaching pure and unadulterated socialism,” Friedman fumed. Businessmen who talk this way are unwitting puppets of

4 Barry C. Lynn, *Cornered: The New Monopoly Capitalism and the Economics of Destruction,* p. 17 (John Wiley Kindle Edition, 2010).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

the intellectual forces that have been undermining the basis of a free society these past decades.

> The discussions of the "social responsibilities of business" are notable for their analytical looseness and lack of rigor. What does it mean to say that "business" has responsibilities? Only people can have responsibilities. A corporation is an artificial person and, in this sense, may have artificial responsibilities, but "business" as a whole cannot be said to have responsibilities, even in this vague sense. . .
>
> Precisely the same argument applies to the newer phenomenon of calling upon stockholders to require corporations to exercise social responsibility (the recent G.M. crusade, for example). In most of these cases, what is in effect involved is some stockholders trying to get other stockholders (or customers or employees) to contribute against their will to "social" causes favored by the activists. Insofar as they succeed, they are again imposing taxes and spending the proceeds.

Speeches glorifying social responsibility may gain corporate leaders "kudos in the short run," according to Friedman,

> but it helps to strengthen the already too prevalent view that the pursuit of profits is wicked and immoral and must be curbed and controlled by external forces. Once this view is adopted, the external forces that curb the market will not be the social consciences, however highly developed, of the pontificating executives; it will be the iron fist of Government bureaucrats.

Unable to resist the plug, in the best free-market spirit, Friedman continued:

> That is why, in my book *Capitalism and Freedom,* I have called it a "fundamentally subversive doctrine" in a free society, and have said that in such a society, "there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud."[5]

There you have it, straight from the lips of Friedman's Chicago School of Economics thought to God's ear: The only social responsibility of a corporation is to do everything within its power to increase its profits "within the rules of the game," which by extension means that the easiest way to maximize corporate profits is to alter the rules of the game to Corporate America's maximum advantage, beginning with rules as then currently applied to containing monopolistic enterprises. Lewis Powell and the US Chamber of Commerce would soon be working on that. By the start of the new decade and the beginning of Ronald Reagan's first term, they would have a powerful ally in the otherwise somewhat obscure William F. Baxter.

---

5 Milton Friedman, "The Social Responsibility of Business Is to Increase Its Profits," *New York Times,* Sept. 13, 1970.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

"Efficiency Considerations"

On February 6, 1981, two weeks after Ronald Reagan had been sworn in as the fortieth president of the United States, the *New York Times* reported that new Attorney General William French Smith had chosen a law professor, William F. Baxter, to head the Justice Department's Antitrust Division. On February 13, not yet officially in the job, Baxter told the *Times'* Leonard Silk that he planned to "pursue an antitrust policy based on efficiency considerations."[6]

To that end, Baxter would soon issue a memo to his legal staff telling them to worry less about the concentration of corporate power and more about efficiency and prices. And with that, virtually all federal constraints on monopolistic behavior began to disappear.

The Supreme Court had unanimously *rejected* efficiency as an excuse for monopolization in 1911 when it ordered the breakup of Standard Oil despite the fact that the company had cut the cost of a gallon of kerosene in half, and again in 1935 when it ruled Franklin Roosevelt's National Industrial Recovery Act unconstitutional. By 1980, the Court was taking on a distinctly more pro-business face under Warren Burger, but the anti-business tilt of the Warren Court lingered and the laws that had been constraining monopolies ever since the Sherman Antitrust Act were mostly still on the books.

But the Court can't hear a case that is not brought, and with William Baxter in charge of antitrust at Justice, the Reagan administration simply ceased to enforce antitrust law, as Donald Trump's Labor Department would decades later do with regulations. Indeed, the whole legal area of "conflict of interest" was basically defined out of existence and then killed by neglect under Reagan's watch. Washington law firms that earned their keep off antitrust law were forced to close their doors. Antitrust departments within the larger, more diverse law firms were shuttered. Their lawyers wandered off to Trusts & Estates.

No longer threatened by antitrust enforcement, big companies got even bigger through mergers and acquisitions, ushering in a wave of consolidation that swept across virtually every sector in the economy, but maybe most dramatically in the financial sector. Banks merged and the mergers merged, and then the merged mergers merged again, especially once the Clinton Administration stripped away the protections of the Glass-Steagall Act – until banks were not only too big to fail, but too intertwined with government to be allowed to fail. Or maybe they simply *were* government. The line began to blur.

Investment banks controlled ratings agencies. They helped governments raise bond issues and hide indebtedness with creative accounting and special-purpose vehicles. Investment bank officials, especially a parade of Goldman Sachs ex-CEOs,

6 Leonard Silk, "Antitrust Issues Facing Reagan," *New York Times*, February 13, 1981.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

also cycled in and out of the key Cabinet-level positions so regularly that one could be forgiven for wondering if they were working for the US government or the US government was working for them.

Where investment banks weren't sufficient to the cause, the Federal Reserve was, especially when the chickens came home to roost in 2008. All the best people were then using AIG as their ultimate credit back-stop. Indeed, AIG was one of only six firms with a coveted AAA rating, and the yet the AIG subsidiary that issued the credit guarantees investment banks used to maintain their solvency was virtually unregulated and so perilously close to the edge that it was almost begging to tumble into the abyss.

How could anyone have predicted that the Fed would bail out AIG, and do so with no discount and without even reducing promised bonuses to AIG executives? In reality, probably, anyone whose eyes were truly open. Every bit of evidence suggests that without the Fed's intervention, many if not most or all of the investment banks that favored AIG with its Triple-A rating would have folded behind it, led by Goldman Sachs. And that, of course, could not be allowed to happen. Administrations changed – Barack Obama took over from Bush 43 – and with the exception of Lehman Brothers, which was allowed to go under, the Economic Order remained essentially unchanged and its royalty unchallenged.

In a 2014 speech on the Senate Floor, Elizabeth Warren detailed how Citigroup had risen from the ashes of 2008, when its market valuation plunged to almost $5 billion less than it owed US taxpayers for their bailout funds, to become a kind of financial octopus with tentacles spreading throughout government policy setting and decision making. Treasury secretaries, the vice chair of the Federal Reserve System, the Treasury Undersecretary for International Affairs, the US Trade Representative and his nominated deputy, the recent chair of the White House Economic Council, the recent head of OMB – they were all Citigroup alums or current executives.[7]

Too Everything to Fail

The world had turned. The nation had changed hands, fought its way back from a collapse that barely escaped Great Depression status. Bad policies and practices within the financial industry had been identified, certified, vilified, and as they used to say in *Mad* magazine, the "usual gang of idiots" was still in charge – in fact, more so than ever.

7 Pam Martens, "Meet Your Newest Legislator: Citigroup," *Wall Street on Parade*, December 16, 2014, p. 2.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

In *A Promised Land*, Obama addressed that status quo:

> For many thoughtful critics . . . the fact that I had engineered a return to pre-crisis normalcy is precisely the problem – a missed opportunity, if not a flat-out betrayal. According to this view, the financial crisis offered me a once-in-a-generation chance to reset the standards for normalcy, remaking not just the financial system but the American economy overall. If only I had broken up the big banks and sent some white-collar culprits to jail; if only I had put an end to outsized pay packages and Wall Street's heads-I-win, tails-you-lose culture, then maybe today we'd have a more equitable system that served the interests of working families rather than a handful of billionaires. . .
>
> The thought nags at me. And yet even if it were possible for me to go back in time and get a do-over, I can't say that I would make different choices. In the abstract, all the various alternatives and missed opportunities that the critics offer up sound plausible, simple plot points in a morality tale. But when you dig into the details, each of the options they propose – whether nationalization of the banks, or stretching the definitions of criminal statutes to prosecute banking executives, or simply letting a portion of the banking system collapse so as to avoid moral hazard – would have required a violence to the social order, a wrenching of political and economic norms, that almost certainly would have made things worse. Not worse for the wealthy and powerful, who always have a way of landing on their feet. Worse for the very folks I'd be purporting to save.[8]

In short, Too Big to Fail, Too Rich to Fail, *and* Too Powerful to Fail – a proposition that applies equally to the institutions at the heart of the collapse and to their principal players. As noted earlier, Bill Clinton's second-term Treasury secretary, Robert Rubin, segued almost seamlessly from advocating repeal of the Glass-Steagall Act, to the vice-chairmanship of Citigroup, one of that repeal's main beneficiaries. But history would prove Rubin the rule, not the exception. As George W. Bush's Treasury secretary, Henry Paulson oversaw the bailout of his old bailiwick Goldman Sachs and similar institutions, an overwhelming conflict of interest that did not prevent his retiring to the great respectability of being a fellow at Johns Hopkins University and much lauded by nature conservancy groups for the upwards of $100 million he has contributed to such causes. Franklin Raines – who dithered mightily while Fannie Mae, where he served as chairman, burned – received a generous bonus and walked gently into that good night unlike the tens of thousands of Fannie Mae-backed mortgage holders who lost everything via the mortgage fraud that Fannie Mae somehow overlooked. Timothy Geithner, who succeeded Paulson as Barack Obama's Treasury secretary and kept the bailouts flowing to investment banking, joined the Council on Foreign Relations after stepping down from the Cabinet, started lecturing at Yale School of Management, and became president of the private equity firm Warburg Pincus, one of whose subsidiaries has been accused of predatory lending practices. Obama's Attorney General, Eric Holder, returned to private practice at his old firm, Covington & Burling, whose client list is thick with the banks the Obama Administration declined to hold accountable for the 2008 collapse.

8 Barack Obama, *A Promised Land*, pp. 304–305 (Crown Kindle Edition, 2020).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Thus the revolving door assures that the sacrifices of public service will, at the very top of the heap, be richly rewarded in the private sector – the very definition of efficiency, although as Kurt Andersen noted about lobbyists, there is a certain piggishness to this trough-feeding as well and often a towering self-righteousness when anyone dares suggest it.

Worker Workarounds

Big, though, was only part of the New Efficiency. From the cold-blooded perspective of efficiency, few things are more problematic than a labor union. Unions drive up wages; they lock corporations into long-term contracts and enduring obligations with pension and health plans; they nag about safety standards on the factory floor. For decades it had been assumed that unions were serving a public good beyond the benefits they conferred on their members by balancing corporate power and nurturing a stabilizing middle class in the bargain. John Kenneth Galbraith argued as much. But though union power had once been that strong, it certainly was not in 1981. That's when Ronald Reagan fired the entire force of air traffic controllers and hired immediate substitutes without even so much as a whimper of protest.

Inspired by such deafening silence, companies like GM began to spin off production activities in the 1980s. Publicly, the justification was competing with lower-cost Japanese manufacturers. Privately, the dual intent was anything but hidden: weakening unions and driving down wages. Both goals were met, but the money saved through efficiency almost never went to producing a better product.

Jack Welch of GE was one of the most celebrated advocates of this strategy. In the early 1980s, he became known as Neutron Jack for eliminating workers while leaving the buildings intact. He did so not to plow money into R&D but to fill the coffers of GE shareholders. As Welch became a national, in some way global, celebrity, GE soared to the most highly capitalized publicly traded company in the world, and investors started demanding that other CEOs do likewise.[9]

That momentum was still alive, well, and building in January 1993 when Bill Clinton ascended to the Presidency and pushed through a compliant Congress the North American Free Trade Agreement, opening markets in Mexico and Canada, and further – and dramatically – weakening America's labor unions (Fig. 3.1).

At one time, "efficient" corporations had to scurry off to southern, right-to-work states to avoid unionization, even though they were still handcuffed by the minimal pay expectations that come with operating in a First World nation. Now they could begin moving their operations and jobs to Mexico, and do so with Bill Clinton's blessing.

9 Barry C. Lynn, *Cornered,* p. 219.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

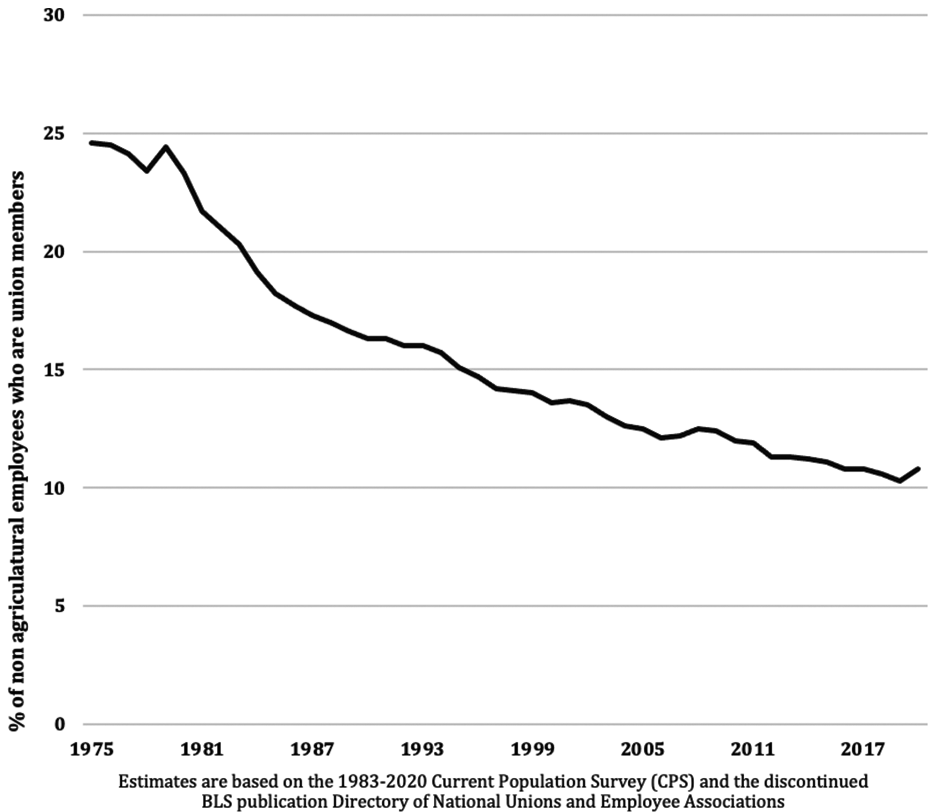


Fig. 3.1: Union Busting.
Source: CPS survey and Barry T. Hirsch, David A. Macpherson, and Wayne G. Vroman, "Estimates of Union Density by State," Monthly Labor Review
Note: Over the past five decades, union membership among non-agricultural workers has shrunk from one in four to roughly one in ten.

Ross Perot heard that giant job "slurp" coming from south of the border, but Perot was a maverick with a political agenda of his own. What was more surprising in some ways was how thoroughly Clinton's union bashing and dismantling of antitrust protections were backed by supposedly left-leaning institutions like the Economic Policy Institute, founded in 1986 by, among others, Lester Thurow, Robert Reich, and Robert Kuttner. Thurow, in fact, had already pre-blessed the move. Six years earlier, on the eve of the first Reagan administration, he had written an "Economic Affairs" column for the *New York Times* headlined "Let's Abolish the Antitrust Laws." Thurow's argument ranged far and wide, but his conclusion was relatively succinct:

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

> In an economy as complex as that of the United States, no one can say with 100 percent certainty just what would happen if the antitrust laws were abolished. Perhaps we would find some unacceptable results and some new regulation would be necessary. If so, the regulations can be written when the abuses appear. This is now an area so complex and so little connected to economic goals that we need to start over and see what a modern economy needs to remain productive.[10]

Actually, four decades on from Thurow's thoroughly neo-liberal argument, we do know what the outcome of effectively neutering antitrust law has been. Through Democratic and Republican occupants of the White House and the Executive Branch – and despite the political leanings of majorities in the House and Senate – consistent federal government policies have radically favored the rich, especially corporations, while widening the gap with the poor and crippling work forces, communities, and states cut out of jobs and related tax revenues. Meanwhile, corporations have been busy transferring their costs to the general public by externalizing responsibilities they had once been legally, contractually, and/or morally bound to, and were almost equally busy, in some instances, profiting by internalizing what had once been public interests.

Social Contract 2.0

The Employee Retirement Income Security Act of 1974 had every appearance of being a noble piece of legislation. ERISA's goal was to establish minimum standards for pension plans in the private sector. Plans were required to be transparent. Fiduciaries would be held to strict standards of conduct, and beneficiaries would have access to federal courts to seek remedies if they felt they had been wronged. Backstopping the whole idea were the Department of Labor, the IRS, and the Pension Benefit Guaranty Corporation. In concert with the long-standing tradition of a lifetime relationship between employer and employee, this gave every appearance of assuring most retirees of income security beyond the basic protections offered by Social Security.

Corporations, however, saw ERISA and the Pension Benefit Guaranty Corporation in a different light: Both were a port in the storm, a place where they could offload their own pension obligations and cut their employees free to be the masters of their own retirement fate via Keogh plans and IRAs (see Fig. 3.2).

The PBGC issued its first pension check on the last day of February 1975 – $140.75, to an employee of a failed New Orleans bank. Thirty years later, Bethlehem Steel, LTV Steel, National Steel, Pan Am, Weirton Steel, TWA, Kaiser Aluminum, Eastern Airlines, and Wheeling Pitt Steel – to cite just the ten largest failures – had

10 Lester Thurow, "Let's Abolish the Antitrust Laws," *New York Times,* October 19, 1980.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

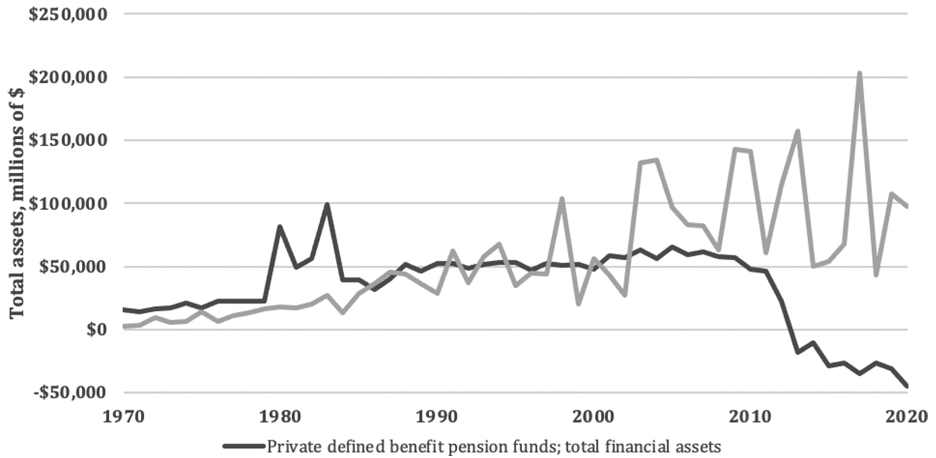


Fig. 3.2: Shifting the Pension Burden.
Source: Federal Reserve, Financial Accounts of the US
Note: Defined-benefit pension plans, once a mainstay of corporate compensation, today have a collective negative value, owing to employer defaults. Meanwhile, defined-contribution plans, funded largely by employees themselves, have become the norm.

either defaulted on their defined-benefit pension obligations or otherwise walked away from them, with United Airlines soon to join the parade. By then, the PBGC was nearly $23 billion in the hole with more than a $100 billion in likely claims looming just ahead.[11]

The following year, when IBM announced that it was repudiating its remaining defined-benefit plan, a company spokesmen said Big Blue expected to save as much as $3 billion through the next several years, while providing a more predictable cost structure. This was efficiency in action for IBM and its many subsequent imitators, but also a time bomb still ticking for the nation as a whole.

According to the Economic Policy Institute,

> The shift from pensions to account-type savings plans has been a disaster for lower-income, black, Hispanic, non-college-educated, and single workers, who together add up to a majority of the American population. But even among upper-income white college-educated married couples, many do not have adequate retirement savings or benefits. And women, who by some measures are narrowing gaps with men, remain much more vulnerable in retirement due to lower lifetime earnings and longer life expectancies.

EPI, admittedly, leans leftward, but look around you. Ask your friends, your plumber, your uncle who just got superannuated by some global behemoth whose

11 Congressional Budget Office, based on Pension Benefit Guaranty Corporation, *Pension Insurance Data Book*, 2004.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

CEO is pricing 140-foot yachts as you read this. Look at the numbers. While corporations and their very senior management get ever more wealthy, the evidence mounts daily that America faces a looming crisis of huge proportions: an aging population with minimal savings to support itself. In time, the only answer, short of no answer, will be a draconian tax hike for corporations and the very wealthy they have helped to create. And guess who will oppose that with every fiber of their being – the very people who have done so much to create the crisis. This, too, is more than efficiency in action, much more. It's nihilism – the ultimate endgame.

Offloading health-care obligations to employees is yet another example of efficiency, but only if you look at it from a C-suite perspective. On the loading dock, on the shop floor, down by the office water cooler, things look far different. Between 2010 and 2020 alone, according to the Kaiser Family Foundation, the premiums employees pay for health insurance grew 55 percent on average, while average wages grew by only 27 percent . . . but that's only part of the story. Deductibles on those same health-insurance policies soared by 111 percent over the same timeframe. Employees, in short, ended the decade paying far more for insurance that covers far less (see Fig. 3.3). Corporations, meanwhile, were not only saving money but retaining far more of their earned income. Over those same ten years, the federal corporate tax rate fell by 40 percent, from 35 percent to 21 percent.

Internalization has been another sweetheart deal for Big Business. For most of the life of the nation, it was assumed that certain obligations were incumbent upon state and federal governments – waging war, housing prisoners, considering and passing legislation. As we have already seen, the latter two of those have been in many ways taken over by Big Business and turned into profit centers – for the private corporations that now run so many state prisons and by the lobbyists and private-sector lawyers who now effectively craft so much state and federal legislation.

The privatization of war-making is a newer and more troubling tale. According to the Costs of War Project based at Boston and Brown Universities, in 2019, US contractors representing US military interests in the Middle East outnumbered American troops by 53,000 to 35,000. Since 2001, an estimated 8,000 contractors have died while working in the Middle East, a thousand more dead than registered by US regular forces. As of 2019, more than half of the defense budget went to civilian contractors' efforts, from weapons to services.

This, too, is efficiency in action, for both the private and public sectors. Many of those contracted are foreign nationals, who work for less pay, receive no health or education benefits, and are in line for no service pension once their years of duty are over. Even when the mercenary warriors are American, their coffins aren't met by somber honor guards and the waiting media, nor are their remains laid ceremoniously to rest at Arlington National Cemetery.

In 2018, Erik Prince, whose Blackwater mercenaries did much of the heavy lifting in the early years of the Iraq War before he sold the company in 2010, laid out for

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

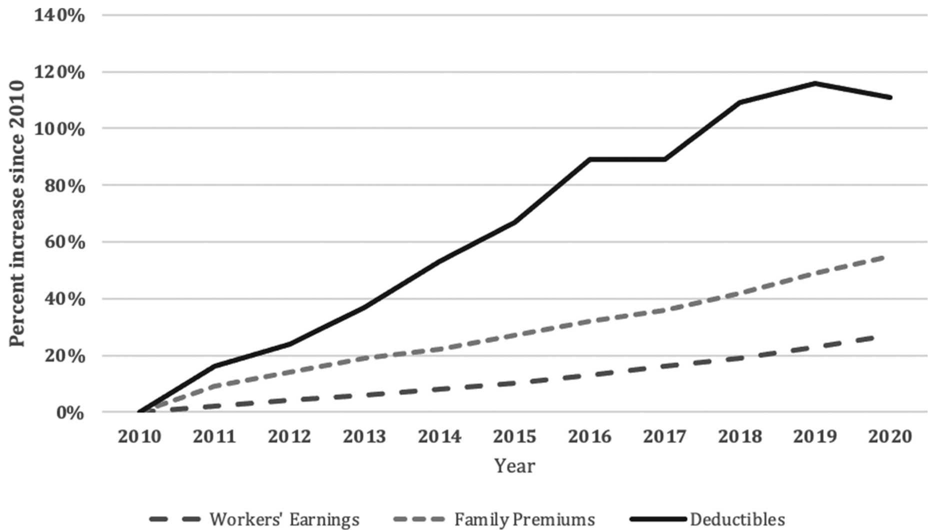


Fig. 3.3: Externalizing Health Costs.
Source: Kaiser Foundation
Note: While workers' earnings have remained virtually flat over the past decade, private medical insurance premiums continue to grow, and deductibles have skyrocketed.

Military Times his plan to privatize the then still ongoing war in Afghanistan. Prince said he would replace the 23,000 combined forces then serving in Afghanistan (15,000 Americans and 8,000 NATO troops) and 27,000 supporting contractors with a far smaller force made up of 6,000 contractors (60 percent former US special operations forces, the rest former NATO special-ops troops), augmented by 2,000 active-duty US special-ops troops. A third of Prince's contracted forces would be assigned to operate a private air force providing close-air support and helicopter air assets as needed, as well as providing a medevac rescue and running two combat surgical hospitals.

As for accountability, the Uniform Code of Military Justice would apply for civilian and regular-duty forces, with justice meted out by "a JAG element, similar to what's assigned now for US Forces. . . . Any investigations and trials would be conducted in Afghanistan. Any incarceration would be by their home country of citizenship or US as acceptable."

The cost, Prince estimated, would be a very efficient $5.5 billion annually: 36 percent for the active-duty troops, 64 percent for Prince and his contractors. Donald Trump was said to have been interested.[12]

12 https://www.militarytimes.com/news/your-military/2018/09/05/heres-the-blueprint-for-erik-princes-5-billion-plan-to-privatize-the-afghanistan-war/ (accessed October 13, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

A Culture of Impunity

Is there any chance of something like what Erik Prince envisioned coming into existence? Probably not immediately. Americans are unlikely to want to give up their war-making powers altogether to private hands; and the Pentagon, one can bet, would not easily accede to anything of the sort – without at least some guarantees of lucrative post-military employment. But never underestimate the divine right of capital to do, really, whatever the hell it wants – the right, that is, to rule over people and the rest of nature. The sheer weight of massive capital gives an artificial legal entity created by living people to serve living communities full license to pollute the air, foul the water, threaten habitats, warm the planet and so add exponentially to climate change – all this to make money for other corporate entities. And in doing so, the artificial entity is aided and abetted by a series of decisions handed down by a corporatist US Supreme Court, extended and codified by global agreements (misleadingly labeled trade pacts), and written and promoted by corporate lobbyists to place corporations ever further beyond the reach of democratic accountability.

Presumably, in a free-market economy, the players require some restraints in their pursuit of society's resources and creation of externalities, and these restraints are to be imposed by government acting in response to the preferences of individual human beings who have a much broader range of preferences than simply wealth maximization. To allow wealth-maximizing business corporations a powerful voice in determining how *social* resources are to be allocated by government, how prisoners are to be treated, who will be the axe man when it comes to that, and even how war-waging powers are to be divvied up, grants those corporations power to determine the rules of the game, rather than confining them to play under the rules preferred by human individuals. Far worse, doing so goes a long way toward annulling the legitimacy of democratic government, which may be the whole point, conscious or otherwise.

And yet, how to stop, much less reverse the process? Big companies are now multinational, while governments remain national. Big companies are so financially powerful that governments are afraid to take them on. Big companies are also the major funders of political campaigns in the US, while politicians themselves are often part owners, or at least the silent beneficiaries, of corporate profits. Roughly one-half of US Congress members are millionaires, and many had close ties to large corporations even before they arrived in Congress.

As a result, politicians often look the other way when corporate behavior crosses the line. Even if governments try to enforce the law, companies have armies of lawyers to run circles around them. And they have powerful friends in the media ready to mobilize on their behalf. The very thought that Allison Herren Lee, the Biden-appointed then-acting chair of the SEC, would solicit comments on how publicly traded companies should disclose climate risks drove *The Wall Street Journal* editorial board to the mattresses in a March 18, 2021, fulmination:

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

> If shareholders believe a company's policies on climate, racial politics or other ESG (environmental, social and governance) issues are important, they can pass a proxy resolution mandating more disclosure. Yet most such resolutions fail, garnering 27% shareholder support on average in 2019.
>
> Last year Amazon activist investors submitted a resolution requiring the company to detail how it is mitigating environmental damage that affects "communities of color." It got 6%. Amazon proxy resolutions related to facial recognition (31%), hate speech (35%) and gender/racial pay equity (15%) also failed.[13]

True enough, but the WSJ's editorial board knows full well how stacked against proxy resolutions these shareholder meetings are. If the editors get this heated up over a mere effort to *introduce* the subject where corporate owners have gathered, imagine their apoplexy if Herren and the SEC had actually called corporate leaders out for selling America's and the world's climate down the river.

The result is a culture of impunity, based on the well-proven expectation that corporate crime pays and the demonstrable fact that corporate leaders are almost never held responsible when their actions run afoul of the law or endanger society as a whole. Instead, it's Groundhog Day all over again, year after year.

The officials sworn to uphold and defend the American financial system keep making bland assertions about its deep bench strength as Federal Reserve chair Jerome Powell did at an April 2021 press conference when he assured reporters that "leverage in the financial system is not a problem" despite the facts clearly running in the opposite direction. Scant months before Powell spoke, the Office of the Comptroller of the Currency had noted in its quarterly report that equity derivative contracts had soared from $737 billion just before the 2008 financial implosion to more than $4 trillion by the end of 2020. Since derivatives were the tipping point that led to the 2008 debacle, logic might suggest that we are five times more likely to implode in the near future than we were back then.

Worse, almost 90 percent of these contemporary derivatives are held by four banks only – JPMorgan Chase, Bank of America, Citigroup's Citibank, and Goldman Sachs – and not by their unprotected investment banking units, but by their federally insured banking units, which means that if and when the derivative contracts do blow up again, US taxpayers will be on the hook, not the banks themselves.

This is more than a Groundhog Day scenario. It's a failure to learn so great that again one can only assume intent behind it. Eight years after his Senate Permanent Subcommittee on Investigations did groundbreaking work on the Enron collapse, Michigan Democratic Senator Carl Levin was back in the majority and holding subcommittee hearings on the catastrophically failed credit ratings issued by Moody's and S&P prior to the 2008 collapse of the derivative markets.

---

13 https://www.wsj.com/articles/the-securities-and-politics-commission-11616107165 (accessed October 13, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

The subcommittee's findings left little if any doubt about what had happened: Credit rating agencies were paid by the Wall Street firms that sought their ratings and profited from the financial products being rated. Under this "issuer pays" model, the rating agencies were dependent upon those Wall Street firms to bring them business and were thus vulnerable to threats that the firms would take their business elsewhere if they did not get the ratings they wanted. When the threats started flying, the rating agencies weakened their standards as each competed to provide the most favorable rating to win business and greater market share.

What's more, evidence gathered by the Investigations subcommittee showed conclusively that the credit rating agencies were well aware of problems in the mortgage market, including an unsustainable rise in housing prices, the high-risk nature of the loans being issued, lax lending standards, and rampant mortgage fraud. But instead of using this information to temper their ratings, the firms continued to issue a high volume of investment-grade ratings for mortgage-backed securities, even as the abyss yawned ahead.

The obvious lesson out of all this is actually quite simple: While credit ratings are necessary for a functioning debt market, they cannot – by their very nature – be generated from the private sector. When there are two or three rating agencies, any one of whose imprimaturs will confer salability, competition will inevitably dilute the rating criteria, creating instability in the debt market and ultimately undermining the entire economy.

Derivatives are complicated to understand, the debt market can be murky at best, but this is common sense. You don't put the pitcher on the mound in charge of determining balls and strikes. The quarterback doesn't get to call pass interference on his receivers, the fox doesn't guard the henhouse, and credit ratings should never be assigned by firms competing for the work. And yet who continues to provide credit ratings today, more than a decade later? You guessed it.

One more bit of common sense: You don't reward those most responsible for the greatest financial collapse in modern history by enriching them with lavish non-compete contracts to clean up the very same mess, but that is exactly what the Fed did. As Bernie Sanders put it, "The Fed outsourced virtually all of the operations of their emergency lending programs to private contractors like JP Morgan Chase, Morgan Stanley, and Wells Fargo. . . . Altogether some two-thirds of the contracts that the Fed awarded to manage its emergency lending programs were no-bid contracts. Morgan Stanley was given the largest no-bid contract worth $108.4 million to help manage the Fed bailout of AIG."[14]

Add to that the trillions of dollars the Fed spent to keep those same banks afloat through and beyond the debacle, and the Federal Reserve was in effect prepaying the fines that have been heaped on many of those financial institutions in the

14 https://www.sanders.senate.gov/press-releases/the-fed-audit/ (accessed October 13, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

decade-plus since. Any parent knows what happens when you reward a child's tantrum: Kids just keep repeating it time and again until you finally put your foot down and stop giving them ice cream for breakfast.

The More Things Change . . .

Little wonder that, as Pam Martens and Russ Martens have pointed out in "Wall Street on Parade," the chicanery proceeds apace:

> The equity derivative contracts, called swaps, hide the true ownership of the stocks (equities) for reporting purposes. The banks' 13F filings with the SEC list the stocks as if they are owned by the banks when, in fact, the contract provides both the upside and downside in the stocks' share price performance to the hedge fund, while the banks collect lucrative fees.
>
> This highly problematic derivative contract does three other things as well: it allows the banks to avoid the Volcker Rule that bans them from owning a hedge fund while still letting them loan out their balance sheet to a hedge fund; it allows them to ignore the Federal Reserve's Regulation T, *which limits them to an initial margin loan of no more than 50 percent of the purchase price of the stock*; and it allowed the banks to ignore their own internal broker-dealer rules on loaning against concentrated stock positions. There is also the riveting question of just who was paying the capital gains taxes on these stock trades. . .
>
> "The Fed has increasingly become the bank supervisor that lives in a dream world of its own fictions," the Martens conclude. "Former Fed Chair Alan Greenspan's flaky theory was that Wall Street bank executives would look out for the good of the country because it was in their own interests to do so. That theory led to the greatest Wall Street crash in 2008 since the Great Depression. When questioned in a House hearing about the Fed's myopia as the problems escalated within the banks, Greenspan offered the millions of jobless and homeless Americans this explanation: 'I got it wrong.'"[15]

Greenspan's successors apparently intend to get it wrong again and again and again themselves, even in the opening months of what appears to be the far more vigilant watch of the Biden Administration after the kleptocratic antics of its predecessor. The default mode of American capitalism is deference to capital, through administrations of both stripes, through Congresses controlled by either party, and through the Federal Reserve under everyone's watch. The capital itself is too big to die, and the impunity with which it operates is a structural part of the American financial system.

Who's going to enforce any kind of discipline on the big Wall Street banks? Not the Federal Reserve. It has turned that duty over to the New York regional branch of the Fed, and the New York Fed is basically run by JPMorgan Chase, Citigroup,

15 https://wallstreetonparade.com/2021/04/archegos-unpacked-equity-derivative-contracts-held-by-federally-insured-banks-have-exploded-from-737-billion-to-4-197-trillion-since-the-crash-of-2008/ (accessed October 13, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Goldman Sachs, Morgan Stanley, and Bank of New York Mellon. Collectively, they vote on two-thirds of the New York Fed's directors. Their senior staff sits on the New York Fed's advisory committees. Not surprisingly, the five banks were also principal beneficiaries of the $29 trillion the Fed doled out between 2007 and 2010 to prop up the financial system.

And who's going to enforce any kind of discipline on the Federal Reserve itself? Not voters. The Fed has enormous latitude to determine the winners and losers in any economic crisis, but it has been immunized against democracy, and pretty much from congressional meddling, too, given the capacity of Big Finance to control election outcomes with its donation dollars.

What individual of significance, for that matter, is even calling the Fed or the big banks to task, other than perhaps a rogue Bernie Sanders or Elizabeth Warren? As Joe Biden's Treasury secretary, Janet Yellen certainly has the standing to do so, and she certainly showed courage in her chastisement of Wells Fargo, but in her off-duty years between the Obama and Biden Administrations, Yellen earned at least $7 million in speaking fees from the likes of Standard Chartered Bank ($270,000 for one engagement) Jamie Dimon's JPMorgan (three appearances for a total of $651,600), and the giant hedge fund Citadel (just shy of a million dollars for multiple appearances).[16]

Of course, there's no inherent obligation in any of that, but when someone has shelled out more than a quarter million dollars for a few hours of your time, you are definitely laboring above the minimum wage and at least subconsciously likely to be grateful for it.

Nor is there any inherent evil in Yellen's successor, Jerome Powell, joining Jamie Dimon, Ivanka Trump, Jared Kushner, Kellyanne Conway, and others at a January 2021 party at the DC home of Jeff Bezos. The event was an after-party to the annual Alfalfa Dinner, a big-name gathering that pulls together politicians, business celebrities, and others of all stripes; and Washington has long prided itself as being a place where reasonable compromises get brokered over beef tenderloin and plenteous cabernets at the dinner table of the late *Washington Post* owner Katharine Graham and other similar sociopolitical nodes.

But consider that Bezos, the current *Post* owner, has doubled as the very richest American (once preeminent but now second to Elon Musk). And bear in mind also that Wall Street's darling Dimon, along with main-chancers Ivanka, Jared, and Kellyanne have all been sued for being, in essence, high-end grifters. So it's no surprise that Representative Katie Porter at a June 2021 House subcommittee hearing raised a question about the propriety of the Fed chair attending such a gathering, and no surprise either that Powell was deeply offended by the suggestion, as he clearly was. Not since J.P. Morgan essentially served as America's Central Banker a

16 Pam Martens and Russ Martens, "The Wall Street Captured Fed Consolidates Its Power Under Biden," *Wall Street on Parade*, posted June 7, 2021.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

century and a half ago has Big Money operated more brazenly in the nation's capital and with less fear of meaningful punishment.

A Systemic Wrong

Granted, it's easy to make the financial industry and its federal partners the lead villains in this tragedy. They audition hard for the role. The money flow is often more naked in finance than in other endeavors, though far from transparent, and so is the venality and the whining arrogance that accompanies it.

Bloomberg "Money Matters" writer Matt Levine provided another ready example of the shamelessness of it all in his May 20, 2021, column on the Biden Administration's initiative to provide $4 billion in loan-debt relief to minority farmers, a group historically given the back of the hand by lending institutions. According to Levine, the banks were up in arms not because they didn't want the loans paid off – of course, they do – but because paying the loans off early would throw off their future income-stream projections.

As Levine put it, "By allowing borrowers to repay their debts early, the lenders are being denied income they have long expected, they argue. The banks want the federal government to pay money beyond the outstanding loan amount so that banks and investors will not miss out on interest income that they were expecting or money that they would have made reselling the loans to other investors."[17]

This despite the fact that the feds were already intending to pay 120 percent of the outstanding loan amount to cover fees and taxes, *and* despite the fact that the loans came with no prepayment penalty, *and* despite the fact that these were risk-free loans to begin with, guaranteed by the US Department of Agriculture's Farm Service Agency. Still, the American Bankers Association, the Independent Community Bankers of America, and the National Rural Lenders Association were moved to send a strongly worded joint letter of protest.

In the wonderful world of finance, enough is never enough, the field can never be tilted too far in your favor, and no risk is too small to mitigate or demand government protection from while running pell-mell from anything that even hints of regulation. It's all *quid*, no *pro quo*. But it's not just the Big Banks and financiers that have enjoyed a uniquely symbiotic relationship with US government officials and that demand a playing field all their own. Add the defense industry, the energy sector, the health-care industry, Big Pharma, Big Tech, and it becomes clear that just a few "classes of men" have held inordinate sway over the functioning of Washington for the past several decades.

Something systemic is wrong.

17 Matt Levine, "Money Stuff," *Bloomberg Opinion*, posted May 20, 2021.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Chapter 4
$100 Million Here, $100 Million There

> Is the [executive-compensation] system rotten around the core, or is it rotten to the core? In other words, are we dealing with a handful of abusers, statistical outliers who, in a perverse way, merely demonstrate the basic system is fundamentally sound? . . . I have some grave doubts about the entire system.[1]
>
> –Graef S. Crystal

Like many of the introductory quotes to these opening chapters, this one is essentially a prophecy realized. Graef “Bud” Crystal knew whereof he wrote in his 1991 book *In Search of Excess*. Bud was a leading executive-compensation consultant. He had seen the beast close up and could feel the howling winds blowing. CEO pay had risen over a thousand percent in the previous twenty years – to an average of $2.8 million annually, including stock options. Bud feared there might be no stopping the ascent without some kind of drastic intervention, and he was right as so many of our earlier prophets – Abe Chayes, Joseph Schumpeter, Adolf Berle, and Gardiner Means – have been right. In fact, today we can confirm for Bud entirely the “grave doubt” expressed above: Corporate executive compensation in America is rotten to the core.

The proof is in the numbers; however you crunch them.

In his 2005 bestseller, *The Battle for the Soul of Capitalism,* Vanguard founder Jack Bogle noted that in the previous quarter of a century, average worker wages had risen a thin .3 percent annually while CEO compensation grew at 8.5 percent annually over the same time frame.

“The rationale,” Bogle wrote, “was that these executives had ‘created wealth for their shareholders,’” but Bogle found it a rationale that withered under scrutiny. During the years in question, corporations had projected their earnings growth at an average annual rate of 11.5 percent, but they had achieved growth of less than half of those projections: 6 percent on average, slightly less than the 6.2 nominal growth rate of the economy. In real terms, corporate profits inched ahead at 2.9 percent, slightly behind the 3.1 percent annual growth rate of the Gross Domestic Product.

“How that somewhat dispiriting lag can drive average CEO compensation to a cool $9.8 million in 2004 is one of the great anomalies of the age,” Bogle wrote.[2]

The “dispiriting” part of CEO compensation still exists. After a down year in 2018, share prices came roaring back the next year. The S&P 500 average gained 31.5 percent in 2019, yet of the 25 highest paid CEOs that year, fewer than half – 11 to be exact –

---

1 Graef S. Crystal, *In Search of Excess: The Overcompensation of American Executives,* p. 29 (Norton 1991).

2 Quoted in John C. Bogle, “Reflections of CEO Compensation,” *Academy of Management Perspectives*, 2008, p. 21.

https://doi.org/10.1515/9783110696998-004

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

produced total shareholder return in excess of the S&P gain. The highest paid CEO, Sundar Pichai of Alphabet, Google's parent company, had a total reported CEO compensation of $280.6 million, way ahead of his peers, while Alphabet's owners – that is, its shareholders – saw a total return of a relatively light 28 percent, 11 percent below the S&P marker.

A few CEOs arguably earned their keep and more. Lisa Su of Advanced Micro Devices pulled down $58.5 million while her share prices soared by 148 percent. John Plant of Howmet Aerospace justified his $51.7 million with an 84 percent spurt in Howmet's stock value. But many other of the top-paid CEOs would be hard-pressed to justify their compensation in 2019 if shareholder return is the leading criterion. Charles Scharf at Wells Fargo earned $34.3 million on share-price growth of 21 percent; Larry Merlo at CVS Health made $36.5 million on a 17 percent share-price bump; while Robert Iger at Disney pulled down $47.5 million manning the helm of a business whose share price grew 13 percent, almost 60 percent behind the average, stunted by any measure. (Disney shareholders, at least, have a comforting measure of comparison when it comes to top executives and pay far in excess of performance. When Michael Ovitz was fired as Disney's president in January 1997, after a miserable fifteen months in office, he walked away with $38 million in cash and a $100 million in stock, prompting a shareholder suit that was finally settled in Ovitz's favor eight years later.)

Meanwhile, the gap between compensation at the top of the heap and worker pay down in the trenches grew far beyond the 2004 ratio of 280 times based on averages (see Fig. 4.1). Median measurements tell the same story. Scharf's 2019 pay was 540 times greater than the median earnings at Wells-Fargo; Merlo's pay, 791 times greater than the median at CVS Health; and Iger's, 910 times higher than the median for all those gnomes that keep the Disney businesses going. Even at Alphabet, where no one seems to have been low paid, Pichai's $281 million take-home was more than a thousand times higher than median 2019 earnings of $258,000. Happily for Pichai, the 2017 federal income tax breaks for the wealthiest American CEOs and the corporations they lead were by then in full effect.

The year 2020 was, of course, anomalous in many ways. Pandemic conditions drove everything off kilter, but the disconnect between CEO pay and performance was eerily predictable. Hilton laid off almost a quarter of its employees as its hotels sat empty and lost $720 million in all, while chief executive Chris Nassetta took home almost $60 million. AT&T lost even more – $5.4 billion – and John Stankey took a $1.5 million pay cut, but still earned $21 million in compensation. Boeing had maybe the worst year in its long history: its 737 Max grounded after two crashes, 30,000 workers laid off, and a cumulative loss of $12 billion. In response, CEO John Calhoun gamely gave up more than a million of the $1.4 million in cash salary he was entitled to, but with stock awards, Calhoun's total compensation still topped $21 million. This is the very definition of winning by losing.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

But while such "dispiriting" numbers could and can stand as admissible evidence, simple logic tells us the same story, in some ways even more effectively when it comes to CEOs and their ever more soaring compensation. Consider:

- Shortages are not driving up the pay. There are no fewer CEO positions to be filled than existed a decade or two ago, and no fewer candidates for the position either.
- There has been no increase in corporate productivity to justify the increases.
- Increased foreign competition would have suggested a decline in pay; instead, just the opposite has happened.
- The Good Fairy didn't wave a wand and produce this effect.

Ergo? Sherlock Holmes suggested the solution: "When you have eliminated the impossible, whatever remains, *however improbable*, must be the truth." Somebody or, more accurately, somebodies made it happen. It just stands to reason.

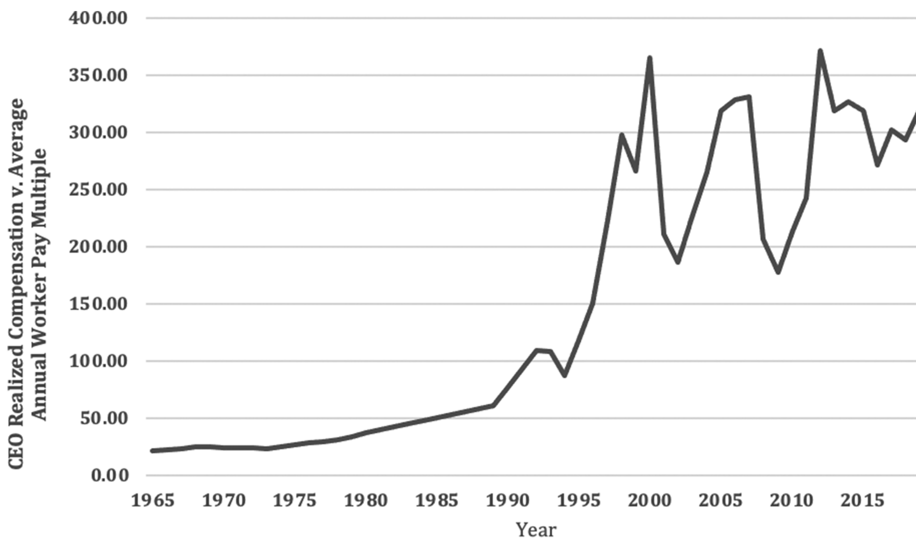


Fig. 4.1: Take the Money and Run.
Source: Economic Policy Institute https://www.epi.org/publication/ceo-pay-in-2020/
Note: A half century ago, the average CEO earned roughly 30 times the annual compensation of workers in the store, the mine, or on the shop floor. Today the ratio exceeds 300 to 1.

It's the Real Thing

The modern story of executive compensation generally begins with Roberto Goizueta, CEO and Chairman of Coca-Cola from 1980 to 1997. Goizueta is thought to be the first corporate officer to be paid more than a billion dollars in compensation entirely derived from personal service. The Coca-Cola board, then and now, was comprised of

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

several of the leading American industrialists. I happened to know Jim Robinson, longtime CEO of American Express and a Coke director for 35 years. On a private occasion, he mentioned to me that the question of Goizueta's compensation was never approved by the board; in fact, it wasn't even presented to the board. On another occasion, I was lunching alone with Warren Buffett, and he, a deferential man by nature, confessed that during his tenure on the Coca-Cola board, neither he nor any other director raised the question of Goizueta's total compensation.

That's what is known as an "agency problem." Directors are supposed to represent the shareholder-owners' best interests – to be their *agents*, in effect – and it's virtually impossible to argue that Roberto Goizueta or any other chief executive is worth a billion-dollar payout over 17 years. The job just isn't that hard. But if reining in grotesque CEO overpay was simply a matter of appealing to directors and awakening negligent shareholders to the issue, the solution I posited in *The Emperor's Nightingale* might still have a fighting chance. Require directors to see to their fiduciary responsibilities, remind the massive institutional investors of the better angels of their nature, and – *presto!* – the agency problem is solved.

The problem, though, as I finally had to admit to myself, is far deeper and more complex than that. There's the simple reality that plate tectonics have shifted within American society, opening up an ever-wider breach between the inordinately compensated and everyone else and further solidifying the super-rich as a special branch of humanity owed excessive reverence and endless deference.

Social Security taxes are a prime example of this kind of unnoticeable drift effect, a way that the richest have made out better than everyone else for the last five decades. People's incomes over a certain level aren't taxed to pay for Social Security at all. But from the beginning of the system, Congress regularly and significantly raised the income threshold where that tax-free level begins, so that as the twentieth century rolled on, more and more affluent people were paying more and more Social Security taxes. But then around 1980 Congress stopped raising it – instead, the tax-free threshold has increased according to an automatic formula, pegged to increases not in the cost of living but in average wages. As a result, since average wages have increased at a snail's pace, at best, since 1980, people with higher incomes have just kept getting more and more of their money shielded from taxation. Today a fifth of all income earned by Americans is free from any Social Security tax, twice as much as in the early 1980s – and that tax break is going only to the richest 6 percent of us, those who earn more than $138,000. Meanwhile, the revenue stream automatically flowing in to fund Social Security has shrunk dramatically, threatening the future financial well-being of those who have paid the greatest share of their income into the system.

On its face, this is patently crazy. It is also almost never commented upon anymore. Actuarial madness has become baked into the system. So has a kind of cruel inhumanity.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

America has virtually eliminated a meaningful pension system. The ancient dream, attributed to Prince Bismarck, of retirement years financed by an employer has – without notice – been whittled to virtual nothingness by the promise, on the one hand, of individual control over their own future and, on the other, by the removal of the employer from any semblance of responsibility for results. Both have drastically diminished the quality of life for many working Americans, which in turn has contributed to the bitter political divisiveness of recent times and its accompanying social unrest.

As we saw in the previous chapters, this frequently gets explained as a casualty of globalization and the need to compete in a changing world. The reality, though, is otherwise and more complex. On a national level, the amount that companies have "saved" by welching on their promises of a defined benefit pension are virtually the same as the amount of excess compensation paid to the top executives. This is not by coincidence, and no case better shows why than that of IBM and Lou Gerstner.

Big Blue Busts a Move

The year was 1999. IBM was once again riding high after a turnaround led by Gerstner, who had taken over as CEO six years earlier and was soon accorded the status of a philosopher-king within graduate business school circles. Gerstner was closely followed by the financial press and frequently imitated by his peers, and he and IBM were about to pull off a doozy.

The company was sitting on prepaid pension assets of $5.6 billion and fair value in excess of benefits of almost twice that. These reserves could be used for several purposes – primarily to pay pension liabilities, but also to offset market declines and to serve as a refilling well to subsidize reported earnings, and that was good for the stock price, but it was about to be very good for Lou Gerstner personally.

The company had determined to change the mode of compensation that it offers employees. It wanted a more modern mix that accommodates the new realities of transient service and few lifetime jobs. To that end, it proposed a new "cash" pension plan to carry out this policy, and then it insisted on cramming this new pension package down the throats of its legendarily loyal employees – all except the most senior thirty executives – even stating publicly that 45,000 employees who had worked for the company for 15 to 24 years would see average benefit reductions of 20 percent, assuming early retirement.[3]

The company argued steadfastly that the new plan was of most value to the youngest and most junior employees, and yet it is precisely those individuals below the age of 40 that it deprives of making a choice. The dialogue is surreal: "We

3 Richard A. Oppel Jr., "Under Fire, IBM Alters Pension Plan," *New York Times*, September 18, 1999.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

cannot do any more without putting IBM's competitiveness at risk" was Gerstner's predictable mantra. But what was the risk of giving under-40 employees a choice? This had nothing to do with what would be offered to new hires, who were, of course, free to work elsewhere.

A certain conclusion is impossible to divine from the reported numbers, but it does seem highly unlikely – indeed, almost impossibly so – that the actuarial charges involved in allowing all IBM employees to choose to retain the pension plan in effect at the time of their hiring would exhaust the huge pension surpluses. Nor does it seem likely that the company's long pension holiday of not having to contribute a cent of company funds to the pension plan was in immediate danger of coming to an end. Honoring its pension promise to existing employees even appears equally unlikely to have required a charge against current earnings of IBM. What then was the "competitiveness" problem involved in dealing honorably with the workforce?

Again, if we follow logic in the absence of hard evidence, the real goal here seems to have been IBM's stock price, traditionally driven by earnings, which in turn were buoyed up by keeping intact those pension surpluses. But who was most affected by the stock price? Not the company itself – IBM demonstrated no use for the cash it generated. The real winner was Lou Gerstner's employment contract, as amended on September 29, 1997, and the options therein contained. Even modest estimates hold that the revamping IBM's pension plan benefitted Gerstner personally to the tune of $150 million or more.[4]

Limning the "miracle" of IBM's turnaround to an audience at his MBA alma mater, Harvard Business School, Gerstner explained that when he arrived at Big Blue, he inherited "behavior, values, and systems . . . created for another age." "Culture," he said, "is everything." In Gerstner's new corporate culture, however, the imperative that CEOs should not be rewarded for raiding the employee pension fund was also regarded as hopelessly outdated.

In her book *Retirement Heist* and in 2014 testimony before the US Senate's Finance Committee, *Wall Street Journal* reporter Ellen Schultz expanded on the practice. Some employers like Montgomery Ward terminated healthy pension plans to pay creditors; others, like Dupont, used pension assets to pay for retiree health benefits. Still other corporations sold their pension assets in mergers and acquisitions deals, indirectly converting them into accessible cash. Most to the point for these purposes:

> Employers took advantage of tax loopholes to carve out parts of the tax-subsidized pension plans for the rank-and-file to pay for supplemental executive pensions and deferred compensation for highly paid employees. . . . Intel was able to move more than $200 million in unfunded obligations for deferred compensation for the top 3 percent to 5 percent of its work force into the pension plan.[5]

4 Graef Crystal, "Crystal Reports," posted March 24, 1998.

5 Ellen E. Schultz, Testimony before the US Senate Committee on Finance, September 16, 2014.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

This also goes to the “agency problem,” and other examples are legion. Among those who went to school on Lou Gerstner was Verizon CEO Ivan Seidenberg. Like IBM, Verizon had a huge surplus in its pension plan as the new century began and Seidenberg took the helm. By 2011, though, when Seidenberg stepped down, the pension plan was $3.4 billion in the hole, thanks to a huge drawdown and the crippling 2008 market crisis. Agony for Verizon’s rank and file, but not for its retiring CEO. He walked away with nearly $100 million.

Like Gerstner, Seidenberg is also not immune to platitudes. “What binds people together is a mission or a purpose that’s bigger than themselves,” he told a July 2019 audience at a Wharton School Leadership Conference. Increasingly, what seems to bind CEOs together is the desire to earn as much as possible – the peons on the shop floor be damned – and what binds their boards together is the desire to let the CEOs do just that.

Three Myths of Executive Compensation

In a 2003 panel discussion on “What’s Wrong with Executive Compensation,” sponsored by the *Harvard Business Review*, Ed Woolard, CEO of Dupont from 1985 to 1995, talked with unusual frankness about the “three big myths” that underlie the process:

1. “That CEO compensation is driven up by competition for CEOs’ services. I do not believe that is true. The main reason compensation increases every year is that most boards want *their* CEO to be in the top half of the CEO peer group, because they think it makes the company look strong.”
2. “That compensation committees are independent. They really are not. They bring in outside experts . . . who tell them that compensation for the peer group’s CEOs has increased. Then the top HR guy, who’s usually a stooge for the CEO, says, ‘By the way, the CEO really would appreciate it if he was in the top end of the range, because it’s important that the outside world knows that the board supports him.’ That’s a lot of pressure. I think it’s important to get input from consultants and from HR, but it’s essential not to let them stay in the meeting when the final decisions are made.”
3. “That share prices reflect CEO performance.” We’ve already looked at that canard.

Then there’s Sandy Weill, the former CEO and chairman at Citigroup and a virtual Harry Houdini of stock options. Weill not only grabbed up all the options he could lay his hands on; he was also truly inspired in assuring that option holders such as himself would be guaranteed the highest possible price of their shares. “If he fails

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

to pick the day in the ten years when the stock is at its highest price to exercise his option shares, the company will make up the difference," Bud Crystal wrote.[6]

> Weill's reload options started with an original grant of 3.6 million options in 1986. The stock has split six times. As Weill exercised his options, many of reloads magically gained a new lease of life: their terms were extended for another 10 years when the original options were exercised. His total compensation for some twenty years work exceeded Goizueta's billion for a life time.

Hiding the Options

Greed of this magnitude and at this level requires infrastructure and cover, and both were (and continue to be) generously provided by the benignly named Business Roundtable. Founded in 1972 on the heels of Lewis Powell's red-alert memo to the US Chamber of Commerce, BRT is essentially the Chamber purged of lower life forms. Its members are all CEOs of leading US companies. They are in the great majority white males, and when it comes to compensation, they are laser-focused – and have been since BRT's founding, when no one had ever heard of lasers outside of sci-fi literature.

Through BRT, the leading chief executives in America personally devoted their time and reputation to removing obstacles to their unlimited capacity to reward themselves. One of the critical breakthroughs was persuading the accounting profession to permit stock options to be awarded without any impact on the profit-and-loss statement. In effect, options could be issued almost without limit as they appeared to be "free," while potential dilution issues could be subsequently dealt with by stock buy-backs often enabled by money leached out of abandoned and reduced pension-fund pools.

In early 1992, John Reed, then-chairman of Citicorp and head of the BRT Accounting Principles Task Force, led the charge by meeting with executives of the Financial Accounting Standards Board, which sets the actuarially vital GAAPs (Generally Accepted Accounting Principles) even as Reed was rallying BRT members to turn those standards in their favor:

> We need help from BRT CEOs in the following areas: 1. Communication with and EDUCATION of your public accountants. 2. Communication with and EDUCATION of your compensation consultants. 3. Communication with FASB now, before their views become solidified. We believe these contacts would be most effective if made by CEOs.[7]

6 Graef Crystal, *In Search of Excess*, p. 178.

7 Cited in: Robert A.G. Monks, "An Outline of Ownership Based Governance," Speech delivered at Cambridge University, July 1996.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

In plain English, Reed was asking his fellow CEOs, personally, to intervene in relationships between their corporation and certain of its professional advisers so as to "educate" them, presumably, on the consequences of their publicly expressed attitudes about appropriate accounting treatment for stock options. Nor did the resulting activity go unnoticed. The journalist Alison Leigh Cowan reported at length on it for the *New York Times*:

> Corporate America is quietly seeking to muzzle the compensation consultants who routinely provide information about executive pay to the business press or to regulators . . . Leading the charge are John S. Reed, Chairman of Citicorp, and H. Brewster Atwater, Jr., Chairman of General Mills, with several other members of the Business Roundtable, an influential group of chief executives . . . the pressure tactics against the half-dozen or so firms that routinely provide this information seem to be working . . .
>
> The Roundtable scored an even bigger coup this summer when some of its members who are clients of Towers Perrin led that firm to conclude that it was not in its best interest to continue helping the Wall Street Journal prepare the executive pay survey it publishes each spring. . . . The sensitivity of the issue became clear on March 31, when four consulting firms and one accounting firm received a technical request from the FASB asking them to demonstrate how they would value five types of stock options. Using computer models, all five responded. But several chief executives said they felt betrayed by the consultants' participation in a demonstration that undermined the executives' contention that values cannot be easily placed on options.[8]

Cowan's *Times* colleague Mary Williams Walsh poignantly described the focused power CEOs were able to bring to the question of their own compensation. Timothy S. Lucas, who recently retired as the board's research director, said he had never seen anything like what followed. In other cases, the rule makers had tried in vain to have chief executives involved in their work, he said. But this time, John Reed summoned him and the board's voting members to a private meeting. Jack Welch, then chief of General Electric, and Sandy Weill were also present, he recalled.

This all-star lineup praised stock options as an excellent employee-motivational tool and an engine of economic dynamism. The board's complicated rule would spoil everything by making companies unwilling to issue them, they said. Mr. Lucas had heard it all before and found it as unpersuasive as ever.

> "But the Roundtable luminaries made clear the stakes as no one else could," he said. He left the encounter with the understanding that even if the board went ahead with its rule, the SEC would never enforce it anyway. The business opposition was just too strong.[9]

8 https://www.nytimes.com/1992/08/25/business/executives-are-fuming-over-data-on-their-pay.html (accessed October 13, 2021).
9 https://www.nytimes.com/2002/07/14/business/is-true-reform-possible-here.html (accessed October 13, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

In an earlier book, I wrote that accepting the practice of leaving stock options off financial reports would be a clear violation of the Hippocratic Oath if the accounting industry had one. I'll stick by that here.

Co-opted Boards

The reality of American corporate governance is that Chief Executive Officers, first, pay themselves as much as possible; second, obscure what they are legally required to disclose so as to blur objective scrutiny; third, take such steps as "back dating" options to enhance returns to which they were ostensibly entitled; and, fourth, transfer as much of their real compensation to categories where disclosure is not strictly required, creating a treasure house of "stealth compensation." Loans, guaranteed interest on deferred compensation, supplementary retirement plans, "awards" of fictitious years of service for purposes of computing pension payments – CEO money gets stashed all over the place. Jack Welch's 2013 divorce settlement – pegged at something like $180 million – revealed a cornucopia of continuing benefits that had followed him into retirement, none of which had been publicly disclosed.

The further reality is that rather than rein in CEO compensation, corporate directors by and large have been enjoying the ride. While CEO compensation at S&P 500 companies rose almost 30 percent in the ten years beginning 2009, including stock options granted, and over 50 percent including stock options realized, total director compensation for those companies rose 42 percent over that time span, to an average of $304,856.[10]

To echo the earlier litany on CEO compensation in this chapter:

- The average number of board meetings annually at S&P 500 companies has held constant during the ten years in question at eight.
- Similarly, the average number of committee meetings annually is largely unchanged.
- There has been no decrease in the average size of boards, which would arguably result in more work per member.
- Presumably the 42-percent average increase in director fees has also broadened rather than narrow the pool of candidates willing to take on such duties.
- The Good Fairy didn't wave a wand and produce this effect either.

Ergo, to cite Detective Holmes again, "When you have eliminated the impossible, whatever remains, *however improbable*, must be the truth." Somebody, or more accurately, somebodies made it happen. It just stands to reason, and not very pretty reasons at that.

10 See Matthew Friestedt, Marc Treviño, and Melissa Sawyer, "Trends in U.S. Director Compensation," Harvard Law School Forum on Corporate Governance, posted August 16, 2020.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

This is an ugly picture, individually and collectively – in the CEO suite and in the boardroom. To ignore it, though, is to fail to come to grips with the essential difficulty of accommodating a greed-based system with the well-being of society. To ignore it also is to willfully neglect why CEOs in America today are able to pay themselves amounts that have no relationship to what their predecessors a half-century ago received for the same work, no correlation with what is paid in other countries, no connectivity with the workers they oversee, and no causal connection with increases in productivity or market value. The answer is not to be found solely in the usual dark corners: a lack of independence of boards, compensation committees, and compensation consultants. That might have once been true – and it certainly seemed true when I was writing *The Emperor's Nightingale* – but today those are symptoms, not causes. The cause is power – raw power. The mythology of accountability to boards and to shareholders has revealed itself as just that – *myth* – in the face of the capacity of CEOs to dominate the process and co-opt the personnel by whom they are supposed to be monitored.

As I wrote in reviewing Lucian Bebchuk's book, *Pay Without Performance*,

> Most of the scholarship and legal focus of the last half century has taken as gospel that management rather than ownership controls the public American corporation. Now, we have no choice but to put a fine point on it – the current CEO is an autocrat. This is not a question of legal procedure or of economic functioning; it is a matter of power. CEO self-enrichment is the most incontrovertible proof of the existence of absolute power in the corporate chief executive.

In fact, CEO self-enrichment may be the most baked-in assumption of them all. Here is what then-Federal Reserve Chairman Alan Greenspan had to say on the subject in remarks at NYU's Stern School of Business, way back in March 2002:

> After considerable soul-searching and many Congressional hearings, the current CEO-dominant paradigm, with all its faults, will likely continue to be viewed as the most viable form of corporate governance for today's world. Such CEO leadership is critical for achieving the optimum allocation of the nation's corporate capital.[11]

Even, presumably, when the very most optimal allocation of a corporation's capital is directed to the CEO him- or herself.

11 https://www.federalreserve.gov/boarddocs/speeches/2002/200203262/default.htm (accessed October 13, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Chapter 5
It's Alive!

> 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.[1]
>
> –Justice Louis Brandeis

History will someday record that two-plus centuries of government "of the people, by the people, and for the people" in the United States lurched toward an end in the opening years of the twenty-first century. The elements of corporatism – what I have in the past termed (with a capital C for emphasis) "Corpocracy" because its sound grates so powerfully – had been sown decades earlier, but the membrane burst with the Congressional elections in November 2002.

President Bush explained the plethora of corporate scandals that had soiled his first two years in office as the work of a few bad apples rather than a systemic failure, and the voters gave him majorities in both the Senate and House of Representatives. From there, his administration moved unflinchingly to associate itself with winners in the new national order:

- Through the nomination of John Snow to be Secretary of the Treasury. The affable Snow previously served as Chairman of the Business Roundtable, which on his watch had masterminded the subjugation of the accounting profession (and the US Senate) in permitting options to be issued without reflection on the profit-and-loss statement. This single act more than any other created the atrocity of CEO compensation, which caused the corporate defalcations that cost so many Americans so much and which, given Snow's record, was wholly predictable. While CEO of CSX, Snow sucked over $70 million in compensation out of a marginally profitable railroad. Charles Grassley, the amiable Iowa farmer, as Chairman of the Senate Finance Committee having jurisdiction over 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.
- Through the change of committee agendas. The 2002 Hearings of the Senate Permanent Subcommittee on Investigations, chaired by Democrat Carl Levin of Michigan, were among the most insightful congressional looks ever taken at corporate failures and mismanagement, including the previous year's spectacular Enron collapse. The subcommittee's 2003 agenda under its new chair, Republican Norm

1 Louis Brandeis, dissenting in *Liggett v. Lee*, 288 U.S. 514, 458 (U.S. Sup. Ct. 1933).

https://doi.org/10.1515/9783110696998-005

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Coleman of Minnesota, eschewed corporate malfeasance and overreach, despite its staff's hard-earned expertise in the field.

- Through tax priorities. The Bush administration successfully managed to introduce tax incentives for dividends. While this might be justified in microeconomic terms, it demonstrated concern with corporate priorities rather than those of individuals.
- Through policies affecting its own agencies. The long-anticipated report on global warming prepared by the Environmental Protection Agency was substantially altered by Administration officials. According to reporting by the *New York Times*, "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."[2]
- Through the award of a no-bid contract to Halliburton to rebuild Iraq, notwithstanding that Vice President Cheney had been its CEO before being elected to public office.
- Through the fundraising practices of the President, which publicly aimed at building a money mountain to protect re-election in 2004. It is unimaginable that $150 million could have been raised without the involvement (legal) of corporate staffs to coordinate contributions from officers and employees.

Clearly, corporate imperatives had become national imperatives; the Republican Party was now the party of corporations, and in 2004, George W. Bush would run for reelection as President of the first corporatist state . . . and, of course, win.

Long Time Coming

Corporations are a relatively recent institutional creature with origins in the public good. The enterprising were encouraged through limited liability, perpetual existence, and tradable holdings to channel their energies through the corporate form in pursuit of specific public objectives, ranging in the earliest days from 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. Gradually, incorporation became a right available to all applicants, although corporations were limited as to size, term, and purpose. Inexorably, those limitations soon began to bleed away.

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

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

No one has described the menace from dilution of these limitations as well as Justice Louis Brandeis does in the introduction to this chapter, but Brandeis was writing in the relative infancy of this corporate coup d'état.

As early as the 1930s – even as Justice Brandeis sat on the Supreme Court – large publicly held corporations were passing from the control of owners to control by managers. Debate 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.

In more recent times, Milton Friedman sharpened the discussion with his insistence that the purpose of corporations is the maximization of profit for owners. Like Friedman, David Engel has painstakingly pointed out that managers have no legitimate authority to redefine their own responsibility beyond profit optimization.[3] Both stressed that this maximization must take place within the rules, but as noted earlier, that made attacking and altering the rules and controlling the rule-making all the more attractive, indeed an imperative. And that changed the game, perhaps forever, and made the federal government its playing field.

For a long time, the separation between corporation and state was so complete that the private sector didn't even bother to learn the language of Washington. President Franklin Roosevelt would inveigh against excessive executive salaries; President Truman might briefly "seize" the steel industry; and President Kennedy would charm reporters by recollecting his father's characterization of big business leaders as "SOBs." But these were Democrats, after all. When General Motors was caught hiring private detectives to shadow Ralph Nader's early work, the utter incompetence of the business sector to speak the language, feel the sensitivities, or relate in any significant way to government was manifest.

Business would continue to "lose" frequently – to labor, to Democratic congressional committees, to federal agencies – until former Democrat John Connolly in the waning days of the Nixon term began the work that led to the creation of the Business Roundtable. As limned in the last chapter, the BRT was a work of genius, perhaps evil genius – a tax-exempt lobbying group created solely for the purpose of implementing policies of benefit to leading American CEOs, who undertook all of the staff expense necessary for the project, thus insuring top-quality private-sector professionals and a minuscule bureaucracy. A lean, clean fighting machine, in brief, with the full brunt of Corporate America behind it.

At a certain point, business leadership understood that Democrats were real people who liked to play golf and were partial to very large post-public-service legal and consulting fees. 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.

---

3 David L. Engel, "An Approach to Corporate Responsibility." *Stanford Law Review*, vol. 32, no. 1, 1979, pp. 1–98.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

George W. Bush kept the party going by staffing his administration from the BRT. Former officials of the highest rank associated themselves with the Carlyle Group, which was conspicuously involved in government-related businesses. Business domination of government has occurred before in American history, noticeably at the end of the nineteenth century, but before Bush 43, there was never a time when *all* the principal elected and appointed federal officials had been personally enriched through Big-Business connections, never a time when federal programs reached such a level as to deserve the Cato Institute's sobriquet "Corporate Welfare," never a time of such brazen disregard of government officials favoring former corporate connections.

Then along came Barack Obama to command the tank of state that George W. Bush had sent marauding over America's free-enterprise traditions, and Obama's approach to Big Business turned out to be "just the next gear,"[4] as Timothy Carney wrote in *Obamanomics*. Using many of the same senior personnel as his predecessor, Obama "rescued" America from Bush's derelictions by bailing out AIG, throwing lifelines to Goldman Sachs and other investment banks, and thereby assuring that there was no bottom to which government would not sink when it came to supporting the Corpocracy and protecting it from its own malfeasance, greed, and occasional flat-out idiocy.

But even that did not cement Big Business's chokehold on democratic principles and values. That *coup de grâce* was left to John Roberts and the US Supreme Court.

Game, Set, Match?

If one needs to put an event and a date as the time when reality changed and the issue became not just unbridled corporate power but the nearly absolute hegemony of corporations over political power, it is the 5–4 decision in *Citizens United v. the Federal Elections Commission* that the Supreme Court handed down on January 21, 2010. In that decision, the Roberts Court found that corporations, just like humans, have the right to free speech and that therefore corporate support of political candidates is protected under the First Amendment. That decision liberated vast pools of corporate money to wash through the political system, often with no accounting and certainly without limitation, and in doing so changed the dialogue from corporate power *over* government to corporate power *as* government.

Game, set, and match – and quite possibly meant to be exactly that. Chief Justice John Roberts' pro-business leanings are a matter of record, but what was truly startling about the *Citizens United* case is that precedent and procedure were both tortured to decide an issue that had not been brought before the Court.

---

4 Timothy P. Carney, *Obamanomics: How Barak Obama is Bankrupting You and Enriching His Wall Street Friends, Corporate Lobbyists, and Union Bosses*, p. 152 (Regnery Publishing Kindle Edition, 2009).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

The Supreme Court had already affirmed in the *Bellotti* case the capacity of corporations to spend as much money as they chose in trying to influence public opinion about referendum issues. Nor was there ever any question whether the employees of corporations have political rights, just like their suppliers and customers. They can speak at the ballot box in response to how government alternatives affect business. Moreover, it has been long accepted that corporations are entitled to the protection of the "due process" clause of the US Constitution, which assures that their property cannot be taken by government except with fair recompense. What further legitimate needs do corporations have?

Yet according to a majority of the Supreme Court, there was still one critical weapon missing in the corporate arsenal: the right to have "corporate speech" treated for Constitutional purposes as equivalent to human speech, a notion preposterous on its face.

As Justice Stevens put it on page 77 of his dissenting opinion:

> It is an interesting question 'who' is even speaking when a business corporation places an advertisement that endorses or attacks a particular candidate. Presumably it is not the customers or employees, who typically have no say in such matters. It cannot realistically be said to be the shareholders, who tend to be far removed from the day-to-day decisions of the firm and whose political preferences may be opaque to management. Perhaps the officers or directors of the corporation have the best claim to be the ones speaking, except their fiduciary duties generally prohibit them from using corporate funds for personal ends.
>
> Some individuals associated with the corporation must make the decision to place the ad, but the idea that these individuals are thereby fostering their self-expression or cultivating their critical faculties is fanciful. It is entirely possible that the corporation's electoral message will conflict with their personal convictions. Take away the ability to use the general treasury funds for some of these ads, and no one's autonomy, dignity, or political equality has been impinged upon in the least.

That's damning enough evidence of the sheer illogic of the Court's decision, but this is an illogic that just keeps on giving. There is no philosophy of corporations, no ethic of corporations. Efforts to anthropomorphize corporations are not successful. They simply do not have human characteristics. They are nothing but legal assemblages of energy with a profit-maximizing dynamic. Even if we can't fully understand the consequences of unleashing these energies onto a pluralistic society, we would be foolish not to recognize the likelihood of corporate hegemony and the danger of infusing public-policy decisions with the language of corporations. Doing so does more than insert the camel's nose under the tent; it brings the camel inside and enthrones its profit imperative at the tent's very center, with consequences that reverberate throughout the body politic, the social fabric, and the life of the nation as a whole.

Maximizing profits requires constant, indeed perpetual, increase in the scale of operations, while logic – if not preservation of the species – tells us at some point, on a planet with finite resources, there must be a limit to infinite expansion. At the

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

very least, we must recognize that the dynamic of growth will inevitably crowd resources and lead to a struggle over their use – to maximize profit or to preserve health and livability. One side of that equation, we already know from its most ardent supporters, exists for no other purpose than profit maximization, and thanks to the Roberts Court, it now has at its disposal unlimited resources to influence public opinion and both the legislative and judicial process without ever having to identify precisely which corporate coffers are funding its many initiatives. This is a legacy that we now live with thanks to *Citizens United,* one that Theodor Geisel (a.k.a. Dr. Seuss) captured unforgettably in his wonderful and haunting children's tale, *The Lorax*.

Anthropomorphizing the Unimaginable

Unlike humans, corporations lack the ability both to feel joy and suffering, and to express these and other feelings in language. Corporations don't feel love or hate. They have no capacity to use language to refer both to feelings and to intuitions, and they lack moral discernment. Fairness, an ability to judge equality and inequality in social relations and reciprocity, and to find a response fair or unfair, the ability to foresee consequences and choose accordingly – these qualities may be found in abundance among those who work for corporations and among their shareholder-owners, but to the entity known as a corporation, they are all foreign concepts.

In America and the West generally, even ex-presidents and former prime ministers can be charged with crimes and brought to justice. In America particularly, those who direct corporations – the extravagantly paid human intelligence in the corner suite – are virtually immune from prosecution. The essence of being a good citizen is taking personal responsibility for one's actions. The essence of being a corporation is precisely the opposite. No one individual is responsible. If Citigroup were to shoot someone down in cold blood on Fifth Avenue – to borrow Donald Trump's infamous formulation – who would they possibly charge? No one! Stuff just happens.

In America, too, we at least maintain the fiction that everyone ponies up a fair share at tax time – for defense, for the common good, for all the benefits conferred on us by citizenship. Increasingly, corporations don't even pretend to do so. CEOs gladly welcomed the 2017 legislation that slashed the corporate tax rate to 21 percent (from 35 percent) and nodded agreeably when told that along with paying less, they were now also expected to cheat less. Then they continued to run their billions in earnings through tax havens like the Cayman Islands and Bermuda, maximizing profit so efficiently that in 2020 fifty-five of the nation's largest corporations – Nike, FedEx, and others – paid no taxes at all on collective profits of more than $40 billion.

Conflating humans and corporations dehumanizes the former while granting the latter a heart and soul it simply doesn't possess, and never can. Confusing human and corporate speech also corrupts the language of the national agenda, nowhere

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

more so than in the consolidation of corporate control over the television, print, and Internet media.

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 important, the media is Constitutionally protected in whatever activity it takes with respect to elections. While there are some restrictions on candidates and parties, the media can devote limitless space or time to particular campaigns. One has to wonder whether this power has anything to do with the decision by the Federal Communications Commission to eliminate all restrictions on ownership of newspapers, radio, and television in a community. 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.

Tens of thousands of words could be written on this subject alone. Suffice it here to say that John Roberts is not a foolish man or an un-nuanced one. He would not have blemished, perhaps permanently, his own record as a fair umpire unless the results, in his view, were worth it. To Corporate America, they clearly were, in multiple ways.

Earth to Justice Kennedy

As effectively as the decision in *Citizens United* calls into question the independence of the Roberts Court's thinking, Justice Anthony Kennedy's majority opinion in the case also leads one to seriously question what planet at least one of the Justices was living on when the case was heard. Of all things, Justice Kennedy justified the Court's decision by pointing to the Internet.

Kennedy's majority opinion assured us, for example, that "With the advent of the Internet . . . shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests."

Kennedy also held that disclosure "permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[5]

To enforce the point, Kennedy expressed enthusiasm that technology today makes disclosure "rapid and informative." But "disclosure" of what? Corporations are not required to make the disclosures to shareowners as Justice Kennedy seems to

5 US Supreme Court, *Citizens United v. Fed. Election Commission*, 130 S. Ct. 876, 915 (2010), p. 55.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

have believed. More than a million Americans have asked the SEC to require corporations to make such disclosures, to no avail.

How can we, as shareowners, hold corporate managers accountable when we do not know what candidates or measures they are supporting? As we've seen, the vast majority of Americans do not hold stock directly. Instead, most of our investments are held by mutual and ETF funds, often in deferred compensation plans where we do not even see how shares held by our investments are voted in corporate elections. In the past, I have proposed new rules requiring real-time disclosure in a user-friendly format. To ensure our shares are voted in alignment with our values, we must first know how they are voted, I contended. It all fell on deaf ears.

The bottom line? The majority opinion in *Citizens United* is expressly based on the public disclosure by corporations of their political expenditures. That was untrue when the opinion was written. In the very first election cycle post-*Citizens United*, culminating in the November 2010 voting, the sources of about half the money spent by outside groups were kept secret – $136 million of $266.4 million total, double the $69 million spent by outside groups in 2006. This has also been untrue in every election cycle since, a spawn of *Citizens United* ignored by all subsequent rule makers including Barack Obama and Donald Trump, largely because, as Fig. 5.1 shows, both political parties have benefited from this deluge of soft money at the state and national levels.

No wonder American politics is awash in unaccounted and uncountable corporate money. Economists like to talk about "alignment problems" that arise when practices fall out of sync with goals. If, for example, you are a car manufacturer who has vowed to help control carbon emissions yet has failed to even announce a forthcoming hybrid or all-electric model, you are likely to have an alignment problem both inside and outside the corporation. But if the single goal a corporation has is profit, then the only alignment required is to move heaven and earth – and the political system – to that end. In such a circumstance, CEOs would be practically derelict in their duty if they didn't do everything they could to take advantage of *Citizens United*'s almost boundless gift. But the fallout of the *Citizens United* decision reaches far beyond the money itself.

Corporate energy has now influenced the process of Congressional and Presidential elections to the extent of changing their character. The level of corporate financial involvement in election campaigns has rendered individual involvement – except for self-financing by the truly rich – increasingly irrelevant.

To cite a personal example, I was involved in a number of self-funded campaigns for the US Senate in my home state of Maine. None of them involved an expenditure of more than a million dollars. The 2020 Senate campaign in Maine aggregated $200 million in expenditures that are required to be reported, and only the Lord knows how much beyond that. I for one have stopped participating in political giving, simply because however much I could give is totally irrelevant against the hundreds of millions of dollars in the political war chests of the Roberts-enabled sponsors.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

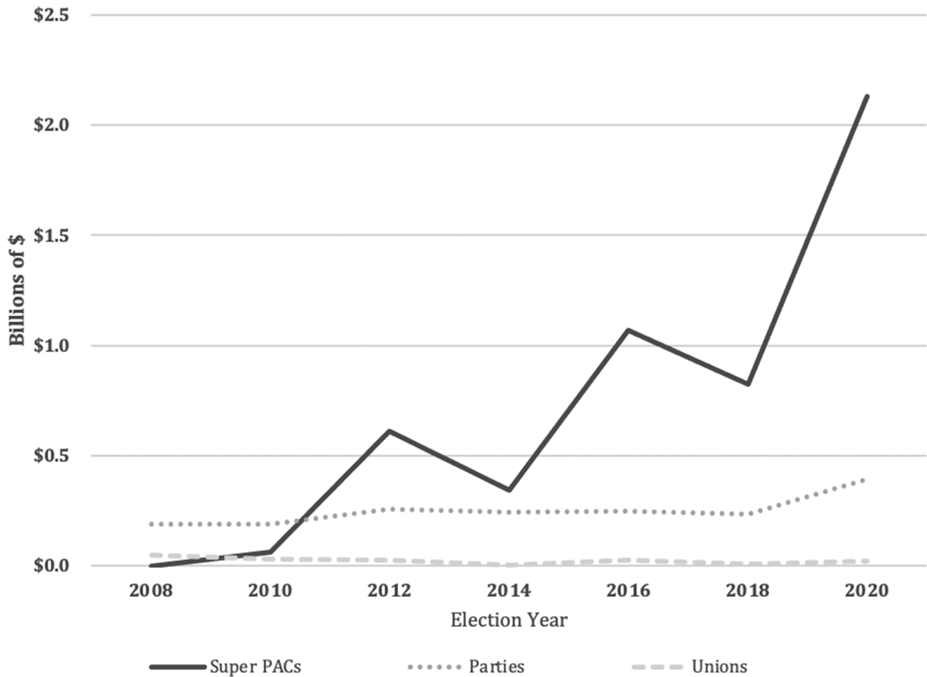


Fig. 5.1: Super Soaring PACs.
Source: Compiled from Data Collected by OpenSecrets.org. Does not represent all spending.
Note: Until the 2010 Citizens United decision, a rough symmetry prevailed in election-year outlays by various interest groups. Since then, Super Pac spending has separated itself dramatically from the pack.

Corporations, on the other hand, already have resources agglomerated that they can efficiently target in a cost-effective way.

The reality is that ultimately individuals can never speak as loudly with our own voices as corporations can with the unlimited amplification of money. In effect, Justices Roberts, Kennedy, et al. with their decision disendowed individual Americans from effective participation in political campaigns, while massively endowing Corporate America to fill the vacuum through organizations like the Federalist Society, which now seems to hold veto power over Supreme Court nominees in the same way the much more broadly based American Bar Association once did, and through the US Chamber of Commerce, which thanks to *Citizens United* is now able to provide cover for its corporate donors while spreading money through virtually every even semi-important nook and cranny of government at both the state and federal levels.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Implausible Deniability

I keep coming back to the Chamber in this account because, despite its benign sounding name, cheerful associations with community picnics, and claim that it's composed of hundreds of thousands of mom-and-pop businesses, the Chamber is Corporate America's scalpel blade in excising democratic rule from the supposedly democratic United States that lends the Chamber the first part of its name. In her excellent book *The Influence Machine,* Alyssa Katz detailed why that is so.

> The Chamber is something unique in the annals of American politics: a single institution that shapes the balance of power in the courts, at the ballot box, in the halls of state legislatures, and in the US Congress. It is protected by the IRS as a trade organization, which means it does not have to pay taxes or disclose its sources of funds.[6]

The Chamber's funding members have opened their wallet to more than election campaigns. It – and they – have also lavished even more money on Washington lobbying, targeting members of the House and Senate who could expect to face the wrath of attack ads if they didn't get in line. As one Hill aide confidentially described the squeeze to Katz: "How do I say no to a K Street lobbyist, realizing that they have all the money they need to defeat my boss in the next election?"[7]

Maybe most important, the Chamber in its infinite wisdom and with infinite money at its disposal, has perfected what Katz termed the "Quadrakill" for dealing with Capitol Hill.

> First, if you don't like a bill, amendment or provision thereof, you try to defeat it with a vote. Just say, then vote no (or n/a, or whatever). If that fails, go to stage two. You can try to defund it through the appropriations process. If that doesn't work, there is stage three. This is where you can try to stop it, change it or delay it through the regulatory rulemaking process. If all of those things fail, you can go to DEFCON four: litigation.[8]

Alyssa Katz, it needs to be noted, was writing in 2005. The years since, spent largely under the shadow of *Citizens United,* have only sharpened her critique and driven the Chamber to ever more draconian measures to shield its principal donors from public view.

Who contributed to, say, the Metropolitan Museum of Art in 2019–2020? Go to metmuseum.org and scroll to "Contributors," and you'll find every one of them – sixteen pages densely packed with names, separated by general category (Foundations & Trusts, Individuals, Corporate Patrons first of course, and so on), specific interests (American Wing, Arms & Armor, Islamic Art, and the like), and so on.

6 Alyssa Katz, *The Influence Machine: The US Chamber of Commerce and the Corporate Capture of America*, p. 19 (Spiegel and Grau, 2005).
7 Ibid., p. 176.
8 Ibid., p. 203.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Who contributed to the US Chamber of Commerce in any given year? That's another story entirely. The best analysis I've been able to find came from Public Citizen, published in 2016, and it's opaque in the extreme, of necessity, but not without a few glimmers of light.[9]

According to Public Citizen's analysis of the Chamber's 2014 tax filings, just 74 donors, each contributing at least $500,000, provided 60 percent of the Chamber's receipts for that tax year, but those 74 donors are listed by amount only, not name. To narrow the possibilities, Public Citizen compared S&P 500 companies that publicly disclose membership in the Chamber – about half of all S&P 500 listees, itself telling – and looked at their total donations for tax year 2016, assuming there was likely to be some correlation between the two reporting years. That winnowing netted ten corporate mega-backers, including Hartford Financial Services, Chevron, Microsoft, PepsiCo, and Johnson & Johnson; but only three of the ten acknowledged that all their contribution went to political expenses: Dow (the runaway winner), Southern Company, and American Electric Power. No mention of what the expenses went to, but given that the most committed spenders were a chemical company and two utilities, it's probably a safe bet that the easing of environmental regulations was a lead concern.

Noncorporate donors in 2014 – at least those that could be identified from their tax filings – included two PACs affiliated with Charles and David Koch: Crossroads GPS, which kicked in $5.25 million and Freedom Partners Chamber of Commerce, which ponied up another $2 million. Again, there's no mention of where that money went, but those bloodlines again leave little doubt about the general direction it traveled in.

Among the Chamber's main lobbying concerns during the timeframe at issue were approval of the Keystone XL pipeline and easing of regulations on coal mining and fracking (of great interest to the Kochs) and passing of the Congressional Review Act, allowing Congress to undo regulations imposed by outgoing administrations (another Koch bucket-list item).

The Chamber's kill list included the Financial Stability Oversight Council, created to stop "too big to fail" banks from triggering another financial crisis, Dodd-Frank (not unrelated to the previous item), and of course any measure that would bring greater transparency to exactly what the Chamber specializes in – heavy handed lobbying funded by as much dark money as it can gather and the attendant obfuscation. As the group's former president, Thomas Donohue, once put it, the Chamber intends to "give [members] all the deniability they need." *Citizens United* doesn't hurt either. And thus the roughly $1.4 billion the US Chamber of Commerce

9 Public Citizen, "The Chamber of Secrets: An Investigation into Who Funds the Notoriously Opaque U.S. Chamber of Commerce," September 13, 2017.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

has spent over the past two decades to influence legislation and the political process creeps stealthily through the shadows, precisely where such money belongs.

With the Chamber's help, its ever-convenient cloak of deniability, corporations and their CEOs can swing elections, and elected officials (including judges in applicable states) can decide on the legal framework within which the power of CEOs can be challenged by any corporate constituency. So long as corporations are careful to funnel resources through both sides of the two-party system – resources that are almost universally welcomed since the cost of not playing according to the Chamber playbook is so high – this is a perpetual-motion machine of enormous destructive power.

Citizens United has effectively turned the leadership of these United States over not to those who have taken an oath to uphold the Constitution to protect and defend the nation against all enemies foreign and domestic, but to those who are sworn to uphold the maximization of profit and to protect and defend *that and only that* against all enemies foreign and domestic. Market efficiencies are king. Cost/benefit analysis is replacing the rule of law, or rather the rule of law is being bent to favor cost/benefit analysis. Thus corporate hegemony becomes embedded ever more deeply in the body politic, the body social, and the body economic, and a new class of philosopher-kings is born.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Chapter 6
Masters of the Universe

> It was, however, striking – in the best sense of the word – that precisely those rules that corresponded exactly to their overseers' economic interests enjoyed unconditional veneration, whereas rules for which said correspondence was less applicable were more likely to be winked at.
>
> – Thomas Mann, *The Magic Mountain*[1]

In *The Emperor's Nightingale*, I discussed several solutions for the ills facing corporate governance, the first of which was the idea of the CEO as a benevolent philosopher-king. In doing so, I was hoping to co-opt and take advantage of a movement already much in evidence: the excessive deference being given to the ever-more-powerful and increasingly super-wealthy CEOs who sat atop the nation's business thrones.

The singular pursuit of profit, the ruthless imposition of "efficiencies," the abrogation of any sense of obligation to the environment, to workplace safety, to an equitable distribution of earnings between senior management and the factory floor – all these and more were clearly making America a meaner, more polluted, winner-take-all place. But corporations, I reasoned, were complex adaptive systems, ultimately answerable not to their CEOs but to their boards and shareholders. If only those nightingales would begin to sing again, corporate governance would become an easier task and the corporation itself a better place, one that served both business and human needs.

Instead, of course, shareholders retreated to the deep forest, perhaps never to sing again; board members sat mute on their increasingly generous director's fees; the Gospel of Profit and Efficiency became virtually the law of the land; and CEOs became the nation's new philosopher-kings, but not the kind I had devoutly hoped for – in fact, just the opposite. Rather than help to rebalance society, they doubled down on what was making us ever more uncentered, almost a disassociated state between promise and performance.

Twice in the first five years of the new century, one of those new philosopher-kings, General Electric Chairman and CEO Jack Welch, topped the *New York Times* bestseller list, first with *Jack: Straight from the Gut*, published in 2001 just as Welch was retiring from GE with a severance package valued at $417 million – the largest such payment in the history of business, and one that hid all sorts of benefits from public view – and later *Winning*, published in 2005, four years before GE's stock price cratered at well under $10 a share.

Turns out, Neutron Jack's famous "rank and yank" strategy – every year, he fired the bottom 10 percent of his managers – didn't necessarily build a deep-bench of corporate excellence. His decision to concentrate on acquisitions while all but

1 Thomas Mann (John E. Woods, translator), *The Magic Mountain* (Everyman's Library, 2005).

https://doi.org/10.1515/9783110696998-006

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

ignoring research and development didn't position GE well for future growth either. And his hand-picked successor, Jeffrey Immelt, was nowhere near up to the job, or perhaps to untangling the mess that Welch had left him. But never mind, when Jack Welch spoke, America listened.

Four years after *Winning* appeared, it was Jamie Dimon's turn to enthrall and educate the American reading public. In *Last Man Standing: The Ascent of Jamie Dimon and JPMorgan Chase*, journalist Duff McDonald provided, to quote from its Amazon page, "an unprecedented and deeply personal look at the extraordinary figure behind JPMorgan's success. Using countless hours of interviews with Dimon and his full circle of friends, family, and colleagues, this definitive biography is by far the most comprehensive portrait of the man known as the Savior of Wall Street."[2]

By now, we know that Dimon's real savior act, post-2008 crash, was to save himself from prosecution. At the same time that poor people were being arrested and financially ruined over minor cases of shoplifting,[3] bank CEOs like Dimon were avoiding prison for overseeing what is clearly a pattern of criminal behavior involving billions of dollars over many years. But again, never mind. Deference must be paid to this ironic "Savior of Wall Street." Or perhaps one should question whether Wall Street is worth saving, if this is the one who did it.

When Facebook Chief Operating Officer Sheryl Sandberg speaks, America also listens, and buys. Her 2013 bestseller *Lean In: Women, Work, and Will to Lead* – was a runaway bestseller. But the leaning in Sandberg did on behalf of Cambridge Analytica – facilitating the secret transfer of personal data for as many as 87 million unknowing Facebook users for a psyops targeting of those same users – resulted in Congressional investigations and a $5 billion fine. Sandberg's subsequent efforts to defend herself for harvesting customers' identities for profit showed her to be tone-deaf at best, however close she might hold women's best senior-management hopes.

And when Bill Gates speaks, the nation all but stands up and salutes – or did until word surfaced that the Bill & Melinda Gates Foundation had worked to scotch Oxford's plan to offer its Covid vaccine on a nonexclusive basis so it could be manufactured and distributed cheaply and widely around the world, and until the pending divorce of Bill and Melinda shone a more direct light on Bill's unsavory relationship with sex-magnate Jeffrey Epstein.

The point being that, while many corporate CEOs and mega-empire founders have admirable traits – their grit, their perseverance, the jobs they often create, the new markets they open up – this is often genius that operates within a narrow bandwidth defined by three things: profit, more profit, and most profit. What's

2 https://www.amazon.com/Last-Man-Standing-Ascent-JPMorgan/dp/1416599541/ref=sr_1_1?dchild=1&keywords=Last+Man+Standing%3A+The+Ascent+of+Jamie+Dimon&qid=1627439486&sr=8-1 (accessed October 13, 2021).

3 https://www.hrw.org/report/2018/02/21/set-fail/impact-offender-funded-private-probation-poor (accessed October 13, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

more, it's a genius that sometimes, maybe often, comes with personality defects that serve the pursuit of profit beautifully but can be otherwise disabling. Federal Judge Thomas Penfield Jackson, who oversaw the turn-of-the-century antitrust case against Microsoft, told author Ken Auletta that Gates has "a Napoleonic concept of himself and his company, an arrogance that derives from power and unalloyed success."

True leadership requires far more – as the saga of Henry Ford illustrates.

Almost a century before Trump, Americans were "Hot for Henry" – Henry Ford, that is. Not only was Ford a production-line genius; he was also the Great Emancipator of the working man, paying a $5-a-day wage (about $67 in current dollars) and producing a car the working man (in theory) could afford. "Ford for President" clubs sprang up all across the country. A *Collier's Weekly* nationwide poll in the summer of 1923 had Ford running far ahead of incumbent Warren Harding for the Republican presidential nomination. Soon thereafter, though, Harding died, and Ford backed his vice president and successor Calvin Coolidge. The fervor mounted again in 1929, *after* the Great Crash, when Ford actually raised the daily wage to $7 a day (and quietly laid off some 30,000 Ford workers to make the math work in the newly crippled economy).

From there, however, what was either Ford's defects or essential nature seemed to take hold. When Ford workers staged a March 1932 march in support of unionization in Dearborn, Michigan, police fired point blank on the demonstrators, killing three and wounding 50. Six years later, when Adolph Hitler presented Ford with the Supreme Order of the German Eagle as reward for the automaker's many contributions to global anti-Semitism, Ford happily received it. Imagine an ex-American president in thrall to the Fuhrer as the skies darkened over Europe.

Half a century further on, another auto executive (and bestselling author), Lee Iacocca, briefly surfaced as the "CEO America Needed at 1600 Pennsylvania Avenue," although Iacocca's credentials at Chrysler consisted largely of arranging the 1979 Congressional bailout that saved the company. In a preview of the Obama Administration's handling of the 2008 financial crisis, Chrysler was deemed Too Big to Fail, or maybe Michigan's electoral vote was Too Big to Ignore. Either way, Iacocca's frequent appearances in Chrysler ads made him a celebrity CEO, and by 1988, polls showed he had a credible shot to be the Democratic nominee for the White House. Finally, House leader Tip O'Neill had to talk him out of running.

Texas industrialist Ross Perot was the next CEO to test the presidential waters, in 1992, and he did a lot more than stick his toe in the water. Armed with a fistful of hot-button issues – balancing the federal budget, upping the war on drugs, using new interactive technologies to create "direct democracy" via electronic town halls – and with a spunky Texas style that played well on the *Larry King Show* and other national TV, plus the deep pockets to fund his own independent campaign, Perot was polling at 20 percent of the electorate in early summer when he temporarily suspended his campaign, before resuming it near the start of October. Even with that, he

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

still finished with almost 19 percent of the vote in the general election that November, enough to scare both the incumbent, George H. Bush, and the winner, Bill Clinton.

Perot fared less well when he ran as the Reform Party presidential nominee in 1996, but he had proven that a CEO with a brash style and no political experience could be taken seriously for the nation's highest office. And thus it was, that 20 years later another CEO also with a caustic personality and no political experience, one who had weaponized bankruptcy law repeatedly to save his empire, a philosopher-king whose entire philosophy seemed to consist of two words uttered repeatedly on a TV "reality show" – "You're fired!" – ascended to what no CEO before him could claim: the White House.

By then, though, the American presidency was almost beside the point. Corporate ambition had gone global. All the world was its stage. Davos Man had been born.

Magic Meeting Place

No single event marks the emergence of chief executive officers as a "new global political leadership class." There's no one development along the lines of the 1971 Powell memo or the Supreme Court's 1978 *Bellotti* and 2010 *Citizens United* decisions that, respectively, imagined a corpocratic future or opened the floodgates of corporate money into the political system. But, just like the separation of pay from performance or dissolution of the notion of CEOs' social responsibility, there are events and people and numbers that tell the story of this new uber-wealthy class of people who, having dominated their corporations, began looking at the world's political systems as a new challenge or, perhaps, political plaything.

The 1924 Thomas Mann novel *The Magic Mountain* tells the bizarre, bacchanalian and occasionally fatal stories of a group of tuberculosis patients at a sanatorium located high in the Swiss alps. A *Time* magazine review from the 1920s described how the characters' isolation from the rest of the ordinary world – what Mann calls The Flatlands – made "the caperings of man seem puny by comparison."

Five decades later, a German engineer and economist named Klaus Schwab chose the same location – Davos, Switzerland – as the setting for a different kind of exclusive retreat. Initially, the meetings of the European Management Forum brought together academics and businesspeople to share wonky modern management concepts. Within just a few years, however, the forum expanded by inviting politicians and trending toward economic, social, and geopolitical issues.

Throughout the 1970s, the conference remained relatively low-key and Euro-centric. In America, "Davos" was just an exclusive ski resort on the pages of the *New York Times'* travel and sports sections. But, like the Business Roundtable, supply-side economists, and the presidential ambitions of Ronald Reagan, it was a gathering storm. Just as those forces of corporate hegemony began emerging in the following decade, Davos garnered attention in a 1981 *Time* article that labeled it the "Magic

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Meeting Place" – the mountain-top seclusion reportedly facilitated open exchanges between business and political elite.

Perhaps because Davos' attendees were happy to keep their exclusive event hidden from public view, the WEF didn't attract much more attention in the US media during the 1980s. In fact, the words "World Economic Forum" didn't appear in the *New York Times* until the July 5, 1989, story – "A Business Climate Study" – briefly covered the findings of the "Switzerland-based World Economic Forum."

Nonetheless, the annual event was rapidly growing in influence in political and business circles. Finally, during Bill Clinton's era of third-way, bipartisan fealty to neo-liberalism, the media could no longer ignore Davos. A September 26, 1994, opinion piece by Paul Krugman referred to the World Economic Forum as a place that "every year draws an unmatched assemblage of the world's political and business elite." Two years later, the event was covered by three different dispatches in the *New York Times*' "Davos Notebook." A February 2, 1997, article titled "Reservations Most Definitely Required" included a picture of armed guards outside the ski village – a response to the sometimes-violent antiglobalization protests spreading across the world in the mid-to-late 1990s.

In 1998, Hilary Clinton attended – as did the AFL-CIO's John Sweeney, the first ever American labor official to make the trip. WEF founder Klaus Schwab explained that he tried to invite more union representatives, but it was hard to find "labor leaders who thought globally" – sounding almost wistful for the 1920s militancy of the International Workers of the World.

Fast forward to 2020 and the *New York Times* was not just covering the World Economic Forum, but writing retrospectives leading up to it. A January 19th article reviewed 50 years of pictures and events from Davos. There were geopolitical successes – Greece and Turkey announced a resolution of tensions in 1988 – and spats – in 2009 Turkish President Recep Erdoğan stormed off the stage after a debate with Israeli Prime Minister Shimon Peres.

The Place to Be

Today, Davos is a well-established annual party for the super-rich, a place where 3,000 executives, world leaders, media, and celebrities can mingle comfortably removed from the "caperings of man." The steady ascendance of the event, finally rebranded the World Economic Forum in 1987, is also an echo of corporate hegemony's rise. Launched in 1971 – the same year Lewis Powell wrote his militantly pro-business memo – Davos is now an indisputable annual triumph of Powellism.

The World Economic Forum is funded by 1,000 member companies, normally global enterprises with more than $5 billion in revenue, that pay somewhere north of half a million dollars for various memberships and partnerships. In other words – it's their party. The politicians, celebrities, media, and heads of NGOs don't pay to get

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

in, but the warning about "free" apps and online services applies at Davos: If you're not paying for the product, then the product is you. World leaders provide unique political access, media provide free content, celebrities make the whole thing photo-worthy.

Powell's 1971 memo griped about the attacks on corporate hegemony by the "respectable elements" of society. Fifty years later, leading representatives of media, academia, arts and sciences, and politicians all attend Davos, mingling with the wealthy transnational elite.

The list of political heavyweights present is stunning; it reads like a more exclusive UN. In 2020 alone, the heads of France, Germany, Singapore, China, South Africa, India, the European Commission, European Central Bank, UN, and IMF attended. US president Donald Trump – who campaigned against "globalists" – made his second visit. For good measure, the heads of the WHO, WTO, OPEC, OECD, NATO, and INTERPOL also showed up.

The World Economic Forum also hosts gold-standard academics, activists, and celebrities to speak about various issues, from inequality to gender diversity to climate change to their charities. And, because it's Davos, they are the cream of the crop. In 2020, attendees could hear from a founder of Occupy Wall Street, climate change activist Greta Thunberg, Greenpeace Executive Director Jennifer Morgan, cellist Yo-Yo Ma, Cambridge University classicist Dame Mary Beard, and regular attendee and long-time rock star Bono – to name a few.

Not everyone at Davos is reading from Lewis Powell's gospel, but the celebrity activists that go "off message" are what give the media its headlines. Speaking on climate change, Greta Thunberg declared: "Our house is on fire" – the money quote that *The Guardian* and *New York Times* ran with. Aside from increasing publicity of the event, the sense that Davos is a free and vibrant exchange of ideas provides even more of the "respectability" Powell craved. But make no mistake, the dialogue at Davos is hardly up for grabs.

As the event grew in influence, it also became shorthand for the emergence of a new sort of wealthy, transnational elite. In 2004, the Harvard political scientist Samuel Huntington gave the people so well-represented at the World Economic Forum a sobriquet: "Davos Man," which he described as representative of a "dead soul"[4] that owed its allegiance not to a nation but to a neo-liberal, globalizing economy.

Of course, this new superclass doesn't begin or end with Davos. It's a larger effect of globalization and its tendency to diminish the significance of large corporations' putative home countries. But it makes for a hell of a metaphor: the global elite schmoozing atop a snowy mountain in a wealthy country known for keeping

4 Samuel P. Huntington, "Dead Souls: The Denationalization of the American Elite," p. 5 (*The National Interest*, no. 75, Spring 2004).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

financial holdings and transactions secret. As International Affairs Professor Cas Muddle writes in *The Guardian*: "In essence, the World Economic Forum is the high priest of plutocracy, i.e., rule by the ultra-wealthy."[5]

At the event, the world is Davos Man's oyster. He can mingle with Bill Gates or Mark Zuckerberg or Tony Blair. He can go skiing, attend symposiums, pose with Hollywood A-listers and rock stars. At night he can attend ritzy parties – with his every whim catered to.

"There are a lot of prostitutes at Davos," said one female attendee, explaining why she would dress more conservatively the following year.

A Bubble of Positivity

Because it concentrates so many .1 percenters in one place, Davos has also been a lightning rod for criticism on everything from the cost of security to the local community to fostering a wealthy global elite with no connection to The Flatlands beneath them. In fact, the optics were considered so bad that no US president attended – until, appropriately, Bill Clinton did in 2000, two months after his Treasury Secretary answered Citigroup's CEO Sandy Weill's prayers by supporting the repeal of the 1933 Glass-Steagall Banking Act.

The conference – especially the infamous nighttime parties after symposiums and meetings – also faced criticism for lack of gender diversity (see Fig. 6.1). The WEF has recently begun incentivizing companies to send a quota of "Davos Women" in their delegations by offering them free tickets. However, some of the women who did end up in the exclusive meeting found a less-than-welcoming atmosphere. One woman, a Silicon Valley-based founder of a video platform, described the old boys club: "There is a lot of money and booze. It's kind of like Las Vegas, it's a spectacle. It sometimes feels like a parody of itself."

But the Masters of the Universe – that is, most of the attendees – take these criticisms in stride. They happily invite the best change-makers in the world. What actually happens after the speakers give Davos its headlines is unclear.

The stated purpose of Davos is exactly that of a philosopher-king savior: "Committed to Improving the State of the World." However, it buries its actual agenda in extraordinarily anodyne language. The official theme of WEF 2020 was "stakeholder capitalism" – which could be meaningful, if it was clearer what businesses contributing "to a more cohesive and sustainable world" actually meant. The Davos agenda for 2021, conceived during a global pandemic, called for leaders to partner to create a more cohesive and sustainable future in a "challenging new context."

5 https://www.theguardian.com/commentisfree/2020/jan/25/davos-world-economic-forum-capitalism-plutocracy (accessed October 14, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

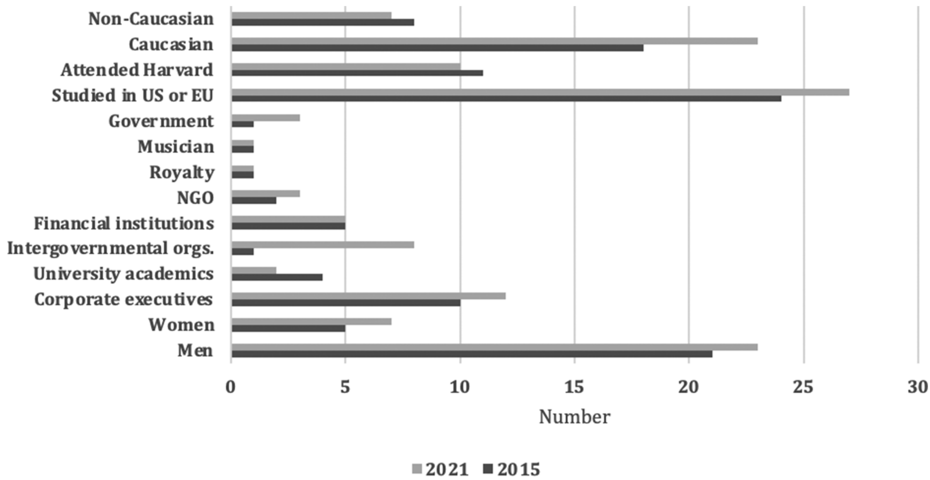


Fig. 6.1: Big Ideas, Narrow Perspective.
Source: World Economic Forum and Transnational Institute
Note: The World Economic Forum vowed to make its board of directors more reflective of the world as a whole, but the six years since 2015 have produced marginal changes at best. Davos' lens on the world is still overwhelming white, Western, male, and increasingly corporate.

Economist Joseph Stiglitz reserved judgment on the forum's newest angle on global issues. "The discussion at Davos this year may be part of a move in the right direction, but if leaders truly mean what they say, we need to see some proof: corporations paying taxes and livable wages, for a start, and respecting – and even advocating – government regulations to protect our health, safety, workers, and the environment."

Perhaps this new call for responsible capitalism will signal a sea change. But, so far, it fits neatly into Davos' recent messaging: sanitized conversation suggesting partnership, entrepreneurship, and innovation as the solution for virtually all problems. Specific proposals to rein in increased corporate governance, tackle income inequality, and promote environmental regulation or higher corporate taxes are eschewed. It's also entirely possible that WEF's founder Klaus Schwab is sincere in his desire to transform the world. Unfortunately for Schwab, he's hosting a party for Davos Man. Ultimately, does JPMorgan Chase CEO Jamie Dimon answer to anyone?

Good intentions or mouthing words that may or may not convey a specific meaning is one thing; being flat out wrong is another. Over the years, Davos had also developed a reputation for flawed projections.

In a January 2008 panel discussion, for example, economist Fred Bergsten inexplicably opined that "It's inconceivable to get a world recession" – even as the US housing market was in free fall, Wall Street firms were in a liquidity crisis, and stocks were having their worst month since the tech bubble burst.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

In January 2016, Davos' experts neglected to include the Brexit referendum or the possibility of a Trump presidency in its global risk report. The consensus seemed to be that neither the nationalist referendum nor the boorish populist had any chance of winning. Aware of the groupthink fostered at reclusive events like Davos, former Fed and IMF economist Ken Rogoff joked to Bloomberg: "No matter how improbable, the event most likely to happen is the opposite of whatever the Davos consensus is." Shorting the Davos consensus has continued to be a good play.

About this same time, Davos became shorthand not just for a transnational superclass, but one that was perhaps in the twilight of its power. With the self-described Socialist Bernie Sanders running an unexpectedly competitive primary campaign against Davos-attendee Hillary Clinton, Paul Krugman authored a June 13, 2015, piece called "The Decline and Fall of Davos Democrats." On November 9, 2016, leftist author and academic Naomi Klein wrote in *The Guardian* that Clinton's loss to the antiestablishment rhetoric of Donald Trump was a referendum on the "Davos class, a hyper-connected network of banking and tech billionaires, elected leaders who are awfully cozy with those interests, and Hollywood celebrities who make the whole thing seem unbearably glamorous."[6]

Three years later, in the run-up to the 2019 World Economic Forum, even founder Klaus Schwab had adapted the arguments of the acerbic critics of his conference by declaring: "Globalism is an ideology that prioritizes the neoliberal global order over national interests." The following year, Jamie Dimon unconvincingly tried to get in on the elite-bashing. Speaking about coronavirus at a 2020 board meeting, Dimon said he'd had a nightmare "that somehow in Davos, all of us who went there got it, and then we all left and spread it. The only good news from that is that it might have just killed the elite."[7]

Of course, the transnational super-elite are still around, richer than ever, even if some have decided to turn down their triumphalism a few ticks. In January 2017, after absorbing the twin body blows of Brexit and Trump's victory, even Davos had to take a reluctant look in the mirror. As a corporate entity, it did so by bringing in an outside consultant – in this case, a forecasting psychologist.

The WEF "doesn't *always* get things wrong," he said during a panel discussion. The problem is that famous, self-confident, and well-to-do masters of the universe are poor forecasters. A lack of criticism from the press doesn't help matters. Finally, the viral groupthink encouraged by crowding a whole bunch of the world's most powerful people into a ski village only further convinces Davos Man that he is right.

6 https://www.theguardian.com/commentisfree/2016/nov/09/rise-of-the-davos-class-sealed-americas-fate (accessed October 14, 2021).
7 https://www.ft.com/content/021c7176-3953-437d-91fc-6359b67b1cc7 (accessed October 14, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Loukina Tille, an 18-year-old climate activist who attending Davos 2020 with Greta Thunberg, voiced the same conclusion: the event is "locked in a bubble of positivity."[8] Is Davos Man the missing evolutionary link between humans and corporations? Consider the comparison of default positions in Fig. 6.2.

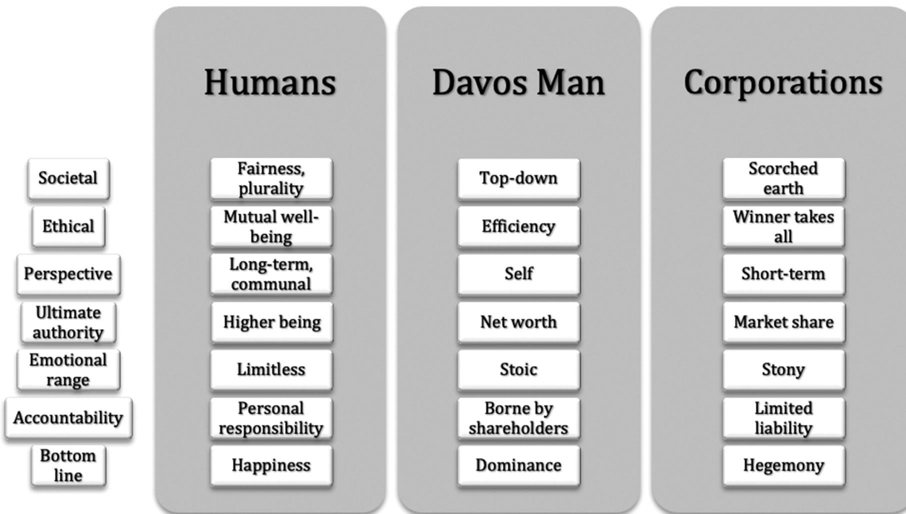


Fig. 6.2: Comparison of "Davos Man" to Humans and Corporations.
Note: How can humans and their corporations be so different? Davos Man may be the missing evolutionary links between them.

That same year, the WEF again proved it was up to the task of missing the next big thing. While CNN was running live coronavirus updates along with stories about Chinese lockdowns, mandatory facemasks and the arrival of the virus in the United States, Davos attendees were listening to a group of experts discuss the next "Super Bug." The only problem: the discussion focused on a theoretical future threat, not the actually existing and spreading real one. One panelist mentioned the novel coronavirus, although he later added that government reactions to the rapidly spreading virus would probably be excessive. The next January he was proved resoundingly wrong: a scaled-down conference was held virtually while the in-person meeting was delayed further and further into 2021.

There are other reasons why Davos Man continues to make bad projections. For one, people keep showing up to his party – not just the executives and government leaders – but, in just the past few years, celebrities like Sir David Attenborough,

8 https://www.nytimes.com/2020/01/24/world/europe/greta-thunberg-davos-protest.html?searchResultPosition=6 (accessed October 14, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Hollywood A-listers Cate Blanchett, Matt Damon, Leonardo DiCaprio, Bollywood actor Deepika Padukone, and singers Elton John, Shakira, and will.i.am. At fifty, Davos is still a magic mountain. It is maybe the only place in the world where Americans can temporarily put aside their terrestrial political alliances. In 2020, for example, there was room enough for George Soros and Donald Trump.

Most importantly, though, Davos Man pays no price for being wrong. When you have achieved regulatory capture and employ all the best public relations firms and lawyers and lobbyists, things just have a way of working out.

Whistling in the Wind

In a telling anecdote from his biography, *A Promised Land*, Barack Obama describes his frustration dealing with executives early in his presidency while he was trying to rescue the financial sector.

> Meanwhile, bank executives bristled – sometimes privately, but often in the press – at any suggestion that they had in any way screwed up, or should be subject to any constraints when it came to running their business. This last bit of chutzpah was most pronounced in the two savviest operators on Wall Street, Lloyd Blankfein of Goldman Sachs and Jamie Dimon of JPMorgan Chase.

(Naturally, both men are Davos attendees.)

Obama claims that he thought these "clueless" Wall Street executives "whose collective asses we were pulling out of the fire" should have stopped being so tone-deaf, stopped ordering new corporate jets, stopped giving themselves bonuses, and generally been more thankful – or at least reasonable. But it's inconceivable that the president wasn't, in some way or another, aware that chances of these philosopher-kings doubting themselves was nil.

In fact, the president then undermines himself with an eloquent explanation of why he – the newly-elected, historically popular president of the United States[9] – couldn't possibly hold any of these men responsible for the worst economic crisis since the Great Depression. In his eyes, holding people who had turned the financial system into something between a casino and a game of Russian Roulette was simply not why regulatory agencies and the Department of Justice exist, but the desire of bloodthirsty populists. It would be, he said, serving up vengeful "Old Testament justice."

His cascade of reasonable-sounding excuses begged the question: who is more clueless? The Masters of the Universe, who knew they would not be held responsible, or Obama who had appointed an Attorney General who would do everything possible

9 https://www.pewresearch.org/politics/2009/04/23/obama-at-100-days-strong-job-approval-even-higher-personal-ratings/ (accessed October 14, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

not to convict any Davos Men? (As an aside, I once had a discussion with Obama along these lines on my front lawn in Maine. Nonplussed, but consistent, the president claimed that the Justice Department "couldn't identify any criminal activity.")

An inside look at one ineffectual attempt to hold Wall Street banks accountable begins in November 2012, when a lawyer named Alayne Fleischmann glanced at her iPhone and saw this Wall Street Journal headline: "JPMorgan Insider Helps US in Probe."

By that point, four years after Obama was elected, many people might have been surprised that the Justice Department was moving forward with any prosecution at all. But for Fleischmann, surprise had an uncomfortable, personal angle. She was the "insider" mentioned – and no one at the Justice Department had told her that they were going public with the information. Fleischmann, a lawyer-turned-whistleblower, had been fired from JPMorgan four years earlier. After approaching US authorities about the irregularities or crimes she'd witnessed, she was moving on with her life. Fleischmann was looking for work at the time and didn't want her name linked with testimony against the powerful bank.

Fleischmann needn't have worried. The headline threatening to release her details was merely a bargaining chip. The Justice Department had no interest in actually winning a conviction much less putting someone in jail, they just wanted to bring Chase to the table. When the bank agreed to a $13 billion dollar settlement, which effectively settled all fraud claims around the financial crisis, Fleischmann was not mentioned.[10]

With that episode settled, Fleischmann found herself in the same role as the small number of other Wall Street whistleblowers – Richard M. Bowen III at Citigroup, Michael Winston at Countrywide Financial, and Peter Sivere at Barclays Capital. They were all employees who had witnessed widespread crime at Wall Street banks and went to law enforcement officials with details. Each was fired. Regulatory groups like the SEC and Justice Department showed, at best, sporadic interest in their stories. Their testimony was only ever used to extract settlements from financial institutions, not prosecutions. In the end it was the law-abiding citizens, not the CEOs, who lost their jobs. Masters of the Universe: 1, Whistleblowers: 0.

The Holder Doctrine

These settlements did extract huge amounts of money from banks and investment companies. According to an article in *The Atlantic*, between 2009 and 2015, 49 financial institutions paid government entities and private plaintiffs nearly $190 billion in

10 https://www.rollingstone.com/politics/politics-news/the-9-billion-witness-meet-jpmorgan-chases-worst-nightmare-242414/ (accessed October 14, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

fees and settlements.[11] But the Davos Men at these companies still came out on top. First of all, it was the corporations that were being prosecuted – not the executives personally. Second, the money wasn't coming out of their pockets – all the settlements were paid for by shareholders. In some cases, part of the settlements were even tax-deductible. And, finally, the executives weren't even punished by their boards.

After 2013, a year in which JPMorgan Chase paid over $20 billion in settlements, including the case in which Fleischmann had given testimony, long-time CEO Jamie Dimon received a 74% pay raise – bumping him up to $20 million annually. Although the alleged criminal activity that resulted in the massive fines occurred on his watch, perhaps there was a good reason for the board to reward Dimon: the Davos Man had personally intervened to stop prosecution.

On September 24, 2013, Attorney General Eric Holder scheduled a press conference to announce criminal charges against JPMorgan. The conference was abruptly cancelled that morning. Later news reports suggested that Dimon had called Holder and talked him into settling out of court.[12] Given the Justice Department's track record, however, it seems just as likely that the press conference was mostly theater.

In June 1999, then-deputy attorney general Eric Holder wrote a memorandum urging caution on prosecuting large banks. Essentially, the brief held that big financial institutions should be treated with kid gloves because holding them responsible for laws they broke could possibly create collateral damage in markets. Instead of "too big to fail" it was "too big to jail."

As proof of what became known as the continuing grip of the "Holder Doctrine" on the Justice Department, the head of its criminal division, Lanny Breuer, told the New York City Bar Association in 2012 that it was his duty to take into account factors such as the company's health as well as the health of the markets and larger industry as part of his decision to file charges.[13]

It's hard to imagine a more accommodationist policy toward Wall Street – or applying that same logic to any other type of criminal prosecution. Dennis Kelleher, the co-founder of Better Markets, a group formed in 2008 to promote public interest in financial markets, vividly described the Justice Department policy as "charging a serial murderer with a single assault and giving them probation."[14]

In early 2015, Holder all but officially ended any chance of further prosecutions, announcing a 90-day deadline for beginning any other investigations. In June that

11 https://www.theatlantic.com/magazine/archive/2015/09/how-wall-streets-bankers-stayed-out-of-jail/399368/ (accessed October 14, 2021).
12 https://dealbook.nytimes.com/2014/01/23/fined-billions-bank-approves-raise-for-chief/?searchResultPosition=1 (accessed October 14, 2021).
13 https://www.nytimes.com/2015/09/12/business/dealbook/justice-dept-shift-on-white-collar-crime-is-long-overdue.html (accessed October 14, 2021).
14 https://www.rollingstone.com/politics/politics-news/the-9-billion-witness-meet-jpmorgan-chases-worst-nightmare-242414/ (accessed October 14, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

same year, Holder returned to his previous gig, at Covington & Burling, a law firm with clients including Bank of America, JPMorgan, Well Fargo, and Citigroup.[15]

Chump Change

Exactly one American financial executive has gone to jail for the 2008–2009 financial crisis, Kareem Serageldin, a trader at Credit Suisse who got 30 months for inflating the value of mortgage bonds. The *New York Times* noted his status as a trader "several rungs from the corporate suite at a second-tier financial institution." Although it's hard to feel bad for Serageldin, the judge who sentenced him regarded him as a somewhat unlucky token, calling him: "a small piece of an overall evil climate within the bank and with many other banks."[16]

The comments of judges presiding over the cases of financial executives and managers who ultimately escaped prosecution is also instructive of how easily the Masters of the Universe – and their institutions – are getting away. One critic of the Justice Department, US District Court Judge Jed Rakoff, rejected a settlement between the agency and Citigroup over the selling the mortgage-backed securities at the center of the financial meltdown. Rakoff called the proposed $285 million penalty "pocket change" for the bank.[17]

By 2012, the five-year statute of limitations on one of the main laws used to prosecute had run out on crimes committed between 2005 and 2007 – when many of the worst abuses that resulted in the financial crisis occurred. There was another law that could be used with a 10-year statute of limitations, but that was primarily used to force banks to cough up cash. Judge Rakoff again criticized the process of settling for cash payments and largely meaningless reports about misdeeds: "Lost in that whole thing, was anyone trying to investigate whether the individuals did something wrong."[18] A similar case pursued by the SEC, produced what Rakoff called nothing more than "a quick headline" for the government regulator.[19]

In early 2013, an SEC spokesman touted the agency's roughly $1 million settlement between the SEC and two Bear Stearns executives – who had made millions while allegedly lying to clients about the health of hedge funds: "These serious

15 https://www.democracynow.org/2015/7/8/eric_holder_returns_to_wall_street (accessed October 14, 2021).
16 https://www.propublica.org/article/the-rise-of-corporate-impunity (accessed October 14, 2021).
17 https://dealbook.nytimes.com/2012/02/13/bear-stearns-ex-managers-to-pay-1-million-to-settle-s-e-c-case/?searchResultPosition=4 (accessed October 14, 2021).
18 https://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html (accessed October 14, 2021).
19 https://dealbook.nytimes.com/2012/02/13/bear-stearns-ex-managers-to-pay-1-million-to-settle-s-e-c-case/?searchResultPosition=4 (accessed October 14, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

sanctions reflect the defendants' misconduct, their ill-gotten gains and other considerations."[20] The judge in the case, Frederic Block, disagreed, calling the settlement "chump change."[21]

Bankers and finance executives have not always gotten off scot-free. The Congressional Pecora Commission set up following the 1929 crash didn't result in high-profile indictments, but was instrumental in passing the most important federal tools to reign in corporate abuse – 1933's Glass-Steagall Act and 1934's Securities Exchange Act, which created the SEC.

During the Savings and Loan failures of the 1980s, over a 1,100 people were prosecuted, including top executives. The bursting of the Nasdaq bubble in the early 2000s revealed corporate accounting scandals, which sent top executives from WorldCom, Enron, Qwest, and Tyco to jail.

In our era of unquestioned CEO brilliance, however, the prosecution of white-collar crime in general has dropped significantly. In the mid-1990s, white-collar prosecutions represented an average of 17.6 percent of all federal cases. In the three years ending in 2012, the share was 9.4 percent.[22] These numbers have continued to drop. According to a database at Syracuse University, the US Justice Department prosecution of white-collar criminals hit new lows in the spring of 2020.[23]

These sorts of toothless investigations combined with massive bailouts only serve to feed Davos Man's conviction that he is untouchable. After all, many corporate elites got 2008 wrong – and were bailed out by the Obama Administration. Stocks – which executives own a disproportionate percentage of – rebounded well ahead of other economic indicators like the employment rate. This extreme coddling of incompetent and criminal corporations and their CEOs points to a new dynamic in an old story.

Privatizing Politics

The largest problem for American democracy that is posed by the Masters of the Universe is not really that a transnational super-elite hold fabulous parties in the Alps, or that they have captured the system meant to hold them responsible, or even that their lack of responsibility almost guarantees they will continue to lead companies with an eye on reckless short-term gains. The bigger problem is that their dominance over democratic institutions only continues to grow. In a system

20 Ibid.
21 Ibid.
22 https://www.nytimes.com/2016/07/22/business/dealbook/a-clue-to-the-scarcity-of-financial-crisis-prosecutions.html?searchResultPosition=7 (accessed October 14, 2021).
23 https://www.marketwatch.com/story/its-disturbing-us-justice-department-white-collar-criminal-prosecutions-fall-to-their-lowest-level-on-record-2020-03-06 (accessed October 14, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

where campaign contributions are virtually unlimited and CEOs' realized compensation averages 320 times higher than workers, there will inevitably be an elite that intend to dominate the political system.[24] And they will likely succeed.

In the post-*Citizens United* era, spending has both increased dramatically and become more concentrated in the hands of just a few donors. Between January 2009 and December 2020, 12 mega-donors – mostly billionaires – and their spouses, a total of 19 individuals, contributed $3.4 billion. This enormous sum of money represented $1 of every $13 dollars received by federal candidates and political groups. It was perfectly bipartisan, of the 12 billionaires, six were Democratic and six Republican.

The result of just a few people injecting these enormous sums into elections has transformed long-standing political structures. A 2014 *New York Times* article detailed how the flood of money was shifting power from party bosses to wealthy donors. After all, the super-rich can easily hire all the best people to take over traditional party functions like running ads, setting up field operations, maintaining voter databases, and even recruiting candidates. A lawyer who helped draft the McCain-Feingold legislation that limited campaign donations, described the post-*Citizens United* universe: "Suddenly we privatized parties."[25]

Indeed, it was following *Citizens United* that these privately owned political groups spread. By 2014, Independence USA PAC had spent $25 million to elect centrists. TD Ameritrade founder Joe Ricketts started Ending Spending, which coughed up $10 million to elect fiscal conservatives. Michael Bloomberg committed $50 million to support gun control. Paul E. Singer, a hedge-fund executive, spent tens of millions on GOP candidates who supported his vehemently pro-Israel politics.

Tom Steyer, a California-based billionaire hedge fund executive, found politics after becoming interested in climate change advocacy. Steyer, who saw himself as a Democratic counterweight to GOP climate denialists, founded a group called NextGen Climate Action with the specific goal of combatting the money being spent by fossil fuel, chemical, and other industry groups. One of his highest profile contests was the Florida governorship, which turned the election of the state's top executive into a proxy battle between incredibly wealthy out-of-state interests (see Fig. 6.3).

Depending on whom you asked, the increased visibility and importance of Steyer in Democratic politics was either a capitulation to a post-*Citizens United* era of billionaire-dominated politics or an adaptation to the real world. Either way, Steyer became a kind of unofficial political capo; nearly every Democrat considering a competitive run came to see him.[26]

---

24 https://www.epi.org/publication/ceo-compensation-surged-14-in-2019-to-21-3-million-ceos-now-earn-320-times-as-much-as-a-typical-worker/ (accessed October 14, 2021).
25 https://www.nytimes.com/2014/10/19/magazine/how-billionaire-oligarchs-are-becoming-their-own-political-parties.html (accessed October 14, 2021).
26 Ibid.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

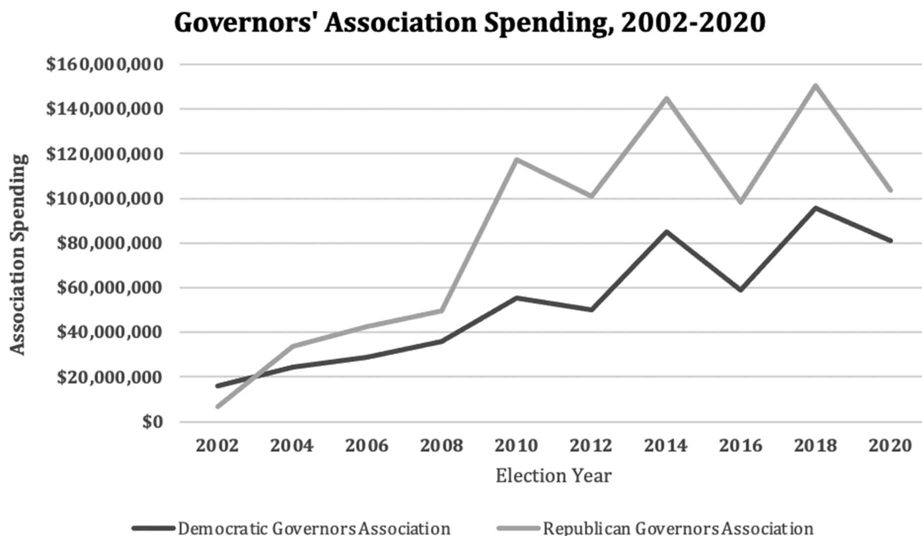


Fig. 6.3: Bipartisan Boom.
Source: Center for Political Accountability
Note: For Governors Associations on both sides of the Great Political Divide, the 2010 Citizens United decision let loose the dogs of electoral war and provided convenient cover for many of their enablers.

2020 Hindsight

As the money kept pouring into the system on both sides, the understandable cynicism in the political system provoked two reactions. The more predictable move was support for candidates like Bernie Sanders, who proudly proclaimed himself free of political influence because his campaign didn't accept donations from certain groups or have their own PAC. At virtually every public appearance during the 2016 primaries, Sanders repeated that his average campaign contribution was just $27.

The other, more deeply cynical, reaction to a political system awash in money was to embrace Donald Trump, a man who had gone out of his way to associate himself with gaudy wealth since the 1980s. In 2016, Trump's campaign and supporters pointed to the candidate's wealth as gold-plated proof of his incorruptibility. Because he already had enough money to finance his campaign, the thinking went, he didn't need to beg wealthy donors. In other words, the corrupting influence of billionaires was so widespread that the only way to break the cycle was to elect a billionaire. Whether or not this logic made sense, Trump went on to become the wealthiest president ever.

Trump's unlikely success then set the stage for an even more extraordinary election, in terms of direct oligarchical intervention. This time, however, it happened

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

on the Democratic side. The initially large field of Democratic candidates included not one but two billionaires. Tom Steyer, by then a veteran political operative, spent almost $250 million of his own money to flame out without gaining a single delegate vote. Former NYC mayor Michael Bloomberg – the 16th richest person in the world – was more successful, although he spent four times as much as Steyer to float his campaign.

Despite entering the race months after more established candidates, Bloomberg moved up in the polls rapidly. He launched a blitz of advertising and slick campaign events with free merchandise and food. He paid entry-level grass roots organizers $72,000 a year, twice what other campaigns offered.

Perhaps just as importantly, Bloomberg benefited from the same voter cynicism to the money sloshing around the US political system. In 2016, Trump supporters thought their candidate's own personal fortune insulated him from this corrupting influence of money. In 2020, Bloomberg supporters thought that only someone with more money than Trump could beat him.

"Money buys votes, and I just hope Trump doesn't win again," an employee at a Stockton mall named Michael Rabago told the *Washington Post*. "I personally want Bernie to win, but money is everything. That's sad to say, but that's how it is. I always see Bloomberg's commercials on TV: 'Mike for 2020.'"

Though Bloomberg came in fourth, he got significantly more delegate votes and a much higher percentage of popular vote than one-time frontrunner – but nonbillionaire – Pete Buttigieg. In fact, Bloomberg ended up within striking distance of Senator Elizabeth Warren. But Bloomberg spent over $900 million to achieve that 4th place finish. Averaging out that money over the 105 days his bid officially lasted, his campaign had daily expenses of roughly $9 million.

Bloomberg and Steyer outspent every candidate other than the eventual winner, Joe Biden – who only barely edged out Bloomberg. Those numbers don't even do justice to what an explosion of cash the Bloomberg campaign was. Biden spent his roughly $1 billion over the course of more than a year. By the summer of 2020, when he was ramping up to face Trump, Biden was getting donations from across the Democratic spectrum – including from Bloomberg himself.

Let's also keep in perspective what this election meant. In 2020, the GOP incumbent as well as the fourth-most-popular Democratic candidate – who finished just 4 delegate votes behind number three – were both multi-billionaires. The dynamics of the presidential contest had taken a huge step beyond the traditional corrupting influence of politicians sucking up to wealthy donors. In this race, three billionaires eliminated the middleman and ran themselves.

As a result, the race for the nation's highest office looked less and less like a series of strategies and debates to select the best man or woman for the job – who was most charismatic, smartest, most likeable, or toughest. Instead, it was shifting toward a system that recalled ancient battles in which both sides put forth their champion. Instead of Achilles against Hector, it was Trump versus Bloomberg. Of

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

course, the Trojan War left both Achilles and Hector dead while neither billionaire paid anything in blood. Nor, for that matter, have they paid virtually any income taxes as a percentage of their wealth growth in recent years. Heroes are always a telling reflection of the times.

In 2020, of course, a candidate with a relatively moderate personal wealth beat back the billionaires – albeit, with their financial help. But that's just one race. As one family of mega-donors has proved over decades, you can control and shape politics and laws without stepping up to the mic yourself. In fact, it's precisely by maintaining a low profile that you can have much more impact.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Chapter 7
The Wichita Mafia

> The Kochs are on a whole different level. There's no one else who has spent this much money. The sheer dimension of it is what sets them apart. They have a pattern of lawbreaking, political manipulation, and obfuscation. I've been in Washington since Watergate, and I've never seen anything like it. They are the Standard Oil of our times.
>
> – Charles Lewis, founder, Center for Public Integrity[1]

The 1980 electoral victory of Ronald Reagan is usually cited as a landmark in the expansion of CEO and corporate power envisioned by groups like the Business Roundtable and US Chamber of Commerce years earlier. But for two far-right executives, it marked a resounding defeat.

Their story began 13 years earlier when Fred Koch, a Wichita-based businessman, died, leaving his son Charles in charge of Koch Industries – a conglomerate that included oil and chemical interests. Three years later, in 1970, David Koch joined his brother as president of the company.

In addition to the prosperous business, the Kochs also inherited their father's anti-government, free-market politics. After spending the 1970s in far-right political circles, Charles Koch persuaded his younger brother to join Ed Clark his vice-presidential nominee on the 1980 Libertarian ticket. Once on the ticket, David Koch could spend his own money lavishly, unrestrained by campaign finance laws.

The 1980 party platform included standard-issue libertarian ideas – abolishing regulatory agencies like the Securities and Exchange Commission and the Department of Energy, eliminating all personal taxes, and legalizing prostitution. David Koch spent $2 million of his own money – and the ticket got just 1.1 percent of the vote, well behind third-party candidate John Anderson.

It was a watershed moment – both for the brothers and, eventually, American politics. After the 1980 defeat, David and Charles Koch decided that they didn't want to be the face of libertarian politics. David remained the duo's affable public side, hosting parties that were "the east coast version of Hugh Hefner's soirees" and eventually becoming well known in New York society circles for his donations to cultural institutions and cancer research.[2] Charles, widely acknowledged as the leader of the two, continued to spend most of his life in a compound in Wichita, Kansas. But politically, both men operated in lock-step behind the scenes – crafting

1 Quoted by Jane Mayer in "Covert Operations: The Billionaire Brothers Who Are Waging a War Against Obama," *The New Yorker*, August 30, 2010.
2 Jane Mayer, "Covert Operations: The Billionaire Brothers Who Are Waging a War Against Obama," *The New Yorker*, August 30, 2010.

https://doi.org/10.1515/9783110696998-007

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

ideas, creating policy, marketing libertarianism, supporting politically aligned politicians, funding grassroots organizations, and litigating regulations.

They were prolific and successful. Over the next several decades, they used their fortunes to develop an enormous web of seemingly independent organizations, think tanks, advocacy and research groups, lobbying and advertising efforts. In the 2010 *New Yorker* article that finally illuminated the brothers' enormous political impact, Jane Mayer called the Kochs the "primary underwriters of hardcore libertarian politics." They achieved that title with persistence, cunning, control, and mountains of money.

Think Tanks, Subterranean Spending, and Staffing the Court

Following the 1980 Libertarian ticket flame out, Charles Koch didn't have to start building the political network he envisioned entirely from scratch. The elder brother had already founded a think tank in 1974, the Charles Koch Foundation, to promote libertarian ideas, including a limited role for government, free market economics, protecting civil liberties, and the sanctity of private property.

In keeping with his preference for a lower profile, Koch changed his organization's name to the Cato Institute. In 1981, Cato moved to Washington, DC, where it is now one of the largest, best-funded, and most influential right-wing think tanks in the country. It employs over 100 staff and faculty and had an endowment of over $70 million in 2015. But the Kochs didn't stop with funding their own organizations, they jumped on board other influential conservative idea machines as well.

Along with Cato, another powerful conservative think tank that emerged in the 1970s was the Heritage Foundation. The organization saw itself as strategically distinct from previous think tanks – it didn't want to be hands-off and intellectually reserved, but drive the political agenda for conservatives.

In 1981, following Ronald Reagan's election, the group produced a document outlining 2,000 conservative policy ideas called the Mandate for Leadership. Reagan reportedly loved it – the *Washington Post* called it the "bible of the Reagan Revolution."[3] In 1986, *Time* magazine called Heritage the "foremost of the new breed of advocacy tanks."[4] The Kochs were also fans. One of their many family-controlled organizations, the Claude R. Lambe Foundation, has given at least $4.8 million to the Heritage Foundation.[5]

Koch-linked groups also provided extensive funding for a different type of effort to influence political thought: the Federalist Society, a nationwide network of

3 https://www.nationalaffairs.com/publications/detail/devaluing-the-think-tank (accessed October 14, 2021).

4 Ibid.

5 https://www.sourcewatch.org/index.php/Heritage_Foundation (accessed October 14, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

lawyers, students, and law professors. The group began in the early 1980s as a way to promote the conservative and libertarian ideas that the Kochs considered missing from the national legal conversation.

Like Cato and the Heritage Foundation, the Federalist Society has been incredibly successful in its mission, most tangibly by influencing the judicial appointments made by every Republican administration since Reagan. As just one metric of what the group has achieved, five of the current members of the Supreme Court – Brett Kavanaugh, Neil Gorsuch, Clarence Thomas, John Roberts, and Amy Coney Barrett – are all current or former members of the Federalist Society.[6][7] The sixth conservative member, Samuel Alito, is ideologically aligned with the society and has delivered speeches at its events.[8] Two Koch family foundations, the Charles G. Koch Charitable Foundation and Claude R. Lambe Charitable Foundation, have given the Federalist Society at least a combined $3.5 million.[9]

Since the 1980s, the Kochs have also given huge sums of money – estimated at more than $23 million – to the Mercatus Center, a think tank affiliated with George Mason University's Department of Economics. The arrangement with Mercatus is unusual in that George Mason, a 64-year-old publicly-funded university, now hosts a privately-funded, ideologically-fixed organization that is essentially a launching pad for deregulation policy aimed at key decision makers in the federal government. Also unsettling is that Charles Koch, who sits on the Mercatus Center's board, has long wanted "to dismantle the public education system entirely and replace it with a privately run education system."[10] Given the alignment between George Mason's economics department, which is heavily tilted toward the free-market Austrian school, and Mercatus, perhaps he has accomplished this goal in at least one case.

The Kochs' money and influence reaches far beyond DC-based promoters of right-wing ideas. Two other groups they fund, the American Legislative Exchange Council (ALEC) and the State Policy Network (SPN), provide expertise drafting and promoting conservative laws on the state level, making them arguably just as important nationally as Washington think tanks. In 2012, *Businessweek* described how ALEC set up meetings between state legislators and corporate interests, presented the legislators with "model legislation" that they could introduce – frequently with

---

6 https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerors-of-the-courts/ (accessed October 14, 2021).

7 https://www.politico.com/news/2020/09/20/amy-coney-barrett-supreme-court-419219 (accessed October 14, 2021).

8 https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerors-of-the-courts / (accessed October 14, 2021).

9 https://www.sourcewatch.org/index.php?title=Federalist_Society_for_Law_and_Public_Policy_Studies#Funding (accessed October 14, 2021).

10 https://www.washingtonpost.com/education/2019/10/16/koch-network-says-it-wants-remake-public-education-that-means-destroying-it-says-author-new-book-billionaire-brothers/ (accessed October 14, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

the goal of keeping taxes low and regulation weak. Of about 1,000 model bills introduced, about 200 become law – an impressively high percentage.[11]

In addition to how widely they spread their donations, the Kochs are set apart from other donors by the sheer amount of money they have plowed into their efforts. The *New York Times* estimates that "since the 1970s, the Kochs have spent at least $100 million – some estimates put it at much more – to transform a fringe movement into a formidable political force."[12] The truly amazing, and perhaps frightening, element of the Kochs' spending is that it flows from and through so many different organizations, many of which are not required to report donors, amounts, or recipients, so that the outside world will probably never know how much they've spent or where the money ended up.

Of the seemingly limitless array of Koch-controlled PACs, non-profits, donor groups, and other organizations, many of them pop up, change names, or disappear between election cycles. This nearly impenetrable web of organizations that the Kochs have funded or created included the Institute for Justice, Institute for Humane Studies, Bill of Rights Institute, Americans for Limited Government, Citizens for a Sound Economy, Americans for Prosperity, Freedom Partners, and Stand Together Chamber of Commerce, just to name a fraction.

The Anti-Davos

The Kochs have also built up behind-the-scenes political power through personal networking. Since 2003, Charles Koch has hosted seminars and retreats with other wealthy donors who share his support for deregulation and free markets. The meetings are like an obsessive, paranoid version of Davos. The attendees are all wealthy and generally executives, but the ethos is not the sort of corporate triumphalism practiced at Davos but, as a leaked 2010 invite from Charles Koch read, developing "strategies to counter the most severe threats facing our free society."

The Koch event is also highly secretive. Instead of a Davos-style outreach to boost its public profile by offering photos of celebrities and the uber-wealthy, Koch attendees are warned not to post anything about the meeting to social media and to guard meeting notes and materials. For reasons of anonymity, and perhaps Charles Koch's obsession over control, invitees are not even supposed to confirm their reservations at the resort where the event is held – everything goes through Koch Industries.

One Politico reporter who went to a Koch retreat found out how unwelcome the media was. After visiting a Koch registration table, the reporter was approached by a

11 https://www.bloomberg.com/news/articles/2012-05-03/alecs-secrets-revealed-corporations-flee (accessed October 14, 2021).
12 https://www.nytimes.com/2019/08/23/us/david-koch-dead.html (accessed October 14, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

member of the omnipresent security team at the resort's café and ushered outside. There, more security guards wearing gold lapel pins with a "K" logo on them threatened him with a "citizen's arrest" if he kept asking questions and taking photos.[13]

Charles Koch's event is also explicitly not about recreation. *Kochland* reports that in his 2010 invitation to a resort in southern California, Charles Koch writes: "Our ultimate goal is not 'fun in the sun.' This is a gathering of doers who are willing to engage in the hard work necessary to advance our shared principles. Success in this endeavor will require all the help we can muster."

Apparently, Charles Koch's stern tone has been appealing. In 2019, the *Washington Post* referred to "the Koch network" as "the influential assemblage of groups funded by billionaire industrialist Charles Koch and more than 600 wealthy individuals who share his pro-business, anti-regulation view of economics and positions on social policy . . ."[14] It is this massive web of donations, non-profits, think tanks, advocacy groups, and personal connections that make up what is known as the Kochtopus.

Controlling Interest

As the strict rules around the retreat suggest, Charles Koch's approach to almost everything is maintaining as much control as possible. In the opening scene of Christopher Leonard's 2019 book *Kochland*, which follows the Koch dynasty from the 1960s to the present day, a group of Wall Street Bankers fly out to Wichita to convince Charles Koch to take his company public. If he agrees, they explain, he'll make $20 million dollars overnight. Charles barely hesitates before turning them down.

There were multiple reasons Koch turned down his massive payday. For one, his company was already very profitable and well-positioned in critical areas of the economy. Clearly, the decision hasn't cost either of the Koch brothers. Charles is reportedly worth $64 billion today, while David was worth $48 billion when he died in 2019.

At least as important, though, was maintaining his unquestioned command of the enterprise. Going public meant the company would have to be more transparent in its accounting and, theoretically at least, responsible to shareholders and a board. Charles Koch simply preferred secrecy and an iron grip to the possible benefits of stratospheric stock market returns.

13 https://newrepublic.com/article/88099/the-kochs-and-the-marketplace-ideas (accessed October 14, 2021).
14 https://www.washingtonpost.com/education/2019/10/16/koch-network-says-it-wants-remake-public-education-that-means-destroying-it-says-author-new-book-billionaire-brothers/ (accessed October 14, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

The Kochs' conglomerate is low profile – it has just a few well-known brand names – but has expanded into multiple critical industries. It is one of the largest players in the oil industry, produces construction materials, has a huge commodities trading team, and is the world's third-largest producer of fertilizer, which is critical for modern food production. They have built their large political machine in the image of their business. Just as Koch Industries has secretly infiltrated the "hidden infrastructure of everyday life," their tightly controlled political network has spread behind the scenes at all levels of government.[15]

Given Charles' preference for authority, it's hardly surprising that the Kochs' massive donations and political giving all come with strings attached. David said they exert tight ideological control over groups that receive their money.[16] In one extraordinary example, Charles Koch demanded – and received – veto power over faculty hiring at the economics department at Florida State University in exchange for a $1.5 million donation.[17] There is no such thing as charity in Kochland, just as nothing happens by accident.

Follow the Money

There is, for now at least, nothing illegal about very wealthy men spending large amounts of money to influence political outcomes. The Kochs frequently claim to be advancing their principles, just as other very wealthy people do who are coming from different ideological positions. The truth is, however, that they have played fast and loose with the rules for decades.

For example, the Kochs have made no secret about wanting to eliminate any limits on political giving – David Koch joined the 1980 Libertarian ticket specifically so he could self-fund it. The brothers have led some legislative and legal efforts to eliminate campaign finance laws. But, even before *Citizens United* granted corporations the right to virtually unlimited donations, the structure of the Kochtopus seemed designed to distort accountability and obscure money flows from government regulators.

The Kochs's giving to the Heritage Foundation is a case in point. The brothers have donated directly to Heritage, but they have also given millions of dollars to two right-wing funding organizations, Donors Trust and Donors Capital Fund.[18] These two linked groups have, in turn, contributed over a hundred thousand dollars to the

15 Christopher Leonard. *Kochland: The Secret History of Koch Industries and Corporate Power in America*, p. 3 (Simon & Schuster Kindle Edition, 2019).

16 https://www.newyorker.com/magazine/2010/08/30/covert-operations (accessed October 14, 2021).

17 https://newrepublic.com/article/88099/the-kochs-and-the-marketplace-ideas (accessed October 14, 2021).

18 https://www.sourcewatch.org/index.php/Heritage_Foundation (accessed October 14, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Heritage Foundation. But it's impossible to say if any of the Koch money went to Heritage. Donors Trust doesn't just pool its donations into a general fund, but sends money to groups that donors request. It's effectively direct giving, but the Donors groups cloak the money's origins.

As obscure as the political activities of Donors Trust and Donors Capital Fund are, Charles Koch and his associates are without a doubt enmeshed in the organizations and the web of money they have directed to many right-wing groups. Investigative Journalist Pam Martens unraveled some of the connections: The two groups have given to the Institute for Humane Studies and George Mason University Foundation, two of the Kochs' favorite targets for donations. The president of Donors Trust and Donors Capital Fund, Whitney Ball, was reportedly one of the elite guests at a Koch retreat. Stephen Moore, who sits on the Wall Street Journal's editorial board, was also at the Koch-hosted meeting and is a director at Donors Capital Fund. Lauren Vander Heyden, a client Services Coordinator at Donors Trust, used to work at the Charles G. Koch Charitable Foundation.[19]

In addition, a major Koch-managed group called Americans for Prosperity received nearly $9.5 million from Donors Trust and Donors Capital Fund. It's entirely possible that the Kochs could have directed those millions to their own organization via Donors Trust. But, just as with the Heritage donation, it's impossible to definitively track where the hundreds of millions of dollars that slosh through the Donors Trust groups are coming from.

In 1997, however, a Senate investigation did investigate the Kochs' suspicious political activity during the previous year's election cycle. Two non-profit groups – Citizens for Reform and Citizens for the Republic Education Fund – ran $3 million worth of ads supporting Republican candidates. Neither group had a staff or an office, but they were connected to a for-profit corporation called Triad Management, which was responsible for advertising supporting Republican candidates in 26 House races and 3 for the Senate. The investigation determined that more than half of the $3 million came from a group called Economic Education Trust, which was possibly one of the shadowy groups linked to the Kochs.

Because a clear connection was never established – aside from a $2,000 Koch Industries check made out to Triad – the Kochs were never charged with campaign law violations. A year later, however, the *Wall Street Journal* reported on a missing link in the affair: a Republican political consultant on the Koch's payroll had been a go-between for Triad and the Economic Education Trust. The newspaper also claimed to have documents that revealed a direct link between Charles Koch and the ads,[20] which would have been a violation of federal law.

19 https://wallstreetonparade.com/koch-footprints-lead-to-secret-slush-fund-to-keep-fear-alive/ (accessed October 14, 2021).
20 https://publicintegrity.org/environment/kochs-low-profile-belies-political-power/ (accessed October 14, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

While the Senate investigation missed these connections, it did include a different sort of revelation. Much of the money spent by Triad and a group called Coalition for Our Children's Future supported Republican candidates in states where the Kochs have operations, including refineries, pipelines, and offices.[21] It turns out that, while top executives like the Kochs may never get caught, their companies sometimes do. Because of Koch Industries' many environmental and safety violations, the brothers' political giving and connections are no doubt very useful.

Scorched Earth

All Koch Industries are run according to the dictates of Charles Koch's patented Market Based Management system – known as MBM. If you know the source, the basic idea is unsurprising: businesses, like society, must be run on the principles of personal liberty and free markets. Market Based Management seems to be very successful at turning a profit, but the pursuit of money has come with a heavy cost. (See Tab. 7.1: Inefficient Efficiencies.) Despite demands that work safety be practiced "10,000%" – 100% of the employees, 100 percent of the time – Koch Industries has an ugly history with safety and environmental violations.

In 1996, for example, a rusty pipeline leaked butane into a neighborhood in Lively, Texas. When two 18-year-olds tried to drive their truck to warn others about the leak, their sparkplug ignited the butane, creating a fireball that killed them and started several other fires. It was a preventable accident – the pipeline had severe corrosion and mechanical damage. Koch Industries was ordered to pay one of the victim's families $296 million, the largest wrongful death settlement in American legal history.[22] Nobody went to jail for the deaths, though.

A 2019 ProPublica article also detailed ongoing worker safety issues at the Koch Industries-owned Georgia-Pacific. In 2013, two workers died at a company plant. Georgia-Pacific addressed the problems by doubling down on Charles Koch's Market Based Management, but things still got worse. In 2014, six employees died – including two burning deaths from an explosion, one truck accident on the factory floor and another in which a worker's head was crushed by machinery. Because of a cap on OSHA fines, the company never paid more than $35,000 in penalties per dead employee.[23]

From 2010 to 2017, injuries at Georgia-Pacific also rose substantially, from 579 to 755. Injuries per employee also went up, from 1.4 to 2.0. Although less alarming than deaths, "injuries" range from, say, spraining your wrist to losing an arm. The lumber

21 Ibid.
22 https://www.salon.com/2014/10/01/8_disturbing_ways_the_kochs_have_amassed_their_fortune_partner/ (accessed October 14, 2021).
23 https://www.propublica.org/article/rising-profits-rising-injuries-the-safety-crisis-at-koch-industries-georgia-pacific (accessed October 14, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

business is a dangerous industry but, in 2016 at least, Georgia-Pacific's record was worse than its major competitors, Weyerhaeuser and Pratt Industries.[24]

As bad as Koch Industries' record on safety is, its environmental record is even more abysmal. Its companies frequently rank among the top ten air polluters in the US.[25] Throughout much of the 1990s, for example, a refinery in Minnesota discharged – on purpose – over 600,000 gallons of jet fuel into wetlands. The business was ordered to pay $8 million in fines and remediation costs.[26] In 1994, an aging Koch-owned pipeline in South Texas exploded, leaking 90,000 gallons of crude oil into a creek, eventually reaching six states. The company was ordered to pay a $30 million civil penalty, a record environmental fine at the time. For former EPA administrator Carol Browning, the repeat violations showed the true colors of Koch Industries: "They simply did not believe the law applied to them."[27]

Sometimes, it turned out, they *were* above the law. In 2000, the same year that Koch Industries paid a record $30 million for its role in 300 oil spills, its petroleum subsidiary and four corporate employees were indicted on 97 counts for covering up illegal releases of benzene from its Corpus Christi refinery. Long-term exposure to benzene reduces bone marrow production of red blood cells, leading to anemia. It can also damage the immune system by decreasing the number of white blood cells. Koch had allegedly released 91 tons of benzene. The company faced up to $350 million in fines.

It looked bad, until the political party they'd given over a million dollars to over the previous year came into power.[28] George W. Bush, the former Texas governor, was a long-time friend of the oil industry. Even better, he appointed John Ashcroft – a member of the Koch-funded, libertarian Federalist Society – to serve as Attorney General. Ashcroft's Deputy Attorney General Larry D. Thompson was also a society member, as were Interior Secretary Gale Norton and Energy Secretary Spencer Abraham.[29] The conservative, oil industry-friendly, and Federalist Society-dominated administration was Koch Industries' saving grace: Ashcroft cut them a deal. Facing up to $350 million in fines, the company cut a plea bargain arrangement and paid $20 million – a 94% savings.

The sea change in regulatory approach between 2000 and 2001 was part of a bigger trend in how the Kochs' businesses faired under Republican versus Democratic

---

24 Ibid.
25 Jane Mayer, "Covert Operations: The Billionaire Brothers Who Are Waging a War Against Obama," *The New Yorker*, August 30, 2010.
26 https://www.salon.com/2014/10/01/8_disturbing_ways_the_kochs_have_amassed_their_fortune_partner/ (accessed October 14, 2021).
27 Ibid.
28 https://www.opensecrets.org/orgs/koch-industries/totals?id=D000000186 (accessed October 14, 2021).
29 https://www.washingtonpost.com/archive/politics/2001/04/18/federalist-society-becomes-a-force-in-washington/9eb2f353-2f3c-4724-ba5c-094736a9a434/ (accessed October 14, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Tab. 7.1: Inefficient Efficiencies CEOs commonly decry environmental regulations as an "inefficient" use of corporate resources. But as these numbers show, regulating a problem at its source is far more efficient than dumping the clean-up costs on the nation as a whole.

Targeted Rule	Average Yearly Costs to Industry (in billions $)	Average Yearly Benefit to Nation (in billions $)
Clean Car Standards	$15.90	$63.98
Fiduciary	$2.10	$17.00
Energy efficient light bulbs	$0.90	$8.90
Ozone	$0.70	$2.50
Methane	$0.30	$0.55
Oil rig safety	$0.04	$0.16
Air compressor efficiency	$0.01	$0.05

Source: Public Citizen.

administrations. Between 2000 and 2019, there were nine years of Democrat-selected leadership at regulatory agencies and 11 years of Republican-run agencies. Over that time, Koch Industries paid nearly a billion dollars in violations. Koch Industries has faced penalties under every administration, but there are some not-so-subtle distinctions in how much they pay and to whom.

For example, four of the top five biggest settlements paid between 2000 and 2019 occurred during Democratic administrations. The top penalties accrued during the nine years of Democratic administrations totaled $724 million – versus $67 million for the largest penalty assessed during the 11 years of Republican presidents.

There is also a stark difference in who holds Koch Industries responsible. That $67 million penalty assessed during a GOP administration was not the result of a federal government regulatory action, but a private lawsuit over a benefit plan violation. The four penalties assessed during Democratic administrations were all brought by federal regulatory agencies based on environmental violations.

For a business that operates in some of the most environmentally dangerous industries – timber, chemicals, oil – lowering the heat from regulatory agencies amounts to a huge savings, one that often represents a handsome return on investment in political giving.

The Obama Problem

In 2009, the first year of the Obama Administration, Koch Industries faced a reckoning that had been delayed under Bush. That year, the Justice Department and EPA

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

announced a Koch-subsidiary called Invista would pay a $1.7 million penalty and $500 million to fix environmental violations at facilities in seven states. Recognizing that an Obama-appointed EPA would crack down on them, the company had self-reported 680 violations at its chemical facilities in order to take advantage of an amnesty provision that reduced penalties. But Invista had known about the ongoing violations, which included years of releasing coal dust and carcinogens into the water and air in multiple locations, soon after purchasing the facilities in 2004.[30]

So after their companies paid substantial fines during the first Obama term, it's hardly surprising the Kochs were all-in on his 2012 opponent, Mitt Romney. While Romney's politics were more in line with that of the Kochs, it also made business sense for Koch Industries to avoid hundreds of millions in fines under a future Romney Administration. What's hard to track, again, on purpose, is exactly how much they spent on this goal.

The 2012 presidential election was also the first since the *Citizens United* ruling unleashed a flood of corporate giving. Although the Kochs' traceable giving, like the Koch Industries PAC, had increased each election year since 2004, it shot up steeply in 2012.[31] There was the obvious support – David Koch hosted a GOP fundraiser at his home in Southampton with a $75,000 suggested donation, split between Romney and other national Republican organizations. An investigation by *Mother Jones* tallied up the brothers' personal giving at $411,000, all of which went to Republicans. But the magazine also noted that the Kochs had pledged a combined $60 million to unseat Obama. If they followed through, and Charles Koch doesn't seem likely to make empty threats, most of that spending was in dark money.

The foundation linked to their non-profit, Americans for Prosperity, also spent tens of millions to defeat Obama, including $12.6 million for ads in swing states.[32] Beyond dark money, their business interests – tightly controlled by Charles – included Koch Industries, Georgia-Pacific, and Flint Hills Resources. These businesses gave a combined $2.2 million to candidates and parties, 95% of which went to Republicans.[33]

That same year, the tentacles of the Koch's political machine were even harder to follow. A labyrinthine chart tracing the flow of $407 million between over 30 different Koch-led groups in 2012 is mind-boggling. Not only does money between Koch-controlled and Koch-affiliated organizations flow in multiple directions, much of it goes to what are known as "disregarded entities," effectively front organizations with seemingly random initials as names. For example, the Center to Protect Patient Rights

30 https://www.epa.gov/enforcement/invista-audit-settlement (accessed October 14, 2021).
31 https://www.opensecrets.org/political-action-committees-pacs/koch-industries/C00236489/summary/2008 (accessed October 14, 2021).
32 https://www.nytimes.com/2013/11/15/us/politics/122-million-in-2012-spending-by-koch-group.html (accessed October 14, 2021).
33 https://www.motherjones.com/politics/2012/11/charts-map-koch-brothers-2012-spending/ (accessed October 14, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

gave over $150,000 directly to the Libre Institute, the Koch's Latino outreach organization. But, also in 2012, the Koch-run Freedom Partners and TC4 Trust gave around $3.8 million to a group called TDNA LLC, which is effectively another name for Libre. Tens of millions of dollars were transferred to multiple LLCs this same obscure way.[34]

The movement of money is even harder to follow because many of these Koch-linked groups popped up and disappeared or reappeared under different names. Between 2012 and 2015, the Charles G. Koch Foundation gave over $57,000 to the Center for Competitive Politics, an organization that attempted to deregulate election funding.[35] In 2017, the group changed its name to the Institute for Free Speech, which is in turn funded by the State Policy Network, which is in turn funded in part by the Charles G. Koch Foundation and Charles Koch Institute, as well as Donors Trust and Donors Capital Fund – to the tune of $26 million between 2014–2018 – which have themselves received money from the Koch foundations. Tracking the spending was like watching a snake eat its tail. Only the Kochs know how much of those millions ended up with the Institute for Free Speech.

It's clear that a lot of the Kochs' money was used to attack President Obama and for get-out-the-vote efforts but, because of the obscure, sophisticated funding arrangements, one of the biggest political operations in the country took place outside of the campaign finance system. Of course, the Kochs lost the big prize in this one – Obama was handily reelected. But they weren't even down, much less out.

The Good Libertarians

So, the Kochs had, at best, a suspect safety and environmental record. Their companies paid record fines for violations. They displayed an enormous lack of compassion and compunction for victims. They gave millions of untraceable monies to candidates that they knew would create more "favorable regulatory environments."

But, from 30,000 feet, couldn't one argue the Kochs remained largely true to their libertarian ideology? Weren't government regulators part of the system they vowed to abolish? Wasn't lowering personal and corporate taxes part of a battle for freedom? Beyond that, haven't the Kochs also been leaders in a bi-partisan movement to hire ex-prisoners, many of whom were unemployable after their convictions? Hasn't Charles Koch teamed up with George Soros to fund an anti-war think tank, given money to train at-risk youth in Wichita, and done important work on prison reform?

34 https://www.sourcewatch.org/images/5/5d/A_Maze_of_Money.png (accessed October 14, 2021).
35 https://www.sourcewatch.org/index.php?title=Institute_for_Free_Speech (accessed October 14, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

The answer to every question is "Yes" – except the first one. When the chips are down, the Kochs have repeatedly abandoned their supposedly deeply-held libertarianism. In departing from the ideology they've claimed to promote for decades, they showed nothing more or less than greed. Their true God, ideology or lodestar is lucre, not liberty.

For example, like other libertarians, Charles Koch publicly holds that the role of government should be reduced to bare essentials, like protecting private property. The Charles Koch-founded Cato Institute popularized the term "corporate welfare." But when the government offers him big incentives, Koch doesn't hem and haw about first principles. Koch Industries happily took its portion of the $85 billion of subsidies offered to energy companies in the 2005 energy bill.[36] A spokesperson claimed not taking the corporate handout would make the company less competitive. It's almost certainly good business sense, but accepting massive amounts of taxpayer-funded corporate welfare is in no way libertarian.

Protecting private property is apparently also optional. In 2001, around the same time that Koch Industries was negotiating a massive plea deal with the Ashcroft Justice Department, the conglomerate was facing another, much more personal assault. David's twin brother Bill – who had tried to take over the family business in the early 1980s – sued Koch Industries. He claimed his family business was essentially "organized crime. And management driven from the top down."[37] Specifically, his lawsuit alleged that the company had been stealing oil from under federal and Native American land for years. The case turned out to be much more than a disgruntled brother playing out a family dispute in the courts.

For years, Koch Petroleum had held the contract to pump oil from under government and Native American land – often in federal forests – and then sell it to refineries or other customers, with the profits going back to either the Native Americans or federal government. At the trial, about 50 gaugers, the people who measure how much oil is coming out of the ground, testified that what was known as the "Koch method" involved keeping a little bit of oil from every barrel they sold. Those dribs and drabs eventually added up to hundreds of millions of barrels that the company translated into millions of dollars in stolen profit.

Trying to obscure the evidence, Charles Koch testified that, "There's always a problem of accuracy in the oil field in measurement." The court saw it otherwise, as a massive theft. Koch Industries was ordered to pay $25 million to the government. The Native Americans got nothing, though.

---

36 https://www.washingtonpost.com/wp-dyn/content/article/2005/07/29/AR2005072901128.html (accessed October 14, 2021).
37 https://www.cbsnews.com/news/blood-and-oil/ (accessed October 14, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Data, AI, and Threats

Finally, the Kochs claim to vehemently support civil liberties. By any measure, this should include freedom from surveillance. The Libertarian Party platform on the Patriot Act, for example, states that it is "unconstitutional and violates our right to freedom from unreasonable search and seizure."[38] The Kochs may have agreed in theory, but by 2016, they found it politically expedient to support some of the strongest proponents of government surveillance, including Senators Mario Rubio, Richard Burr, and Ron Johnson.[39]

Much more damning of their reputed support for civil liberties is the massive surveillance machine they themselves have built. Since 2010, a division of Koch Industries called i360 has developed a gigantic voter database that has gathered 1,800 data points on over 200 million voters and 290 million consumers in all 50 states. Some of the data collected seems fairly unobtrusive – precinct election returns, individual sentiment information on candidates, advocacy groups, basic census info, or Bureau of Labor statistics. But, as the list of data collected by i360 grows, it gets much creepier: social media activity, consumer tendencies, estimated income, recent addresses, geospatial data, brand of car, TV viewing habits, mortgage status, and how many bathrooms a voter has.[40]

As *Salon* described in a 2018 article, "They know if you enjoy fishing – and if you do, whether you prefer salt or fresh water. They know if you have bladder control difficulty, get migraines, or have osteoporosis. They know which advertising mediums (radio, TV, internet, email) are the most effective. *For you*."[41]

(In fairness, the Kochs' voter surveillance activities do align with one of the most disquieting portions of the Powell Memo: "The national television networks should be monitored in the same way textbooks should be kept under constant surveillance.")

This information has been used to run psychological experiments on hundreds of thousands of unwitting Americans. In Colorado, i360 divided up roughly 300,000 unlikely voters into five groups. One got a mailing and phone call. Another got a personal visit and follow-up call. A third just got a mailing, and so on. Based on who ultimately voted, i360 reevaluated their targeting operations to turn out unlikely voters.

---

38 https://www.lp.org/news-press-releases-libertarians-say-restore-freedom-repeal-patriot-act/ (accessed October 14, 2021).

39 https://theintercept.com/2016/11/04/koch-senate-hawks/ (accessed October 14, 2021).

40 https://www.politico.com/story/2014/12/koch-brothers-rnc-113359 (accessed October 14, 2021).

41 https://www.salon.com/2018/11/05/koch-brothers-are-watching-you-and-new-documents-expose-how-much-they-know/ (accessed October 14, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

In Ohio, i360 developed what's known as the "Heroin Model." The opioid epidemic was the top issue in the state. For Republican Senator Rob Portman's campaign, i360 used its database and analytics to determine how individual voters felt about the epidemic. They then targeted ads that adjusted Portman's "position" depending on a voter's likely views. One ad emphasized treatment options, another criminal justice solutions. The "heroin model" was a great digital step beyond the grand political tradition of playing to a crowd: i360 used a massive database to digitally target Portman's politics to the individual level. Portman could say what i360 predicted every individual wanted to hear. And, through the magic of the internet, he could deliver all these different personalized messages at the same time.

Since then, i360 has developed similar campaigns that use AI, machine learning, and reams of personal data to adjust candidates' targeted messaging on hot button issues such as gun control, immigration, energy policy, abortion, and gay marriage. A deal with Dish and DirectTV allows i360 to target voters with tailored messages on select issues during regular television broadcasts. An i360 predictive dialer can make hundreds of outbound calls per hour to more than 100,000 numbers.

It's hard to imagine a principled libertarian being happy about the government, or any other group, hoovering up huge amounts of very personal information on them, analyzing it with machine learning, and then using the results in a targeted information blitz to change how they exercise their democratic freedoms. But the Kochs not only don't care; they've continued to pour enormous amounts of money into developing their voter surveillance apparatus.

That money, along with the fact that i360 isn't dependent on cyclical election-driven funding, has produced a database that is more sophisticated than anything the Republican National Committee can offer GOP candidates. Multiple conservative groups, including the NRA, Americans for Prosperity, and the Libre Initiative, as well as national and state Republican groups and individual candidates, pay to use i360. The Koch network offers an essential resource that rivals or exceeds that of established political parties.

Beyond creating a massive surveillance machine, the Kochs have also allegedly attacked another prized constitutional right, freedom of the press. In August 2010, after the *New Yorker's* Jane Mayer wrote a lengthy and unflattering article about the Koch brothers, she began hearing rumors from various people – including a fellow reporter – that an investigator had been digging into her past. She didn't take the stories seriously until the conservative *New York Post* and *Daily Caller* received information that documented Mayer's reputed plagiarism.

The shoddy charges didn't stick. Neither did an investigation into a troubled college friend of Mayer's. Three years later, she figured out who had been stalking her – a firm called Vigilant Resources International, whose founder had been New York City's police commissioner under Rudolph Giuliani. Mayer also claimed

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

that two other people involved in what amounted an unsuccessful smear campaign were currently or previously employed by Koch Industries.[42]

In 2011, following a 4,000-word report in the Center for Public Integrity about Koch Industry's lobbying operation, a Koch-run "fact checking" group called Kochfacts attacked the report's author, Jack Farrell. The center's executive director, Bill Buzenberg, described the Kochfacts campaign as an "ad hominem attack on a reporter who was objectively doing his job." Koch has also attacked the integrity of outlets including the *New York Times* and Politico.

If the allegations are true, it would be part of a long history of counterattacking people who questioned their operations. The Senate Select Committee on Indian Affairs had investigated allegations that Koch Petroleum had been stealing oil from under Indian land years before they were found guilty of the crimes. The investigation was eventually ended but, according to a Senate report, after the hearings, Koch operatives investigated the personal lives of committee staffers, including questioning an ex-wife. The counsel to the Senate committee said, "These people have amassed such unaccountable power!"[43] That was in 1989.

The Paranoid Style in Koch Politics

Some conservatives used to describe the Kochs as something along the lines of "shy, retiring intellectuals yearning only for high-level philosophical discussion in the free marketplace of ideas."[44] That idea went by the wayside long before Jane Mayer's expose, for anyone who was paying attention.

Today, it's not even possible to advertise them as "two successful men aggressively pushing forward a bold, libertarian vision for the country." There are too many departures from their reputed ideology – and all of them are in the direction of simply amassing power and wealth.

David Koch used to tell a joke about how he managed to get so rich: "My father died and left me three hundred million dollars!"[45] This throwaway line is probably closer to the Koch ethos than any of the high-minded rhetoric on the Federalist Society website about sponsoring "fair, serious, and open debate about the need to enhance individual freedom."[46] The Kochs simply want government agencies, laws

42 https://www.nytimes.com/2016/01/27/nyregion/what-happened-to-jane-mayer-when-she-wrote-about-the-koch-brothers.html (accessed October 14, 2021).
43 https://newrepublic.com/article/88099/the-kochs-and-the-marketplace-ideas (accessed October 14, 2021).
44 Ibid.
45 https://www.newyorker.com/magazine/2010/08/30/covert-operations (accessed October 14, 2021).
46 https://fedsoc.org/about-us#Background (accessed October 14, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

they disagree with, and nosy reporters to get out of the way while they plunder the earth, endanger their employees and capture the political system. It's the ethos of a Davos Man, even if they aren't attendees.

But, in doing so, perhaps they are being true to their father's brand of libertarianism – a belief system not founded on the ideals of limited government and individual liberty, but raw anti-Communist paranoia. Fred Koch was a founding member of the John Birch Society, the conspiratorial organization that saw threats to freedom everywhere. Birchers considered the civil rights movement, United Nations, and fluoridated water to be communist plots. The president of the society accused most of the US government of being communists, famously including President Dwight Eisenhower, who was a "dedicated, conscious agent of the Communist conspiracy."[47] It's not a coincidence that the GOP, the party that now receives virtually all of the Koch's funding, has veered further and further toward similarly kooky conspiracy theories.

For all the convoluted ways they've managed to inject money into the political system, it's clear that the influence it has bought the Kochs has not led to vigorous intellectual debate across the country, but a substantial weakening of the United States. The Kochtopus is not a machine for changing the direction of American democracy, so much as crushing it. Over the last four years they nearly succeeded.

---

47 https://www.washingtonpost.com/history/2021/01/15/john-birch-society-qanon-reagan-republicans-goldwater/ (accessed October 14, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Chapter 8
The Storming of Democracy

> The private powers of the economy want free paths for their acquisition of great resources. No legislation must stand in their way. They want to make the laws themselves, in their interests, and to that end they make use of the tool they have made for themselves, democracy, the subsidized party. Law needs, in order to resist this onslaught, a high tradition that finds its satisfaction not in the heaping up of riches, but in the task of true rulership, above and beyond all money-advantage. A power can be overthrown only by another power, not by a principle, and only one power that can confront money is left. Money is overthrown and abolished by blood.[1]
>
> – Oswald Spengler, *The Decline of the West*

The tableau evoked by Spengler a hundred years ago brings us close to circumstances now prevailing. The historic collision of American money, blood, and democracy, and Charles Koch's role in it, wasn't exactly straight – or perhaps even the intended outcome. Nonetheless, the deep roots of the January 6, 2021, siege of the US Capitol can be tracked and documented back years before insurrectionist chatter popped up on right-wing social media platforms. Behind the gleefully conspiratorial militias and the violent, inflammatory language of the president lies something much bigger than a few thousand angry Trumpists breaking into the Senate. It is the slumped figure of American democracy, sickened and abused by the influence of plutocratic money.

Learning to Love Faux-Populism

Donald Trump was not Charles Koch's first pick for the 2016 candidate of the party that he had been coopting for years. (David Koch, who usually followed his brothers' political lead, became even less of an active player in recent years, he'd spent decades fending off advanced prostate cancer, retired in mid-2018, and died the following August.) Trump wasn't even Koch's fourth choice. Instead, Charles Koch-controlled organizations, and his sprawling donor network, contributed millions of dollars to PACs associated with Jeb Bush, Marco Rubio, Ted Cruz, and Carly Fiorina.[2] The free-wheeling Trump had taken strong positions on limiting immigration as well as adopting a populist antifree trade agenda – both of which ran afoul of Koch's professed libertarian leanings and economic interests. He also seemed eminently uncontrollable.

1 Oswald Spengler, *The Decline of the West*, p. 414 (Viking, 2006, abridged).
2 https://www.theguardian.com/us-news/2015/oct/06/koch-brothers-network-donors-republican-super-pacs (accessed October 14, 2021).

https://doi.org/10.1515/9783110696998-008

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Nonetheless, when Trump swept to victory in November 2016, Charles Koch was hardly left on the sidelines. His mass of affiliated groups had spent millions supporting many of the other Republican lawmakers that gave Trump control of Congress. A Koch front group called Freedom Partners Action Fund had also run attack ads on Democrats. Even without those massive spends, the Kochtopus was too big to avoid – even for a politician who promised to "drain the swamp" and brought in family members and other non-traditional personnel to fill key roles.

For example, the law firm Jones Day, which had a long-standing and very profitable relationship with Koch Industries, ended up landing 12 spots in the Trump Administration.[3] Freedom Partners, a libertarian group that was partially funded by Koch and staffed at the upper levels almost exclusively by Koch Industry employees, also ended up with a dozen former employees working in the administration.[4]

Perhaps even better for Charles Koch, the Trump administration sang from Freedom Partners' hymnal on regulation and tax policy, including withdrawing from the Paris Accords on climate change. Over his term, Trump's light-touch EPA only penalized Koch Industries an average 1.2 of violations per year. By contrast, during Obama's eight years, the EPA found Koch Industries liable for 3.7 EPA violations annually.[5]

Nonetheless, Trump's protectionism irked Koch. In July 2018, he took the rare step of publicly criticizing the economic policies as "detrimental." Trump quickly fired back via Twitter, calling the Kochs "a total joke in real Republican circles."[6]

Ultimately, though, the two had to coexist. Koch – by now a Democratic bogeyman – had hitched his wagon to the GOP, and the GOP base belonged to Trump. So, in exchange for his increase in personal wealth, Charles Koch, the libertarian stalwart, made peace with a president who waged an ongoing war on first amendment rights. The American Constitution Society claimed that Trump had "challenged a number of core principles associated with the First Amendment," including vilifying the media, attacking peaceful social justice protests by athletes, insisting on non-disclosure agreements for positions in his administration, and censorially abusing executive power.[7] Koch's limited public critiques of the president ignored any qualms about government abuses of freedom of expression, instead focusing on

3 https://wallstreetonparade.com/2021/01/the-money-trail-to-the-siege-at-the-capitol-leads-to-charles-koch-and-koch-industries/ (accessed October 14, 2021).
4 Ibid.
5 https://violationtracker.goodjobsfirst.org/prog.php?parent=koch-industries&order=pen_year&sort=desc&page=1 (accessed October 14, 2021).
6 https://www.nytimes.com/2018/07/31/us/politics/trump-koch-brothers.html (accessed October 14, 2021).
7 https://www.acslaw.org/expertforum/president-trump-challenging-core-first-amendment-principles/ (accessed October 14, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

protectionism and other populist economics that conflicted with small government policies.

Similarly, the enlightened philosopher-king Koch didn't take a principled stand against Trump's know-nothingism or the rampant conspiracy theories and tortured facts that animated his administration. In this case, however, Charles Koch may have had a degree of respect for the fact-free universe Trump had created. At the very least he recognized it. After all, Koch had been one of the principal funders of one of the most destructive, cynical lies in American history.

Muddying the Water

Even before the turn of the 20th century, scientists understood the basic mechanics of the earth's atmosphere. They knew that, contrary to the once widely held theory of vulcanism, the earth wasn't on an irreversible cooling trend. They could do the math to prove that the earth's temperature was closely related to its atmosphere. If it were just a big rock sitting 92 million miles from the sun, the earth would boil when the sun hit it and freeze when the sun disappeared. Life on earth existed because carbon, water vapor, and other airborne particulates formed a protective heat-retaining blanket around the earth.

In the 1890s, a Nobel prize-winning Swedish physicist named Svante Arrhenius, following earlier climate scientists Eunice Foote and John Tyndall, had even determined that human-created carbon dioxide emissions would be sufficient to cause global warming. Arrhenius welcomed such a rise in temperatures – more of Sweden could be used for productive agriculture. Over the 20th century, modern climate science developed and helped pinpoint exactly how much carbon had been in the atmosphere historically, how much human activity was contributing to the growth of that total, how much was absorbed by the ocean and trees, and how quickly the earth was heating. Gradually, climate scientists were able to fine tune the correlation between the amount of greenhouse gases human activity was emitting into the atmosphere and rising temperatures. Their conclusions outlined multiple alarming scenarios.

This science finally burst into public consciousness in July of 1988 during the Congressional testimony of a NASA scientist named James Hansen. By nature cautious, scientists normally couch their public comments in technical language and multiple qualifications. Hansen spoke as forthrightly as he could on global warming. Hansen said he was 99 percent sure that the earth was warmer than had ever been measured, that this was a result of greenhouse gases, and that the likelihood of extreme weather would increase with temperatures. Hansen saw a risk and wanted to rally citizens and lawmakers to action. Some doubted his conclusions – it was a massive, terrifying concept that demanded major changes to a fossil fuel-dependent economy. Others ignored Hansen. But enough people believed urgent action was necessary to get climate change on the political radar.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

New Merchants of Doubt

One group that was definitively giving Hansen's claims a lot of attention was the oil industry. Whatever they thought personally about Hansen's data – and there is convincing evidence that many oil executives were already well aware of climate change and its threats years earlier[8] – they all realized that any efforts to rein in greenhouse gases were an existential threat to their business. Cars could be made more fuel efficient, or electric. There was only one way oil companies could make their core products release significantly less carbon: sell less of it.

As a result, the oil industry was determined to spend what it took to smother any action to regulate fossil fuels or carbon. To do so, they borrowed some aggressive tactics from the cigarette industry. In the 1960s, the tobacco companies had faced a similar problem: there was solid medical data that smoking was linked to cancer, emphysema, and other life-shortening complications. The surgeon general spoke publicly on the health risks. Realizing that they couldn't win a straight war based on facts, marketing agencies representing cigarette companies settled for muddying the waters.

The tobacco companies were now, as a marketing executive explained, "merchants of doubt." If they could sell uncertainty to a large enough group of Americans, people would keep smoking, and governments would have a hard time pushing through stricter regulations. The strategy was amazingly successful. Even as the medical links between smoking and life-threatening diseases continued to pile up, no significant restrictions on smoking came into effect until the 1990s – 30 years after the science had been more-or-less settled.

The oil industry launched the exact same strategy – muddying the waters of climate science. By 1991, just three years after James Hansen had dramatically put global warming on the national agenda, Koch Industries, Exxon, and other oil companies were already funding efforts to scuttle climate science.

Their first big test arose when President George H.W. Bush came out in support of limiting carbon emissions. In response, the Koch-founded Cato Institute hosted a conference called "Global Environmental Crisis: Science or Politics?" The invitees included several well-known climate deniers, including Patrick J. Michaels, Richard S. Lindzen, and Robert C. Balling, Jr.[9] All of the scientists have allegedly or admittedly received funding amounting to hundreds of thousands of dollars from fossil-fuel groups. The Cato Institute also circulated a document among White House staff called "Alternative Perspectives on Global Warming" – the ideological predecessor of Trump's "alternative facts."

8 https://www.scientificamerican.com/article/exxon-knew-about-climate-change-almost-40-years-ago/ (accessed October 14, 2021).
9 https://kochdocs.org/2019/08/12/1991-cato-climate-denial-conference-flyer-and-schedule/ (accessed October 15, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Exxon, Koch Industries, and other petroleum companies also spent millions to promote confusing and outright false information on climate change throughout the 1990s and into the 2000s. Their attempts to scuttle climate change science and stave off federal regulation worked just as well as the cigarette industry's had. For nearly two decades, no national regulations or laws targeted greenhouse gas emissions or climate change.

Of course, the obfuscation would not last forever. Anti-smoking regulations had finally appeared in the 1990s and 2000s. Climate denialism was similarly a long, strategic retreat. First, oil industry executives, affiliates, and employees outright denied that the earth was warming. Then, they might admit it was warming, but that warming, just like carbon dioxide, was part of a natural cycle – it might even be a beneficial development. Then, these same people admitted that the planet was warming and that extreme weather may be associated with the rising temperatures, but there no firm evidence of how much human activity had to do with it. Then they might say that anthropogenic climate change was real but dispute the percentage of carbon emissions that was caused by humans. Then the same people admitted that anthropogenic climate change was a potential danger, but that political solutions would destroy the economy.

The effort worked well for years, but by the mid-1990s, public opinion was shifting and many oil companies lowered or stopped their financial support for climate change denialism. BP boldly launched itself as "Beyond Petroleum." Even ExxonMobil began distancing itself from aggressively distorting climate science. Give Koch Industries credit for consistency: they stuck the course, becoming the biggest funder of climate denialism in the mid-2000s. Between 2005–2008, Greenpeace tallied Koch Industries-controlled foundations' contributions to climate denialism at $24.9 million. The much larger ExxonMobil spent $8.9 million over the same time period.[10]

The Kochs were facing increasingly long odds, but they were more than happy to fight dirty. Koch foundations gave $2.1 million to the American Enterprise Institute, a neo-conservative think tank that, in 2007, reportedly offered $10,000 payments to scientists and economists to dispute a major climate report by the United Nations.[11] Koch also funded climate denial groups like the Heritage Foundation, as well as lower profile groups like the Independent Women's Forum, which opposed teaching global warming as fact in public schools.

In 2009, Koch Industries helped promote the so-called Climategate scandal to further seed doubt about scientific consensus and honesty. The manufactured affair,

10 https://www.greenpeace.org/usa/research/koch-industries-secretly-fund/ (accessed October 15, 2021).

11 https://www.theguardian.com/environment/2007/feb/02/frontpagenews.climatechange (accessed October 15, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

which involved emails that reportedly showed how scientific data on climate change was falsified, was quickly discredited. But the media coverage was sufficient to put one more ding in the scientific consensus.

This crusade against science was even more shameless because Charles and David Koch hold masters' degrees in engineering from MIT. Although climate science was still nascent when they graduated, it's inconceivable that neither of them understood the numbers and facts that scientists like Hansen laid out to make their case for a global emergency. In a 2010 interview, David Koch ignored the best available data on climate change, sounding like Svante Arrhenius, the 19th century Swedish scientist who had suggested that the increased growing season would be beneficial.[12]

Beginning in 1991, Koch Industries had actively created a fantasy world propped up by lies and conspiracy theories. Koch Industries' employees were equally insistent in publicly denying climate change. Speaking about the earth's climate in 2014, Philip Ellender, the conglomerate's top lobbyist, upped David Koch's ignorance. Ellender claimed "whether or not the increases and fluctuations [in the earth's temperature] are anthropologic or not is still a question" and "over the past roughly 18 [years], it's cooler."[13] Again, it's virtually impossible to believe that Ellender – a registered Democrat with a Nature Conservancy membership – actually believed either claim. Both were so thoroughly debunked by scientific literature and out of sync with American public opinion that his claims verged on an endorsement of flat earth theory.[14]

Nonetheless, as detailed in *Kochland*, climate denialism was something that almost every Koch executive bought into thoroughly. In a 2009 strategy meeting with top members of the Koch political apparatus, a more junior Koch lobbyist was shocked to hear most attendees refer to climate change as a "hoax."[15]

The 2009 meeting was to generate a strategy to stop a development that threatened to pop their climate-denialism bubble. In 2008, then-candidate Barack Obama stated that the science of global warming was beyond dispute. True to form, the Cato Institute took out a full-page ad in the *New York Times* to dispute him. Obama won election anyway, and the wind appeared to be at his back. Democrats had also swept to control of both houses of Congress. Serious – although ultimately wrong – people were talking about a permanent Democratic majority. Either way, the Republican party was clearly in disarray. Obama pledged that action on climate change would be a priority.

12 Jane Mayer, "Covert Operations: The Billionaire Brothers Who Are Waging a War Against Obama," *The New Yorker*, August 30, 2010.
13 Christopher Leonard. *Kochland: The Secret History of Koch Industries and Corporate Power in America*, p. 401 (Simon & Schuster, 2019).
14 https://www.pewresearch.org/fact-tank/2014/09/23/most-americans-believe-in-climate-change-but-give-it-low-priority/ (accessed October 15, 2021).
15 Christopher Leonard. *Kochland: The Secret History of Koch Industries and Corporate Power in America*, p. 412 (Simon & Schuster, 2019).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

After nearly two decades of denialism, it seemed like major political action on climate change was inevitable. In June 2009, a cap-and-trade bill known as Waxman-Markey passed the House with bipartisan support. The bill was hardly radical. It was based on cap-and-trade, originally a Republican, free-market-based plan in which companies traded carbon credits. The bill seemed poised to pass the Senate on a bipartisan vote as well. At his annual holiday party at his Wichita, Kansas, home, Charles Koch vowed to use his entire political network to make sure that never happened. Making such a pledge defied conventional wisdom, but Koch had a raw and powerful new political ally in the fight.

Welcome to the Party

Charles Koch did not invent the Tea Party. He certainly didn't support all of the politics associated with the group. Nonetheless, he needed every tool he could get to push back on climate-change legislation. The Tea Party movement, which activated millions of Americans who had never participated in politics, was full of passionate and often angry people who hated the establishment and government. In early 2009, the movement's specific politics were still up-for-grabs, so the Kochtopus got in early to shape the perfect machine to derail the Obama agenda.

The first proto-Tea Party rally was held in mid-February 2009, soon after Obama's election, in the liberal bastion of Seattle. It was called a "porkulus" party – a reference to massive spending measures intended to shore up the financial markets and institutions in the face of the ongoing financial crisis. Just a few days later, on February 17th, the Colorado branch of a group called Americans for Prosperity launched a similar protest rally on the steps of the state capitol. At the rallies that continued to spring up across the country, some attendees wore tri-cornered hats while others waved the Revolutionary War-era Gadsden flag. Another group protested a proposed tax to reduce obesity by dumping soda in a river.

The Tea Party wasn't homogeneous politically, but its overall politics were solidly conservative. Early events were popularized by the right-wing media, including conservative blogger Michelle Malkin. A video of CNBC business editor Rick Santelli suggesting that traders should go to the Chicago River and dump derivatives went viral after being picked up by the right-wing Drudge Report. Fox News initially aligned itself firmly with the Tea Party protests, sending talk show hosts like Glenn Beck to speak at rallies. Many members were also newly politicized by fear and confusion about how a Black man had become president.[16] But that racist streak also worked out quite well for the Kochs, making it easier to direct anger at any element

16 https://www.gsb.stanford.edu/insights/how-racial-threat-has-galvanized-tea-party (accessed October 15, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

of Obama's agenda. The Tea Party didn't have a platform so much as focal points of rage: the establishment, the government, and Obama, all of which suited David and Charles Koch perfectly.

The Tea Party spread rapidly throughout 2009 by tapping into the real frustrations and anger of millions of Americans. However, from the beginning, the reputedly populist Tea Party had been invisibly supported and groomed by two of the richest men in America. For example, Americans for Prosperity – the organizer of the February 2009 Denver rally – was actually a tentacle of the Kochtopus with a long history of astroturfing – falsely claiming popularity.

The group's origins go back to 1984, when David Koch, Richard Fink – the head of Koch Industries' political shop – and libertarian political analyst Matt Kibbe created a group called Citizens for Sound Economy. CSE was meant to appear grassroots, but was primarily sponsored by the Kochs, to the tune of nearly $8 million between 1986 and 1993. In the 1990s, CSE spun off a Pittsburgh-based group called Citizens for the Environment, which disputed the science behind acid rain and other environmental problems. As a reputedly grassroots organization, the group had major credibility problems, A *Pittsburgh Post-Gazette* article claimed that the group had zero "citizens" in its membership.[17]

Then, in 2004, Citizens for a Sound Economy split into two groups that would become crucial in the rapid spread and success of the Tea Party movement.

The first was Americans for Prosperity (AFP), which remained firmly in Charles Koch's control. The second was FreedomWorks, which Kibbe, who had held multiple Koch-funded positions, took over. Both groups played a critical role in organizing and training Tea Party members.

As Americans for Prosperity became Koch Industries' major conduit to the Tea Party, its star rose rapidly. AFP had received only $5.7 million from the Kochs in 2007. In 2009, the Kochs doled out $10.4 million to the group. In 2010, its funding took another huge leap, to $17.5 million. With this money, AFP provided logistical support for the new movement. The AFP website connected Tea Party members to local chapters. The site offered tools to transform a bunch of untrained novices into skillful political tacticians – like getting their messages on talk shows or what time to call politicians. Eventually, American for Prosperity understood the Tea Party so well that it could deliver a crowd on a certain day with a certain message in a certain zip code. In the summer of 2009, AFP organized free bus rides to Washington, DC, along with box lunches, and signs protesting Obama's climate plan.

Climate change legislation hadn't been a major issue at the earliest Tea Party rallies. By the summer of 2009, however, one of the hot button topics for Tea Partiers was Obama's climate "hoax." The Kochs were still promoting their 30-year-old

---

17 Jane Mayer, "Covert Operations: The Billionaire Brothers Who Are Waging a War Against Obama," *The New Yorker*, August 30, 2010.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

fantasy world of climate denialism via think tanks and symposiums. They spread similar lies, misinformation, and conspiracy theories throughout the Tea Party faithful as well.

At one AFP event, a speaker got up in a polar bear costume and claimed there were too many other bears in the Arctic, he had to come south to find space. He then referenced a rumor that the EPA was suppressing a report showing that polar bear populations were actually growing. Many of the most fantastic climate denialist lies were popularized by Glenn Beck, a former talk radio host whose anger and conspiracy theories played well with Tea Partiers. Among his hyperbolic rants: clean energy was the biggest scam ever perpetrated on the American people. Beck was rewarded by support from Americans for Prosperity.

In a 2010 *New York Times* article covering the omnipresence of climate denialism among Tea Party members, Kelly Khuri, founder of the Clark County (Indiana) Tea Party Patriots, said, “This so-called climate science is just ridiculous. I think it’s all cyclical.”[18] The same article cited an October 2010 poll that, among other indicators, detailed that just 14 percent of Tea Party members believed global warming was an environmental problem having an impact now, versus 49 percent of the general population.

It’s worth noting that the 2010 poll came toward the end of a year that offered plenty of objective, empirical evidence that climate conditions were changing. The year was the hottest ever recorded, 19 countries set all-time heat records, and Arctic Sea ice was at its lowest recorded volume. It was also the world’s wettest, the most rain in recorded history fell on land. The months following the October 2010 poll would also see Canada have its warmest winter ever while the US had its coldest in a quarter-century.[19] Of course, none of these real-world events popped the climate denialist bubble.

The anti-Obama sentiment of Tea Partiers married with other anti-Democratic Party conspiracy theories as well. At rallies and town halls, people brought copies of the Affordable Care Act and claimed that it mandated microchips be implanted in Americans. (It didn’t.) Online, Tea Party activists also expressed outrage about a story that taxpayers had bought Nancy Pelosi two jumbo jets for her visits to California. That article was also untrue. Pelosi did, in fact, use a government aircraft for her flights back home, just as the previous Republican Speaker of the House had.[20]

---

18 https://www.nytimes.com/2010/10/21/us/politics/21climate.html (accessed October 15, 2021).
19 https://www.theguardian.com/environment/2011/jun/27/climate-change-extreme-weather-2010 (accessed October 15, 2021).
20 Christopher Leonard. *Kochland: The Secret History of Koch Industries and Corporate Power in America*, p. 430 (Simon & Schuster Kindle Edition, 2019).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Coup de Grace

In the second half of 2009, Charles Koch used all of this investment in promoting and shaping the inchoate group for a very sophisticated political goal. Americans for Prosperity taught Tea Partiers an aggressive technique to hobble the Waxman-Markey cap-and-trade bill. Instead of targeting Democrats, the AFP encouraged protestors to go after the moderate Republicans who supported cap-and-trade. GOP supporters of Waxman-Markey quickly found themselves besieged at public hearings by angry, affluent white people – many of them yelling about "cap and tax," "energy tax," and the climate "hoax." It was a raw, angry message, but one fine-tuned by Americans for Prosperity, which had selected and introduced that very language to discredit the climate legislation.

The attacks on Republicans worked brilliantly. Some lawmakers unexpectedly lost their primaries to Tea Party challengers. Others kept their jobs, but were terrified to support the bill. As a result, cap-and-trade, a top priority for a president who had won in a landslide and carried both houses of Congress, died in the Senate.

A 2014 PolitiFact survey of Republican members of Congress shows how effective the Tea Party strategy on climate change remains. Only eight out of 274 Republican lawmakers have gone on record as believing in climate change science. This number is not astounding simply because it was so low or out-of-touch with the general population, but because it was so discordant even with Republican voters. In a Gallup poll that same year, 42 percent of Republican voters responded that the effects of global warming had already begun or would do so within their lifetimes. Only 34 percent said it would never happen. Further, 19 percent of Republican voters thought that global warming posed a serious threat to their way of life.[21] Fearing the Kochtopus, though, 97 percent of Republican politicians refused to even admit in believing the science.

The Tea Party resistance to climate-change legislation gave Charles Koch his biggest victory of the Obama administration. The president got what became known as Obamacare through Congress and, despite the Kochs' best efforts, was reelected in 2012. But Obama's party lost badly in the 2010 midterms, the GOP lurched further right, and the president was effectively hobbled for the rest of his time in office.

The Kochs's tactic of challenging moderate Republicans also helped destroy whatever shred of congressional bipartisanship may have remained over coming years. By funding the Tea Party, the Kochs had taken the politicization of American politics to a completely new level – near total paralysis. The systemic dysfunction within the legislature since 2010 is easy to quantify. The 112th Congress of 2011 and 2012 was the least productive ever in terms of passing legislation. The 113th of 2013

---

21 https://news.gallup.com/poll/167879/not-global-warming-serious-threat.aspx (accessed October 15, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

and 2014 was the second least productive; the 114th of 2015 and 2016 was only marginally better. After a flurry of activity in President Trump's first two years, Congress again ground to a halt. In short, the hyper-partisan period since 2010 has created the least productive legislature in the history of the United States.

To stop moderate, bipartisan climate change legislation under Obama, Charles Koch was willing to break American politics. Koch spent millions to create a network that empowered millions of angry, white, older people driven by disillusionment, racial resentment, and conspiracy theories. So, in 2016, Charles Koch may not have been enthusiastic about a Donald Trump presidency, but it was too late for him to stop his Frankenstein's monster. The tens of millions he had spent funding the Tea Party had already created the core of the America First coalition.

"Be there, will be wild"

On December 18, 2020, President Donald Trump sent out a Twitter invitation to his millions of followers: "Big protest in D.C. on January 6th. Be there, will be wild!" Charles Koch was nowhere to be seen on that day but, once again, his influence was everywhere, if hidden.

Permits for the rally, designed to coincide with the Congressional certification of Joe Biden's presidential win, were obtained by a group called Women for America First. Momentum for the event – officially the "March to Save America" – spread online, by robocalls, and via a website called TrumpMarch.com. Four days before the protest, Republican Senators and Representatives vowed to object to the election certification. On the morning of the protest, free buses delivered thousands of Trump supporters to the Ellipse on the south side of the White House. Around noon, the President began a long speech in which he repeated his claim that the election had been stolen and that he would walk to the Capitol with the crowd to encourage Republicans to refuse to certify.

Soon, thousands of Trump supporters walked from the White House and massed outside the Capitol where lawmakers were gathered to certify the election of Joe Biden. The crowd swelled to over 10,000 and began pushing an overwhelmed police force back toward the Capitol. Just after 2:00, the first rioter entered the Capitol through a smashed window. Lawmakers were soon evacuated and the invaders ran amok inside, ransacking offices, covering walls with graffiti, and rifling through senators' notes in the inner chamber. It took over five hours to clear the Capitol of rioters. The following day, at 3:24 a.m., Congress officially confirmed Joe Biden's victory, at any rate.

Trump – who had, in fact, not marched to the Capitol, but did send incendiary tweets from the White House – was blamed for exacerbating the violence. He was also impeached for the second time and lost his Twitter and Facebook accounts. Media widely reported on plans by right-wing militias to violently take over the Capitol and kidnap or execute lawmakers. But what role did the Kochtopus play in all this?

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Let's start at the beginning.

Women for America First, which got the permit for the speeches and rally, has links to Koch Industries via personnel, but has 501 (c) 4 (dark money) status, so is not required to report donors. The clearest connection is between Koch and Amy Kremer, the founder of Women for America First. Kremer first emerged on the political scene in 2009 as an organizer with the Tea Party Express, a bus tour largely sponsored by the Koch-controlled Americans for Prosperity. In the three weeks before the January 6th rally, Kremer's group hosted another bus tour that featured speakers preaching violence at different locations around the country.

Tea Party Patriots, listed as a coalition partner on the TrumpMarch.com website, has received at least $200,000 from Freedom Partners, a group controlled by Charles Koch.

Leading up to the event, a dark-money group called the Rule of Law Defense Fund, which has received at least $510,000 from Koch Industries since 2014, made robocalls to boost turnout at the rally. Rule of Law Defense Fund is, in turn, an arm of the Republican Attorney Generals Association, a group that received $375,000 from Koch Industries in 2020.[22]

On January 6th, another dark money group, Turning Point Action, sent 80-plus buses to DC to, as they tweeted, "fight for this president." Turning Point Action has reportedly received $610,000 from Donor's Trust, the group that has been linked through various people and donors to Charles Koch and Koch Industries. Free buses were also provided by the Amy Kremer-led Women for America First.

While the rally was ongoing and later as crowds gathered outside the Capitol, over a hundred Republican lawmakers contested the results of the presidential election. In this case, because of campaign disclosure laws, the Koch connections are crystal clear. Ten senators announced days before January 6th that they would reject results from contested states. Among them was Ron Johnson, who received at least $3 million from Koch Industries PAC in his successful bid to unseat liberal senator Russ Feingold. Johnson has since been well-supported by Koch every year since 2012. Koch Industries has also been the number-one supporter of another such Senator, James Lankford.

As it turned out, both Johnson and Lankford changed their minds about certification after the Capitol siege. But eight senators did ultimately refuse to certify votes from either Arizona or Pennsylvania. All had received money totaling millions from Koch Industries.

With the Kochtopus acting as a sort of shadow party to the GOP for past couple of decades, it was inevitable that there would be some overlap between Charles Koch and a huge Republican-supported event. But that massive ongoing presence

---

22 https://documented.net/2021/01/republican-attorneys-general-dark-money-group-organized-protest-preceding-capitol-mob-attack/ (accessed October 15, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

only points back to the bigger picture: Charles Koch's role in creating the political environment in which the siege happened. His network was as critical as any other in funding and organizing the Tea Party. His network focused and encouraged popular anger at everything Obama, especially the cap-and-trade bill. Through support for figures like Glenn Beck, he encouraged the angry conspiracy theory-driven dissolution of America that animated "Stop the Steal." And Koch's promotion of lies and paranoid alternate universes predates the Trump White House – going back to Koch Industries' fantastical climate change denialism.

Ending the Siege

In a November 2020 piece in *Fortune*, Charles Koch congratulated Biden on his victory and called for "putting the us-versus-them mentality of partisan politics behind us."[23] This was the same man whose PAC spent $1.5 million in the just-finished election cycle, 97% on Republican candidates.[24] His byline also included a plug for his book: *Believe in People: Bottom-Up Solutions for a Top-Down* World, a remarkable title for a notorious control freak.

Just for kicks, though, let's give Charles Koch the benefit of the doubt. Despite his financial involvement in creating and supporting the divisive politics that led to the Capitol siege, perhaps the billionaire idealist was so shocked by the events of January 6, 2021, that he has genuinely reconsidered his commitment to win-at-all cost politics. After all, many corporations expressed somewhere between outrage and contrition over the events. Many threatened to cut off funding to the 147 members of Congress who voted to overturn the election results. Koch Industries itself put out a statement that it would "weigh heavy" the actions of lawmakers on future giving.[25]

The mildly worded press release probably didn't leave too many lawmakers nervous that the money would be cut off – at least not permanently. As it turns out, Charles Koch didn't even wait for a few months to fire up his donation machine. A report by the Citizens for Responsibility and Ethics in Washington (CREW), a nonpartisan but liberal-leaning ethics watchdog, calculated that Koch Industries was the single biggest donor to the lawmakers who refused to certify the election in early 2021.[26] The company gave $117,000 to these lawmakers – after reportedly giving

23 https://fortune.com/2020/11/19/charles-koch-political-partisanship-book/ (accessed October 15, 2021).
24 https://www.opensecrets.org/political-action-committees-pacs/C00236489/candidate-recipients/2020 (accessed October 15, 2021).
25 https://nz.finance.yahoo.com/news/corporations-donated-millions-of-dollars-to-republicans-who-voted-to-overturn-presidential-election-183533760.html (accessed October 15, 2021).
26 Ibid.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

$700,000 to them in 2020. Once again, Charles Koch's self-professed high-mindedness took a back seat to business advantage.

But why should Charles Koch change? As with Davos Men like Jamie Dimon, he has little chance of being personally prosecuted when his companies destroy wetlands or steal oil from the federal government or have a flurry of workplace deaths. To retain that untouchable status, he will continue to spend massive sums on politics.

There may never be another storming of the Capitol but, after leaving Americans bruised, stampeded, and fatally shot, January 6th is a particularly visceral metaphor of the ongoing collapse of American politics. The physical conflict on cable news is the visceral equivalent of the legal and political violence long waged on American democracy by corporations, Davos Men, and CEO philosopher-kings. These intrusions may not result in lawmakers from both parties fleeing for their lives from an angry mob, but as long as the wealthy can spend unlimited amounts, democracy will continue to be under attack.

So, how then can we reset our current course of corporate dominance toward a government of, by, and for the people? In the over two decades since I examined this question in *The Emperor's Nightingale*, I've witnessed the ascendance of untouchable Davos Men, the privatization of political parties, and the unleashing of unlimited political spending. But there are also more promising signs: long-awaited shareholder activism, renewed purpose at regulatory agencies, adoption of accounting that includes environmental, social, and governance data. There is even a president who, at the very least, *sounds* more like FDR than any occupant of the Oval Office for at least half a century. The rest of the book explores the possibilities of finding a new nightingale.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Chapter 9
Stepping Out of the Past

> Our great empty corporation statutes – towering skyscrapers of rusted girders, internally welded together and containing nothing but wind. – Bayless Manning[1]

On May 26, 2021, Senator Elizabeth Warren took part in a virtual Senate Finance Committee hearing with the heads of the four biggest Wall Street banks. Sitting in her colonial yellow Senate office, Warren directed her first comments at JPMorgan Chase CEO Jamie Dimon, himself situated in front of dark blue curtains. Their exchange was more dramatic than might be expected of any event in which the interlocutors were spread across the Internet on a jumpy live stream.

The big banks came into the meeting happy to report on how they had helped out their customers during the previous year of pandemic-driven financial strain: waiving some overdraft fees and quickly processing relief payments. Warren wasn't buying it. She repeatedly pressed Dimon with claims that JPMorgan Chase had, in fact, profited handsomely off distressed customers. The senator talked over Dimon constantly, but the CEO seemed to be making so little effort to candidly answer her questions that it's hard to think it mattered. In the end, Warren claimed, JPMorgan Chase made a huge sum, $1.463 billion, in overdraft fees charged during the pandemic.

Warren may have had a winning political case to make about predatory lending practices, but at the end of the day, there was nothing illegal about Dimon's behavior. For some reason, neither Warren nor any other member of the oversight committee mentioned the recent criminal activity at those banks run by the men on the video conference. Perhaps the senators thought that delving into the banks' lack of accountability for such outrageous criminality would reflect poorly on the government's inability to enforce those laws. Whatever the case, quickly detailing these crimes and lack of punishment succinctly delivers a picture of corporate power today.

Illicit Services

Toward the end of 2020, on September 29, Dimon's bank was charged by the Trump Justice Department with two felony charges. Historically, it was quite unusual for major Wall Street banks with federally insured deposits to be charged with felonies. Before 2014, there had been none for a century. But the Dimon-led JPMorgan Chase, with some help from Citicorp and Goldman Sachs, has made extreme criminal activity a regular occurrence for big Wall Street banks.

---

1 Bayless Manning, "The Shareholder's Appraisal Remedy: An Essay for Frank Coker," 72 Yale L.J. 223 (1962).

https://doi.org/10.1515/9783110696998-009

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

This spree – of being caught, at least – started back in January of 2014 when JPMorgan Chase was hit with two felony charges. The crimes were serious: money laundering and enabling the multi-billion-dollar Bernie Madoff Ponzi scheme. They were also not tightly-held secrets. Madoff's account was at JPMorgan Chase, where the bank's employees were well aware his scheme's returns were "too good to be true" – that is, fraudulent.

The following year, in May of 2015, JPMorgan was hit with another felony charge. Just like the Madoff scheme, this charge didn't involve complicated, esoteric crimes like dodgy investments in hard-to-understand derivatives. JPMorgan had been active participants in a banking cartel scheme to rig financial markets. It was straightforward criminal activity and, again, the employees knew about it. Justice Department documents detail near-daily conversations between anonymous traders in a chat room known as "The Mafia." One of the other big Wall Street banks involved in the scheme, Citicorp, was also hit with a felony charge in that conspiracy.

Five years later, JPMorgan was charged with its two most recent felonies. Remember that, before 2014, no other big Wall Street bank had received a single felony charge for a century. Dimon's bank managed to get five in six years – from both the Obama and Trump administrations. These 2020 felony charges were, again, crisply illicit: the bank was accused of tens of thousands of instances of illegal trading, including using wire fraud to manipulate the markets for precious metals. In addition to the bank's felonies, numerous JPMorgan traders were charged under the RICO statute, which is typically used for members of organized crime networks.

However, JPMorgan and Citicorp were not alone in this historic binge of criminal behavior. On October 22, 2020, Goldman Sachs was charged with two felony counts for its involvement in a scheme that resulted in a Malaysian financier looting $4.5 billion of money from the nation's economic development fund. The financier bought himself yachts, jets, Picassos, and other luxury items, at the expense of the other 32 million Malaysians. These felonies were the first in Goldman Sachs' 150-year history.

Here's the punch line: Instead of tapping their well-connected and highly reimbursed legal counsel to mount a robust defense, every bank admitted the essence of the government's charges and agreed to payment of massive fines under deferred prosecution agreements. In each case, after admitting to acting like an international financial *cosa nostra*, the banks simply got deferred prosecution and paid a large fine. "Deferred prosecution" best translates as "escaped prosecution." In theory, the large financial penalty will trigger the internal governance mechanisms of the corporation. Directors will be forced to mollify angry shareholders demanding change at the top, leading to the dismissal of the CEO.

Unfortunately, that sort of justice relies on some quaint ideas about the state of corporate governance. The fines were certainly massive but, far from igniting change, were just treated as the transactional cost of doing sometimes-felonious business.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Goldman, for example, agreed to pay $2.5 billion to settle the Malaysian looting affair – a huge number, except that the company had already set aside $3.2 billion for "ongoing regulatory and legal matters." None of the CEOs, on whose watch the crimes had occurred, were dismissed. Not even Jamie Dimon, who led JPMorgan as it racked up five felony charges which were disposed of only by expensive deferred prosecution agreements.

Spreading It Around

As usual, the decisions to let the CEOs off easy – the shareholders paid the only penalties – involved possible conflicts with the regulatory agencies charged with prosecuting the banks. In just the most recent charges, for example, JPMorgan Chase's outside representation was Kirkland & Ellis, a law firm associated with Attorney General William Barr, and Sullivan & Cromwell, where SEC chairman Jay Clayton had been a partner – and promptly returned in February of 2021.

Given Warren's decision not to raise the issue of the felonies during the May 2021 virtual hearings, there was little chance any other lawmaker would. The securities, investment, and banking industry has spent millions on lobbying and indirect and direct contributions to the people who are supposed to regulate them.

In the post-*Citizens United* political universe, it's all but assumed that most politicians receive substantial political contributions from huge corporate interests. Nonetheless, putting a face to a name – linking the individual lawmakers that, in theory, are supposed to be keeping a watchful eye on the financial sector with the contributions from that same industry – can still be shocking.

In just the past election cycle, for example, Republican Representative Ted Budd received $164,226 in direct contributions from the Securities and Investment sector as well as $149,508 from commercial banks.[2] Budd may have sold himself short; Republican Andy Barr received $410,189 from Securities and Investment companies in the same period.[3] But Barr himself was handily outdone by Republican Representative French Hill's $525,670 from the Securities and Investment industry as well as $290,300 from commercial banks.[4] That haul sounds impressive, until it's compared against

2 https://www.opensecrets.org/members-of-congress/ted-budd/summary?cid=N00039551&cycle=2020&type=C (accessed October 15, 2021).
3 https://www.opensecrets.org/members-of-congress/andy-barr/summary?cid=N00031233 (accessed October 15, 2021).
4 https://www.opensecrets.org/members-of-congress/french-hill/summary?cid=N00035792&cycle=2020&type=C (accessed October 15, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Democratic Representative Josh Gottheimer's $1,320,182, all courtesy of the Securities and Investment industry.[5]

If the media was really interested in transparency and shining a light on the shortcomings of our democracy, it could at least enforce the same rules it expects of itself. Whenever, for example, the *Washington Post* mentions Jeff Bezos, it notes that he owns the paper. Other journalists frequently, if not always, disclose their own financial conflicts of interest in subjects they are covering.

So why, when Gottheimer is questioning Goldman Sachs CEO David Solomon, is there not a chyron under his name reading: "Gottheimer received $37,830 from Goldman Sachs in the 2020 election cycle"? When Gottheimer turns to Jamie Dimon, perhaps the chyron should read: "In the 2020 election cycle Gottheimer received $25,500 from JPMorgan, which has admitted in deferred prosecutive agreements to charges of money laundering, rigging markets, and wire fraud." Suddenly the coverage is providing much more useful information to the average viewer than the omnipresent ticker showing Goldman Sachs' minute-by-minute market performance.

In the case of the Senate Finance Committee on which Senator Warren sits, Goldman Sachs and JPMorgan had also spread the cash around liberally in the 2020 election cycle – they were among the top 20 donors for eight of the committee members. The two banks gave generously to Republican Senators Pat Toomey ($120,929 from Goldman, $55, 425 from JPMorgan), Tim Scott (Goldman $52,775), and Rob Portman (Goldman $117, 975, JPMorgan $92,830).

Democrats were far from left out of this bonanza, though. In the same 2020 election cycle, the megabanks gave to Democratic Senators Debbie Stabenow (Goldman $55,995, JPMorgan $62,033), Bob Menendez (Goldman $53,485), Tom Carper (Goldman $58,725, JPMorgan $48,875), Mark Warner (Goldman $89,800, JPMorgan $74,693), and Michael Bennet (Goldman $88,800, JPMorgan $63,095).

It's hard to imagine how 35 percent of committee members can be expected to do their oversight jobs properly when they've just received an average of over $100,000 from two of the four banks they are questioning.

These spends by Goldman and JPMorgan also represent just the largest chunks of money that eight of the senators have received from two of the biggest banks. The truly crushing number is the cumulative amounts spent by the entire industry on the senators who comprise their oversight committee. In the 2020 election cycle, the 28 Senators – most of whom were not even seeking reelection – sitting on the call with the heads of the biggest Wall Street banks cumulatively received over $25 million from the securities and investment industry. Some, like Warren, received none, which just means that other members – who have the same number of votes on the committee as Warren – received well above $1,000,000. As with the House committee, the donations

5 https://www.opensecrets.org/members-of-congress/josh-gottheimer/summary?cid=N00036944 (accessed October 15, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

were bipartisan: 44 percent of that money went to Democrats, the remaining 56 percent to Republicans. Commercial banks threw in a total of nearly $6 million more.[6]

So how can we face down this blizzard of money? This is the agenda of the rest of the book: wresting control of our country back from the Dimons, Kochs, Davos Men, philosopher-kings, and unaccountable corporations in order to restore a modern semblance of government by, for, and of the people. First, I'll review some of the more promising trends in that direction.

Black Wednesday

I founded Institutional Shareholder Services in 1985 to meet a need of all shareholders – though admittedly a "need" of which they had never heard. Unbiased, expert advice was a previously unavailable service, and one that eventually proved that active shareholder involvement was value-creating. We were able to provide quality data and insight to help shareholders make better investment decisions. We did it far cheaper than any single company could have. Nearly forty years later, ISS has grown to one of the largest proxy advisors in the world and is a proper "unicorn."

Providing this service did not endear us to directors. Annual shareholders' meetings were the only legally mandated occasion on which Presiding Officers must confront shareholders. It never ceased to amaze me the amount of expense and trouble companies went to prevent my appearance at these events, and, if they failed, to try to cripple it.

One day, for example, an assistant secretary of Exxon came to my hotel room in New York. The oil company and I had a long, reasonably acrimonious history. I filed resolutions asking for the separation of board chair and CEO for at least 20 years. I got to 40 percent twice, but I always felt that I would never get further. Exxon would – as, in fact, they did – adjourn the meeting to scramble changed votes and new counting. The Exxon representative at the door was taking a more personal approach, recommending that I should withdraw my resolution for that year's meeting.

"Why?" I asked.

He said that I would find it a good idea.

"Did you bring a horse's head to put under my pillow?" I replied.

He was not pleased, left, and the occasion was not repeated. We've come a long way.

However, decades of efforts to empower shareholders – of course, not just mine – yielded fruit on May 26, 2020, which was quickly dubbed "Black Wednesday"

---

6 For these and other details, visit https://www.opensecrets.org/races/ (accessed October 26, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

for the oil industry. In a matter of 24 hours, three major oil companies suffered defeats as a result of court decisions and shareholder rebellions.

The first, and potentially most far reaching, involved a Dutch court in The Hague ordering Shell to reduce its carbon emissions much more quickly than it currently is, by 45 percent within the next 10 years. The change is estimated to slash a million barrels of oil and gas from production every day, costing Shell, the largest private oil company, several billion dollars a year. Even more interestingly, the decision isn't based on national or EU environmental laws, but human rights law and UN general principles. The company has been ordered to change its business practices to uphold their obligations under the Paris Accords.[7]

Not surprisingly, given the increasingly pro-business leaning of the American court system, the US-based defeats for big oil were not delivered by the judiciary but by ownership activism. At Chevron, a shareholder rebellion forced the company to reduce not just its emissions, but the emissions of its customers.

Meanwhile, shareholders at the biggest American oil company, my old friend ExxonMobil, won an extraordinary victory: a boardroom overhaul in which three directors were replaced. The new candidates won as the result of a campaign started by a brand-new activist hedge fund called Engine No. 1 and supported by ISS – the advisory organization I founded, though no longer run – as well as large institutional investors like BlackRock and Vanguard.

The move was historic, and one in which I admittedly take personal pleasure. First, it was it an all-too-rare victory for owners to replace members of an underperforming board of directors. Second, it was a sign that institutional investors may not be totally useless in promoting shareholder rights. Third, it came at the expense of ExxonMobil, one of the most recalcitrant corporations in terms of both corporate governance and climate change initiatives. In large part because of its dismal financial performance, ownership insisted that the company diversify into other energy fields, including renewables.

Critical to the victory was big money – the contestants spent $30 million versus Exxon's $35 million, which helped them, among other things, uncover last-minute voting shenanigans. For a long time, the "corporate raider" Carl Icahn was the only conspicuous proof of the value to be realized from being an informed, impatient, and imaginative minority shareholder. Perhaps that is changing.

The new shareholder activism may also be spreading, less spectacularly so far, to other industries. On June 2, 2021, for example, 5.5 percent of shareholders at the world's biggest retailer, Walmart, voted in favor of a proposal to reduce refrigerants in its operations. The company's total emissions of refrigerants annually is equivalent to half a million cars on the road. Of that, refrigerant leaks make up 48 percent of the

7 https://www.theguardian.com/environment/2021/may/29/black-wednesday-for-big-oil-as-courtrooms-and-boardrooms-turn-on-industry (accessed October 15, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

retailer's direct greenhouse gas emissions.[8] At the very least, the shareholder demands will remain on the table. Because the vote in favor of greenhouse gas reduction broke 5 percent, it will automatically be reconsidered at next year's meeting.

There's No Accounting

Another dynamic that has changed since *The Emperor's Nightingale* is the growing adoption of a new language to describe business performance. Academic literature has established links between the language we speak and the way we interpret the world, in everything from climate change to economics. Accounting, the language of business, has limited how we interpret business outcomes by focusing narrowly on "efficiencies" while keeping externalities like pollution or low wages off the page. Traditional accounting is also limited temporally; it is capable of measuring past performance – albeit in somewhat narrow terms – and current conditions, but it has no future tense. As such, it's not surprising that so many corporations focus on short-term results, an emphasis that is detrimental to long-term, sustainable growth. Adding new vocabulary that includes externalities and describes pathways to long-term sustainable growth discourages this "short-termism." This is exactly what happens when owners insist on ESG-based disclosures.

In the late 1990s, there were negligible assets under management that incorporated Environmental, Social, and Governance goals. However, the total amount of assets analyzed by holistic standards began growing rapidly around 2012. Today, ESG is the fastest growing sector of investment vehicles.

The growth of ESG is powered by two main factors: investors' altruistic concerns about the negative impact of, say, climate change or discriminatory hiring practices, and investors' financial interest in having as much data as possible to judge a companies' risk and, in particular, protect long-term value. Ownership demands go far beyond disclosures, though. In September 2020, an initiative called Climate Action 100+, backed by over 500 institutional investors managing over $47 trillion, demanded companies reach net-zero emissions quickly.[9]

The amount of assets subject to ESG reporting is likely to keep expanding rapidly. In a 2019 *Harvard Business Review* study, researchers interviewed 70 senior executives at 43 global institutional investing firms, from BlackRock to CalPERS to the government pension funds of Japan, and found that ESG was "almost universally

8 https://r744.com/vote-by-shareholders-puts-pressure-on-walmart-to-act-faster-on-hfcs/?utm_source=rss&utm_medium=rss&utm_campaign=vote-by-shareholders-puts-pressure-on-walmart-to-act-faster-on-hfcs (accessed October 15, 2021).
9 https://www.theguardian.com/environment/2020/sep/14/investors-worth-us47tn-demand-worlds-biggest-polluters-back-plan-for-net-zero-emissions (accessed October 15, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

top of mind for these executives."[10] The transformational investor enthusiasm and demand exists and, as Black Wednesday proved, these groups can score real victories. The biggest challenge to such investment is clarity and consistency in reporting. As an article in the *Harvard Business Review* puts it, ESG accounting is still "a bit like the Wild West."[11] In other words, there's only so far investors can go without a stable ESG-based language.

One sign of the chaos around what the category actually means: companies labeling themselves "ESG-neutral" – a term which means nothing. Even at companies that do make real commitments to account for ESG factors, there is a lack of consistency over what those letters stand for. "E" may be limited to fines, environmental violations, or carbon footprint; while a more complete accounting would include insurance costs, vulnerable coastal properties, or potential supply chain issues from extreme weather.

The "S" category has enormous potential to capture data but, to create consistent data for investors, it needs to be codified. How does a company measure its workforce – by compensation, number of PhDs, days missed for injury, advancement opportunities, diversity? Other factors like political donations or strong whistleblower protections are also important factors for investors to consider.

There is already a fair amount of existing consensus around "G." State laws and corporate charters include governance disclosure requirements like executive compensation or board member stock ownership. But these are policies; effective governance reporting would also quantify their results.

Happily, accounting organizations are scrambling to catch up with the demand for ESG reporting. The British-based International Financial Reporting Standards Foundation, a non-profit that develops and promotes global standards for financial reporting and accounting, is writing uniform rules that companies can use to convey their climate change risks. The International Sustainability Standards Board represents a level of common agreement as to accounting practices reflecting "climate change" issues. Such a merger between the principal US and UK accounting agencies is a very rare event.

In the United States, the SEC is currently contacting accounting agencies as it weighs introducing its own federal standard for ESG accounting. If the agency does introduce its own standard, or endorse any strong set of ESG reporting practices, the SEC will finally be performing one of its intended roles: setting a floor for what must be disclosed to empower investors to more effectively exercise their governance roles and create informed market-based decisions. The result of this new accounting language would also shine a bright light on cases in which capitalism's profit maximization results in externalizing costs onto the public.

10 https://hbr.org/2019/05/the-investor-revolution (accessed October 15, 2021).
11 Ibid.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Keeping the Light on for Biden

In the early days of President Joe Biden's term, the one-time "Senator from MBNA" – a sobriquet predicated on his coziness with his home state's credit card industry – has sounded surprisingly progressive. In addition to his executive orders, included expected reversals of some Trump-era regulatory softening and rejoining the Paris climate accords, he's made other proposals like raising corporate taxes and improving competitiveness by limiting monopolies.

The jury is still out on what he can, and is willing to, accomplish. Mega-donors like Hollywood's Jeffrey Katzenberg, Silicon Valley's Sean Parker, and Wall Street executives at investment, private equity, and venture capital firms like Blackstone and Bain Capital gave millions of dollars to Biden's presidential campaign. The easiest way to keep those donations coming in is by not poking the hornet's nest by raising taxes on the wealthiest people or the corporations they run. Whether or not his bigger proposals make it through Congress, though, Biden has made a few promising starts at being the first president to swing to the left since Ronald Reagan.

Biden's most interesting moves so far have been appointments to various regulatory agencies, including Gary Gensler as SEC chair Gensler, who ends a seven-year stretch of the agency being run by Wall Street lawyers, is unpopular with the mega banks that the SEC – mostly theoretically – regulates. For one thing, Gensler was a senior advisor to Senator Paul Sarbanes during the writing of the 2002 Sarbanes-Oxley Act. That law actually imposed criminal penalties, including prison time, on top executives who signed off on financial statements they know to be false. That describes a significant percentage of the highest-paid people on Wall Street, none of whom have any interest in spending even a few months at a minimum-security prison.

In early June 2021, Gensler declared that the SEC will not enforce Trump-era restrictions on shareholder advisory firms. The winners of this decision are proxy advisor firms like Institutional Shareholder Services. The losers are companies like ExxonMobil that have long suppressed shareholder rights, as well as corporate executive-dominated organizations like the Business Roundtable.[12]

About a week later, Gensler took another step toward making the SEC a regulator rather than lapdog. On June 10, 2021, he promised to tackle some of the structural aspects of Wall Street – for example insider stock sales – that make it more like a mob-run casino than a transparent place for exchanging stocks. New SEC appointee Renee Jones has been rightly critical of dual class stock and those overly hyped "unicorn" companies that go public for huge multiples.

12 The announcement from Chairman Gensler appears at this link: https://www.sec.gov/news/public-statement/gensler-proxy-2021-06-011 (accessed October 26, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Another promising appointment is Lina Khan, a Columbia Law School professor who Biden named to head the Federal Trade Commission. Khan is celebrated for her criticism of Amazon's monopoly status, but her analysis goes deeper. Khan has suggested changes in the actual framework of enforcement, calling for an updated model to deal with market power in the modern economy. In a sign that she is making the right people nervous, Facebook has already demanded that she recuse herself from an antitrust suit against the company, claiming she is biased against the business.

Tim Wu, another Columbia Law School professor critical of big tech, sits on Biden's National Economic Council where he advises the president on competition policy. Wu speaks passionately about the dangers of consolidating power in too few hands. "Extreme economic concentration yields gross inequality and material suffering," Wu wrote in his 2018 book, *The Curse of Bigness: Antitrust in the New Gilded Age*.[13] He has also compared today's economy to the Gilded Age of the late 1800s – not coincidentally the period when courts began granting corporations a variety of Constitutional rights.

Jonathan Kanter, who will run the Department of Justice's antitrust division, including an ongoing case against Google, is considered to be the third part of this troika. In fact, Khan, Wu, and Kanter are called the New Brandeisians, named, of course, after Louis Brandeis, the brilliant Supreme Court Justice known as a champion of privacy and freedom of speech, as well as the scourge of railroads and other monopolists.

Biden's proposal to give an extra $80 billion to the Internal Revenue Service to audit people who earn over $400,000 is another positive regulatory change. Between 2008 and 2018, the IRS lost a third of its agents and officers – note that most of these losses occurred during a Democratic administration – leaving fewer resources to conduct audits. These limitations make it even harder for the IRS to keep up with the tax avoidance schemes embraced by the wealthiest Americans and most lucrative industries.

As a June 12, 2018, story in the *New York Times* details, the private equity industry "has perfected sleight-of-hand tax-avoidance strategies so aggressive that at least three private equity officials have alerted the Internal Revenue Service to potentially illegal tactics." However, virtually none of the whistleblower claims resulted in audits. The IRS simply lacks the time and experts to undertake a mission.

Predictably, the private equity industry has also spent extensively in Washington's halls of power – nearly $600 million in campaign contributions over the past decade, and employs close to 200 Washington lobbyists. In the face of a sophisticated and politically powerful resistance, the IRS has reportedly "thrown up its

13 https://www.nytimes.com/2021/03/05/technology/tim-wu-white-house.html (accessed October 15, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

hands." As a result, Davos Men like billionaire Stephen A. Schwarzman pay federal taxes at a rate similar to average Americans.[14]

A beefed-up IRS that specifically targets high-earners like Schwarzman has become even more popular after a ProPublica document revealed how little the richest Americans pay in taxes. It could also pay significant dividends to the government's budget; the administration estimates it could bring in an additional $700 billion over the next decade.[15] Simultaneously, the almost uniform Republican opposition to expanding the IRS's audit capacity speaks volumes about how America's Money Culture has laid waste to even the most basic notions of fairness and burden-sharing.

Another change sought by Biden is rescinding the 1031 like-kind exchange, which is most lucratively used by real-estate developers to avoid paying capital gains tax if they spend the money to buy another property. That change would, the administration claims, bring in another $19.5 billion in tax revenue over ten years. Both changes would, essentially, amount to raising taxes on the rich without having to go through a Congressional budgetary process.

Once again, we find ourselves at, hopefully, the end of a national crisis with a new Democratic president coming to power holding majorities in both houses of Congress. Some promising recent developments notwithstanding, we still need a much more fundamental check on corporate control over democracy than, say, a shareholder revolt at Exxon or a more aggressive SEC. In the next chapter, I'll briefly delve into the history of corporations in this country, which should serve as a roadmap for developing uniquely American solutions to the lack of governance over today's massive companies.

14 https://www.nytimes.com/2021/06/12/business/private-equity-taxes.html?smid=em-share (accessed October 15, 2021).
15 https://www.nytimes.com/2021/04/27/business/economy/biden-american-families-plan.html (accessed October 15, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Chapter 10
The American Corporation, and What We Can Do About It

> I therefore freely admit to the East India Company their claim to exclude their fellow-subjects from the commerce of half the globe. I admit their claim to administer an annual territorial revenue of seven million sterling; to command an army of sixty thousand men; and to dispose, (under the control of a sovereign imperial discretion, and with the due observance of the natural and local law) of the lives and fortunes of thirty millions of their fellow-creatures. All this they possess by charter and by acts of parliament, (in my opinion) without a shadow of controversy. . . . But granting all this, they must grant to me in my turn, that all political power which is set over men, and that all privilege claimed or exercised in exclusion of them, being wholly artificial, and for so much, a derogation from the natural equality of mankind at large, ought to be some way or other exercised ultimately for their benefit. . . . Such rights, or privileges, or whatever else you choose to call them, are all in the strictest sense a trust; and it is of the very essence of every trust to be rendered accountable; and even totally to cease, when it substantially varies from the purposes for which alone it could have a lawful existence.
>
> – Edmund Burke[1]

Many years ago, I complained to the legendary management consultant Peter Drucker about the unique stature of business power in the United States. An Austrian by birth, Peter responded, "Bob, you must understand that there are two telephones on Chancellor Kohl's desk, one is to the outside world, the other is to the head of Deutsche Bank."

Drucker was right – all corporations play prominent roles in their home countries – but there is still something quite distinct about the American situation. In every other western capitalist democracy, the state retains the right to assert itself over national industries, including by taking them over. Following World War II, for example, France outright owned Renault for half a century, even today it holds 19 percent of the company's shares. The same situation is unthinkable in the US. Faced with multiple potential bankruptcies of Chrysler and General Motors, the government throws money at the problem, but does everything possible to avoid nationalization.

However, the French approach of government supremacy is far more common among the other large capitalist nations, from Italy to Germany to Spain. The British government ran multiple major nationalized companies for much of the 20th century, ranging from steel production, transport, and communications to the holding company for profitable luxury brands like Land Rover and Jaguar. Even today, the UK government owns the BBC, the largest television and radio broadcaster in the world. In Japan, massive, vertically integrated *keiretsu* companies like Mitsubishi,

1 From Burke's speech in the House of Commons on December 1, 1783, re: Mr. Fox's East India Bill.

https://doi.org/10.1515/9783110696998-010

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Mitsui, and Sumitomo can best be understood as adjuncts of government. Government extends them unlimited credit, but the money must be used for "approved" purposes that promote the national interest, like maintaining lifetime employment.

In the 1980s, many countries began a process of de-nationalization – selling off state assets and privatizing government functions. In a crisis, however, almost all nations return to their tradition of state primacy over corporate interests. The US remains notably squeamish at this prospect.

For example, during the 2008 financial crisis, banking institutions in the US and UK were both hit very hard, with some sliding rapidly toward insolvency. Both governments spent huge amounts of public money to prop up these struggling companies. However, the unwillingness of the US to nationalize Citigroup, a massive company that had mismanaged itself into near bankruptcy, contrasted with the UK's nationalization of Northern Rock. The UK also held on to pieces of the bank until as late as 2016.

Given that Americans inherited its earliest concepts of the role of incorporated entities from the UK, how did we end up with such a different modern relationship between the state and corporations? Why is there no analogous social component to corporate prominence in the United States? Can the specific history of corporations in America point toward solutions for their current abuses?

A Joint and Untyed Stock

I put myself in the position of amanuensis for the founding generation and their concept of corporate power. My qualifications are simple. First, my family have lived in Massachusetts and Maine, both originally part of the Massachusetts Bay Colony – "[A] capitalist enterprise chartered by Charles I in 1629 to drag a fortune out of the trade in beaver hats" – since the 1630s, although at a level below the attention of history. Doctors, lawyers, clergy, and merchants have gotten us up from the farm.

During my time as a graduate student at Cambridge University, I began my work on the origins of corporations with study of the East India Company. This global trading behemoth is both important to the Founding Fathers' understanding of corporations – as well as the underlying principles of the modern multinational corporate giants.

At the dawn of the seventeenth century, the reign of Elizabeth I of England was coming to an end. Her country was wealthy; her government was effective. In terms of global trade and colonization, however, the English still lagged behind nations like Spain, Portugal, and the Netherlands. Indeed, it was the commercial success of the Dutch expeditions that ultimately broke all the English political obstructions to the creation of a novel enterprise, the East India Company.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Seeking to augment their eastern fleets, which were making a fortune in products like spices, coffee, and sugarcane, the Dutch inquired about buying English ships. With the national interest, and a lot of profit, at stake, a group of England's business and trading elites drafted an official request to create a new sort of business.[2] The petitioners' argument was simple: the Indies were on the other side of the world, making financing the expeditions an expensive and risky proposition that was only possible "in a joint and a untyed stock."[3] On the last day of the 16th century, December 31, 1599, Queen Elizabeth granted royal approval to the East India Company. It would prove to be one of her most consequential acts, one which began three centuries of unprecedented wealth accumulation for her country and, eventually, political control of over one-quarter of the world's land surface.

Today, in a world in which the advantages of incorporation are unquestioned and available to virtually anyone with an Internet connection and credit card, it's impossible to understand how exciting, even bizarre, the creation of the East India Company was. The company was unlike any commercial entity that had ever existed in the English-speaking world. The specific organizational properties are well known today: limited liability, centralized management by those with a personal interest in the venture, and monopoly rights over a territory or good. During the first sixty years of its existence, it developed a genetic code for commercial organization that was so successful parts of it would be copied for centuries.

However, one important aspect of the East India Company's historical impact on England, and the world, is rarely discussed. It was the genius of the English to discover that wealth generation requires a sharing of power between business and state, between the guilds and the monarchs. Essentially, it required English monarchs to yield some of their power to encourage a new and vibrant source of wealth. Today that trade-off, that lowering taxes or reducing regulations will result in more tax revenue or jobs, is omnipresent – and often overstated. The East India Company's initial success made good on that promise, however. The balance of opinion confirms an 87 percent return for shareholders on the first voyage. The second was disastrous, but the enterprise returned a healthy sustained rate of return above 10 percent going forward.

Once suspicions toward the new entity were removed, members of the English royalty quickly embraced the idea. Prince Charles, heir to the throne, subscribed for six thousand pounds of East India stock for himself.[4] The East India Company showed that the enabling of the expression of economic energies was within the authority of the state.

2 John Keay, *The Honourable Company – A history of the English East India Company*, p. 13 (Harper Collins, 1991).

3 William Foster, *The East India Company*, Vol. 1, p. 147 (Routledge, 1933).

4 Philip Lawson, *The East India Company – A History*, p. 30 (Addison Wesley, 1997).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

The crown did, nonetheless, pointedly reserve the authority to limit the scope of economic expression. Initially, only the sovereign granted charters – it's only in the last century that chartering corporations has become a right. The state wanted to use corporate power for financial benefit; it did not want to be overwhelmed by it. This explains why, for example, corporations were not granted the power of martial law in their territories.[5] While the East India Company from its earliest days was an expression of English power, the political authorities were always sensitive to expressly limiting the scope of its functioning, even at 8,000 miles remove.

In the case of the East India Company, for example, Queen Elizabeth granted the right to export silver bullion and the right to a monopoly among English companies. However, she retained the authority to terminate the venture after two years. It is this same joinder of political and economic interests that characterizes the modern corporation in the UK, with the state retaining the ultimate authority to define corporate scope.

By the 1700s, up to half the world was governed pursuant to the provisions of various English trading companies. But the fortunes being made also led to a previously unknown type of danger for investors. Half a century before the Declaration of Independence, Great Britain experienced a very modern impact of corporate overreach and abuse: a devastating speculative bubble driven by a multinational corporation's opaque accounting practices.

In 1720, the implosion of the South Seas Company bankrupted thousands of Englishmen, including several members of Parliament (MPs). That same year, Parliament passed the Bubble Act, which attempted to rein in the wild speculation around trading companies. The act limited the number and type of new corporations by mandating that, as had originally been the case, they be chartered by an Act of the Sovereign. The corporations also had to accept a range of limitations on the amount of capital they could employ and the number of years they could function. They were further confined to the explicit lines of business authorized in their charters. The long and sometimes confusing cloak of bureaucracy first cast its shadow over corporations.

A little over six decades later, Edmund Burke, arguably the most powerful Parliamentary voice of his age, delivered an epitaph for the East India Company, part of which is excerpted at the beginning of this chapter. Burke was conducting the impeachment trial of Warren Hastings, the former chief administrator of the East India Company in Bengal. Among other charges, Hastings had been accused of extortion, embezzlement, and extrajudicial killing.

The case became a sort of referendum on colonialism and the role of corporations in it. Over the course of the trial, Burke managed to reveal volumes concerning the corruption and abuses that were critical parts of the corporation's operations. Burke's

5 Court Minutes, xviii.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

argument was simple: corporations have no business assuming control over the lives of human beings in the political world. He took moral offense to the notion that a for-profit business would effectively assume the reins of political authority over the Indian subcontinent. Burke belittled the attempt of Hastings' defense to justify it at every turn and spent a decade cataloging their misdeeds. Burke was not anti-colonial; he just believed that Britain had to take into account its sovereign duty to its subjects, uncorrupted by corporate power. After a seven-year investigation, Hastings was acquitted by the House of Lords in 1795, but Burke won the larger battle: the reputations of trading companies were permanently sullied.

A Splendid Government of Aristocracy

Around the time of Hastings' impeachment, the Founding Fathers finalized the US Constitution. Trading corporations were, of course, a very important part of their colonial world – though not well-loved. The protestors at the Boston Tea Party dumped tea belonging to the 172-year-old East India Company. Nonetheless, the term "corporation" does not appear anywhere in the US Constitution because the Founding Fathers simply didn't see setting the rules guiding incorporation, or other forms of enterprise, as part of the Constitution's task.

This was largely because corporations were already tightly controlled by the individual states. Businesses had to apply to state legislatures for the right to become a corporation. The first incorporated entities were largely cities, schools, and charitable organizations. By the 1790s, a number of corporations were business entities, but most of them clearly served the public interest – building canals, turnpikes, bridges, and other infrastructure.[6] In these early decades of America, states were actively engaged in democratizing and limiting the corporate entities. Among other requirements, state acts of incorporation often specified limitations in capitalization, lifespan, and boundaries of operation. It was also inconceivable at the time that shareholders wouldn't exercise their voting privileges. Many early state charters included rules making it easier for owners to hold directors accountable.[7] In short, a behemoth like Standard Oil could not have emerged from the landscape of practice and regulation that existed around the turn of the 19th century.

Nonetheless, in the first few decades of the 1800s, several Founding Fathers were already expressing concern about some corporations' march toward undemocratic concentrations of power. Writing in 1816 about the collapse of England's corrupt, anti-democratic hereditary aristocracy, Jefferson commented, "I hope we shall take warning from the example and crush in its birth the aristocracy of our monied

6 https://hbr.org/2010/04/what-the-founding-fathers-real.html (accessed October 15, 2021).
7 Ibid.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

corporations which dare already to challenge our government to a trial of strength, and to bid defiance to the laws of their country."[8]

In another missive, this from 1825, Jefferson spoke of his fears coming true as banking institutions and corporations – "a splendid government of Aristocracy" – were "riding and ruling over the plundered ploughman and beggared yeomanry."[9]

In 1817, James Madison described similar fears in his Detached Memoranda: "There is an evil which ought to be guarded against in the indefinite accumulation of property from the capacity of holding it in perpetuity by . . . corporations. The power of all corporations ought to be limited in this respect. The growing wealth acquired by them never fails to be a source of abuse." Over two centuries ago, Madison saw the dangers inherent in the political power of corporations; his solutions have yet to be implemented.

All Persons

So, if the Constitution, and its 27 amendments, are mum on the specific subject of corporate power, how did today's corporations acquire their huge array of rights, such as spending endlessly in political elections? It was, more often than not, the work of the Supreme Court – a story that begins with Chief Justice John Marshall's 1819 majority opinion in *Dartmouth College v. Woodward*.

Dartmouth is a private college, founded by King George in 1769, in what later became the state of New Hampshire. After the college's president was deposed, the New Hampshire legislature attempted to take over the governance of the school, essentially making it a public institution. In *Dartmouth*, Marshall ruled that the original corporate charter was a contract between two private individuals and, as such, could not be changed by the state legislature.

This opinion largely dealt with contract law, but was also interpreted as a recognition that corporations are entitled to at least some protections from individual states under the Constitution. Alarmed at this intrusion to their authority, many states passed laws stating that they did, in fact, have the right to change corporate charters. Nonetheless, the precedent gave corporations a foot in the door to use the Constitution to assert rights and protections from state laws, frequently efforts to tax businesses. Ultimately, these precedents powered corporations' quest to have all the same Constitutional rights as living humans.

The next two critical steps in elevating the status of the corporation in American jurisprudence were somewhat convoluted. The first was the 14th Amendment.

8 https://founders.archives.gov/documents/Jefferson/03-10-02-0390 (accessed October 15, 2021).
9 https://founders.archives.gov/documents/Jefferson/98-01-02-5771 (accessed October 15, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Passed following the Civil War, the amendment insured that "all persons" had the same citizenship rights as any other American.

Then, in 1886, an extremely consequential headnote appeared in the Supreme Court's official opinion on *Santa Clara County v. Southern Pacific Railroad Co.* The case, decided in favor of the railroads, was a relatively dull conflict over tax law. *Santa Clara* is memorable only because of a passage included by the court reporter, Bancroft Davis. In it, Davis summarized an opening comment by Chief Justice Morrison Waite: "The court does not wish to hear argument on the question whether the provision in the 14th Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does."

Waite's request was honored during the proceedings – neither the argument nor the decision was based on the 14th Amendment. Nonetheless, the reporter decided to include the Chief Justice's prefacing comments in the official court record. Waite's opening comments were later treated as a precedent that was used to empower an artificial legal creation with the rights originally reserved to natural-born, living citizens.

In addition to being an unusual exception to *stare decisis*, the passage's inclusion became more controversial once correspondence between Davis and Waite recorded the Chief Justice stating clearly that the Court hadn't actually made a decision on the 14th Amendment, which Davis might want to note. Davis' decision to include the headnote without qualifications drew even more scrutiny because of his former occupation: president of the Newburgh & New York railroad.

Needless to say, magicking businesses into persons was not the original purpose of the 14th Amendment. However, it has been used by expensive corporate lawyers to extend "the protection of the Federal Government to corporations whose property rights were threatened by state legislation"[10] much more frequently than to ensure that poor, disenfranchised people gain full rights.

In 1938, Justice Hugo Black noted that the *Santa Clara* case incorrectly interpreted the meaning and substance of the 14th Amendment. In 1949, Justice William O. Douglas noted that because *Santa Clara* had been interpreted as granting corporations Constitutional rights, it was one of the most "momentous of all our decisions."

Over a century after *Dartmouth v. Woodward*, the corporation had come to occupy an essential, unavoidable, and – seemingly – inevitable role in the American economy, politics, and everyday life. Writing a dissent in *Liggett v. Lee* (1933),[11] in which a collection of Florida businesses sued to strike down a new state tax, Justice Louis Brandeis warned of the danger posed by unreservedly accepting corporate domination. 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

10 Samuel E. Morison. *The Growth of the American Republic,* Sixth Edition, pp. 745, 746 (1980).
11 288 US 517 (1933).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

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." One of those prices seems to be the right to a relatively low tax burden compared to human individuals, as Fig. 10.1 attests.

The unquestioned right of corporations to unlimited financial giving also emerged from Supreme Court precedent, albeit more recently. The 1976 *Buckley v. Valeo* decision extended corporate influence in politics by knocking down limits on election spending as unconstitutional. *Buckley v. Valeo* is also a notable early moment of political engagement by Charles Koch. Koch reportedly offered, and later delivered, large contributions to the Libertarian Party, which was one of the plaintiffs in the case. Two years later, this case was an important precedent in *Bellotti v. National Bank of Boston.*

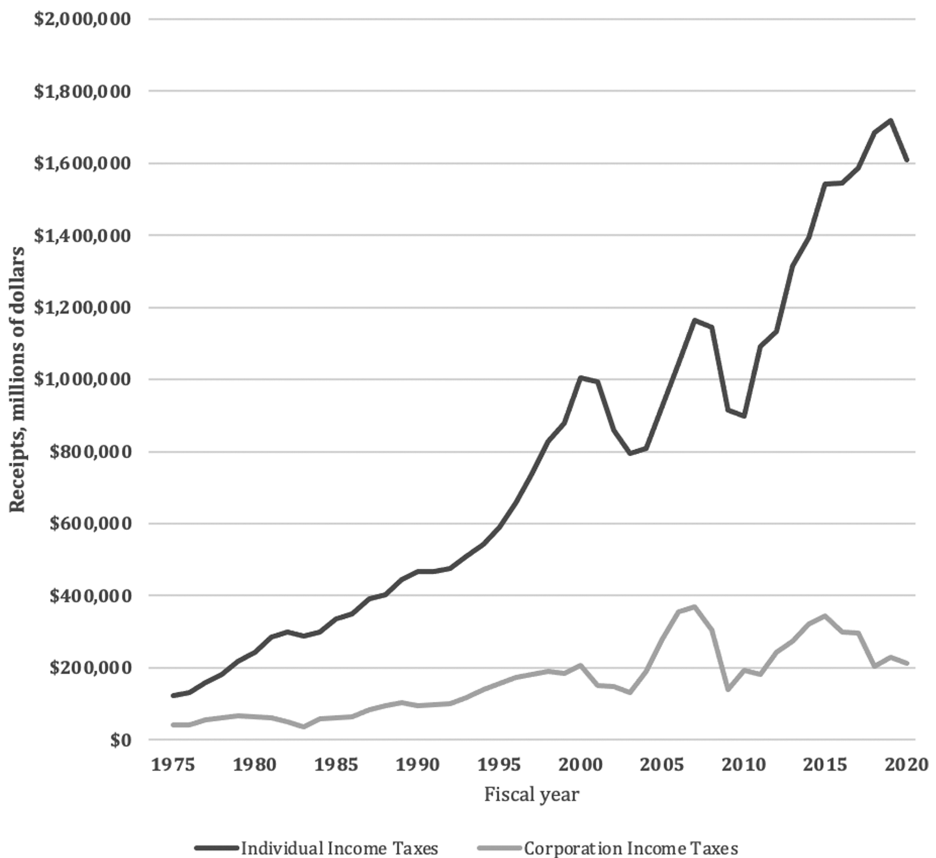


Fig. 10.1: A Very Special Personhood.
Source: The White House
Note: The Supreme Court has granted corporations "personhood" in the political arena, via Citizens United, but when it comes to tax time, America's corporate "persons" are glad to let individual American persons bear an ever-heavier share of the burden.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Another 30 years later, these two streams of precedent – political giving as protected free speech and corporations as persons with Constitutional rights – delivered an unbelievable coup to the Koch Industries, and every other wealthy corporation. In *Citizens United v. FEC*, the Supreme Court held that the free speech clause of the First Amendment prohibits the government from limiting individual expenditures by "persons" to political campaigns, radically amplifying the political power of corporations.

The arc of judicial precedent that led up to 2010's *Citizens United* decision has achieved several things. First, it has created a virtual autocracy of this country. Second, it has shorn the Supreme Court of credibility as the ultimate arbiter on corporate power. It is ironic, perhaps, that this juridical trail also provides a possible solution to the problem it created. In *Woodward v. Dartmouth*, the case cited as the beginning of this history of pro-corporate rulings, Chief Justice Marshall offered a suggestion of how to definitively settle disputes over corporate prerogatives: a federal corporation law.

That law has never come to pass. I have spent decades – as an independent director, responsible owner, shareholder activist, founder of a company that provides advice to institutional shareholders, and author – pushing for alternatives to such a law. What I have discovered is that voluntary, non-compulsory solutions do not work; the dilutions of responsibility have made anything other than clear obligation a delusion. In short, Marshall's proposal is now more necessary than ever. As the first of my corrective measures to claw back a country of, by, and for the people, I propose a Federal Corporation Act for corporations with a net worth of at least $1 billion.

Imagining a Federal Law

Marshall was not the first one to raise the issue of a federal law regarding corporations. Since the beginnings of the Republic, Americans have debated the question of whether the public interest is best served by having one federal or several state corporation laws. At the constitutional convention, Alexander Hamilton suggested a federal corporation power that was limited to situations where the states could not accomplish an objective on their own. The motion was defeated 8 to 3.

The idea was not dead, though. In the post-Civil War era, corporations grew rapidly in size and wealth and, thanks largely to the courts, rapidly assembled political power that cowed the states' attempts to regulate them. It was also the era of muckraking, bloody labor unrest, and enthusiasm for federalizing control of corporations. In the first three decades of the 20th century, 31 bills were introduced in Congress that sought to require federal chartering or the implementation of federal minimum substantive standards. During that era, both Presidents Roosevelt and Taft favored federal incorporation.[12]

12 https://corpgov.law.harvard.edu/2018/06/21/the-federalization-of-corporate-governance/ (accessed October 15, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

The only big victory, however, came following the 1929 market crash – 1934's Securities Exchange Act, which federalized just a small portion of corporate activity.

Forty years later, a growing awareness over the negative environmental impact of large industry, a series of corporate scandals, a miserable economy, and a generalized mistrust of "the establishment" fed another burst of efforts to federalize corporate law. In 1976, three Harvard Law School graduates, Joel Seligman, Mark Green, and consumer advocate Ralph Nader, wrote a lengthy academic paper called *Constitutionalizing the Corporation: The Case for the Federal Chartering of Giant Corporations*.

To make corporations, in Nader's words, "more democratic, efficient and law-abiding," the paper offered changes to governance including increasing the amount of information publicly disclosed, decreasing corporations' size, and worker rights, including whistleblower protections and a ban on surveillance. In order to improve the internal checks and balances of corporations, the paper suggested improving the make-up and functioning on the board of directors. Nader recommends a full-time independent board of directors with their own staffs, a ban on company executives serving on boards, and a specific "constituency" for each director. One director would, for example, advocate for employees while another for consumers.

Of all of Nader's ideas, the independent director is probably the one that has since been implemented by the most companies, but it has failed miserably in the majority of cases. I have some personal insight into this issue.

Independent Insiders

From the 1980s into the early 1990s, I served as an "independent" director of Tyco – an experience that was instructive of some of the many shortcomings of that position. It was my practice to communicate directly and privately with the CEO and Chairman about my reservations regarding board functioning. I abstracted some portion of this correspondence and published it in Nell Minow's and my book, *Corporate Governance*:

> April 21, 1992:
> At the beginning of the meeting in Wisconsin, I asked the "insiders" to leave so that the Board would better consider the question of compensation. The insider directors neither addressed my request nor did they leave. This put me into a most difficult position. Either I had to press my point, which would tend to introduce a confrontational element into our board culture for the first time in my experience, or acquiesce. In doing the latter, I am conscious of having tolerated, even encouraged, a coerced and impoverished discussion of the compensation issues. I, personally, tried to make clear as tactfully as possible that I have been very uncomfortable with the level of compensation to "X." Candor tends to get lost in politeness . . .[13]

13 Robert A. G. Monks and Nell Minow, *Corporate Governance*, Fourth Edition, p. 573 (Wiley, 2010).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

A later suggestion of mine that the Board formally assess its effectiveness resulted in my being asked to leave the Board. The outcome of this company's boardroom malfunctioning was spectacular. The fireworks ultimately resulted in CEO Dennis Kozlowski spending six years in a New York State prison for nearly $100 million in unauthorized bonuses and art purchases, years of lawsuits, Tyco's tarnished corporate image, and a failing company. My experience was hardly an endorsement for the efficacy of what I think clearly was "independence" in a director.

The problems run deeper than a few bad eggs at Tyco, though. The same unhealthy group dynamics exist at innumerable other corporations – there is always a reluctance to join a club just to attack it. Likewise, only directors found on a company's proxy card prospectus can stand for election. It's no wonder that the dominant dynamic at today's boards is self-perpetuation.

There is a more fundamental flaw in vesting so many dreams of efficient, ethical corporate functioning in a single person. These independent directors are nothing more than a wonderful fantasy: no human is as smart, as reputable, as effective as directors are supposed to be. People have written hundreds of books setting forth techniques for making directors do what the law requires. In response to virtually all of them, I quote Peter Drucker: "Whenever an institution malfunctions as consistently as boards of directors have in nearly every major fiasco of the last forty or fifty years it is futile to blame men. It is the institution that malfunctions."[14]

At the risk of offending Aristotelian purists, let me attempt a syllogism:

1. Independent directors are essential to good governance.
2. Directors selected pursuant to a self-selecting process cannot be considered in any meaningful way to be independent.
3. Therefore, good governance requires something other than a board of self-selected directors.

Flashing back to the mid-1970s again, Nader's proposals for federal chartering that created empowered, independent directors were met with the expected disapproval of business groups. After Nader presented his case at a 1977 SEC hearing on corporate governance, the Business Roundtable's Ralph Lazarus refuted his arguments, predictably claiming that there were already "enough checks and balances built into the corporate system."[15]

One of Lazarus' other points was more insightful, though: "shareholders lack the time and inclination to participate more extensively in corporate governance."[16] While

14 Peter Drucker, "The Bored Board," in *Towards the New Economic and Other Essays*, p. 110 (Harper & Row, 1981).
15 https://www.washingtonpost.com/archive/business/1977/10/01/federal-chartering-is-urged-by-nader/39d9fe62-21a0-42f1-a018-f7e11b830a45/ (accessed October 15, 2021).
16 Ibid.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Lazarus' claim was probably both an attempt to describe reality and manufacture consent, he did inadvertently describe a problem and solution for corporate governance that Nader largely missed: the absentee owner. Here, again, I have some personal experience with troubles of ownership.

Legal Casualties

At the age of 30, I found myself the Chief Executive Officer of a family coal and oil company in West Virginia. As a responsible owner, I went into the mines and inspected the housing in the company town. However, naively enough, I was not ready for the inevitable phone call: "We have had a casualty at the Imperial Smokeless Mine."

I asked my colleagues whether this was common.

"Oh, yes," they said. "We have a rate of 1 death per 1,000 employees per year. And we have 4,000 employees."

"Can I go to the funeral?" I asked.

"Oh, no. They have their own culture and their own way of dealing with these problems."

I imagine my colleague was right. With an average four miners dying every year, the small community must have ritualized mourning and taking care of orphaned children. It's entirely possible that my presence at the funeral wouldn't have helped anyone.

Nonetheless, I couldn't escape the feeling that the miner's death was my fault. The law, of course, didn't see it that way. Neither I nor my company had any legal or monetary liability for the death. Whatever the conscience of an owner whispers, he or she will not be forced to face up to any responsibility by the courts. The new kind of ownership that accelerated in the second half of the 20th century – investors whose portfolio contained dozens or hundreds of stocks that are controlled by a fund or asset manager – made shareholders even less likely to feel responsible for their companies' actions.

Another way to describe what I encountered was the inconsistency between the legal position of an owner and what I posit as the ethical position of an owner. There is a subtle but very important conflict in the law. This conflict is absolutely essential to the corporate form of organization, as a competitive structure in which to invest money and to do business, because corporations' their legal liability is limited to the amount of money they put up. There is no obligation beyond that legal liability. But I propose that there is an ethical responsibility for all owners to act with accountability. Nearly a century ago, Berle and Means contrasted the lack of responsibility shouldered by modern shareholders with that of owners of traditional

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

physical property: "the owner of a horse is responsible. If the horse lives, he must feed it. If the horse dies, he must bury it."[17]

In my case, I sold the mining company, something that I have urged on personally connected institutions for the last 40 years. But the bigger question remains. We know that common stock enjoys the privilege of limited liability. But is it in the public interest that corporate owners be entirely free to ignore their external impact on the world around them?

New Species of Owner

Again, we can revisit the responsibilities of ownership as understood and practiced in the early days of the United States. At the drafting of the Constitution, shareholders were fewer in number, often closer to the business they invested in, and most exercised their rights of ownership. Today, the majority of shareholders see themselves as Lazarus described: investors, not owners. Given the state of corporate governance today, however, this type of shareholder is not credible as an ethical owner.

One lesson that I have learned about investing is "you have to have some skin in the game." An example of this mantra comes from the world of private equity, in which the owners – who have substantial amounts of capital tied up the company – hold seats on the board of directors. Their desire to protect shareholder value means that they are engaged in a way that typical directors are not. Instead of showing up every few months, they live with the companies, often getting a very granular look at the business' operations, and conduct board meetings with an extensive knowledge of the company's performance.

I want to create a new species of shareholder along these lines. Under a Federal Corporation Act, an owner would be required to meet specific and enforceable accountability, subject to fiduciary standards. This owner would have obligations not only to vote but also to participate in litigation.

The bigger point is that it's not just enough to empower owners with information or greater voting rights. The only way to make a corporation's internal system of checks and balances work is by compelling shareholders to take their ownership seriously. My proposed Federal Corporation Act would codify the responsibility of a shareholder to act as an interested, ethical owner.

---

17 Adolf A. Berle and Gardiner C. Means, *The Modern Corporation & Private Property* Second Edition, p. 64 (Harcourt, Brace and World, 1967).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

The Race to the Bottom

On the 20th of January 1988 – almost exactly three months after the Black Monday market meltdown – I testified on behalf of the California Senate Commission on Corporate Governance, Shareholder Rights, and Securities Transactions. The state requires that corporations comply with certain minimum requirements which the legislature has concluded are essential to its citizens' welfare; otherwise, they cannot do business in California. As good and necessary as the idea was, the execution was not, but I thought it well worth my time to help protect and improve the state's corporate requirements.

At its core, the problem California faced with asserting itself over corporations is universal. In the early days of the American Republic, states exercised firm control over the entities to which they had granted incorporation. As the 1800s wore on and court decisions favored corporate rights over states' prerogatives, their original practice of judiciously granting corporations the right to incorporate eroded. Then, at the turn of the twentieth century, came a ruling that broke the states' collective back: corporations could legally be domiciled in any state, even if their headquarters and all their business took place outside of that state.

Soon, states began competing for corporations' domicile rights to get a share of tax income and other fees. Since the early 20th century, the largest corporations have had their pick of domicile, which naturally meant they picked whichever state offered the best combination of weak corporate governance laws with low taxes and fees. In this race to the bottom, Delaware established itself as the nadir. Today, over half of the largest corporations in the country are incorporated under Delaware law, which is weak on corporate governance.

This sleight-of-hand explains how Delaware can be "home" to companies with millions of employees while the largest in-state employer is an Air Force base. It also explains how California, the most populous state and fifth largest economy in the world, can be undermined in its attempts to enforce its substantial agenda for corporate governance by Delaware, a state with about 1/40th of the Golden State's population.

At the 1988 hearing, I laid out three approaches to the challenge of competing with bottom-feeder states like Delaware. The first was doing nothing, which meant that California would have no influence over corporations operating in the state but nominally domiciled in other states. The second was to join the race to the bottom, abandoning California's traditions of having a substantive agenda for corporate governance. Third, and this was the only tolerable one to me, the state could actively seek federal preemption. It was darkly ironic: the most populous and economically powerful state could only enforce corporate governance standards within its borders by encouraging a federal takeover.[18]

18 To avoid confusion, the reader should understand that my speech addressed the problems of a single state, so when the word California is used, what should be understood is "all 50 states." My

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Corporations have also engineered another kind of race-to-the-bottom between groups – in this case, credit agencies – that are supposed to rein in the abuses of American corporations. The problem, as with states, is that the credit agencies keep lowering their standards to make themselves competitive. In what is known as an "issuer pays" model, the agencies are paid for their ratings by the same big banks that profit when their securities receive high ratings. In other words, since both parties in this system have an interest in ratings being as high as possible – abuses are inevitable.

Following the 2008 financial crisis, Senator Carl Levin headed up an investigation of the practices of credit rating agencies that found exactly this dynamic at play. As the credit bubble formed, the top ratings, Triple-A, were issued to securities laced with toxic subprime mortgages. The subcommittee's report said, "The ratings agencies weakened their standards as each competed to provide the most favorable rating to win business and greater market share. The result was a race to the bottom."

It was only with the credit agencies' imprimatur that the rotten derivatives could be bought and resold. There were plenty of potential culprits in the crash – banks like Goldman Sachs, lenders like Countrywide – but Levin loaded blame on the Moody's, Standard & Poor's, and Fitch. The senator claimed that if those credit-rating agencies had been diligent in issuing ratings, "we maybe would have averted this crisis."

Of course, if any of the agencies had faced incorporation requirements for strong corporate governance, or proof of public benefit, or a limited lifespan, they would have also behaved differently. But all three of the agencies are incorporated under Delaware law.

So, just as we cannot trust the courts to rein in corporate abuse – or boards of directors and owners, as they currently exist – the individual states are no longer capable or credible as regulators of corporations. A Federal Corporation Act is again necessary as the only meaningful, long-term way to revitalize and update the regulatory capacities once exercised by states.

There are multiple options for how to go about constructing solutions that create a broad array of federal requirements for corporations. One is federal chartering that requires all corporations above a particular size to adopt federal rules for incorporation in total. The second, and perhaps better, option comes from California. Corporations could still be chartered by states, but federal law would overrule state corporation laws that are incompatible with the standards created in federal law.

---

objective remains the same as it was 33 years ago – to find a method of standardizing important provisions of corporate law while permitting states latitude in other respects.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Changing the Language of Accounting

As my long-time colleague Nell Minow reminded the SEC in a recent letter[19] supporting standardized Environmental, Social, and Governance accounting, ESG may have grown rapidly over the past decade, but it isn't a new fad. She attached a picture of a glass sugar bowl in a museum. On the side was written: "East India Sugar, Not Made By SLAVES." (Someday, not more than a few decades in the future, we will likely look at products advertising that they are, say, carbon-neutral or plastic-free or pay a living wage with the same sort of horror that any other form of production was possible.)

At any rate, in the early days of the American Republic, there was certainly an awareness of the broad and sometimes detrimental impact of corporate activity. Business accounting was generally limited to columns of profit and loss, though. However, the impact of corporations in every aspect of our lives is much more pervasive than it was 200 years ago. Such a narrow form of accounting was more acceptable when corporations were few and limited to, say, building canals and bridges. Today, corporations build our houses, grow our food, and make our clothes. They employ the majority of Americans and produce almost all of the carbon emissions as well as the ground, water, and air pollution on earth.

As discussed in Chapter 9, a combination of ownership demands for ESG disclosures and new leadership at the SEC is taking a serious look at creating a standardized US accounting practice informed by ESG principles. This is not the first time. For many years the SEC was charged with the requirement of creating a Federal Law of Accountancy – but that bird never flew. What's more, even if the SEC did require detailed ESG accounting, the measure would be enforced by a regulatory agency subject to the whims of whomever occupies the Oval Office.

Today, for investors, owners, and citizens to make sense of corporate risk and activity, I propose a Federal Corporation Act that provides a reliable system of disclosure and accountability for corporate power.

The manner in which such information is reported is key to prompting ownership responsiveness. Imagine, for example, that Goldman Sachs shareholders received a yearly communication – via letter, email, conference, and whatever other medium the corporation uses to communicate with shareholders – that was solely dedicated to clearly and forthrightly detailing their company's violations of regulations or laws.

In 2020, that would include the four violations that led to a felony conviction in the bank's part in looting a Malaysian sovereign wealth fund, punished to the tune of $2,315,088,000 (that's two billion, three hundred fifteen million, eighty-eight thousand dollars). That's a lot of dough no matter how you break it down in various

19 The full letter can be found in Appendix B.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

metrics – penalty's price per share, comparison to competitors' penalties, and so on. In 2019, Goldman didn't have the same headline-grabbing penalties, but the bank still paid $1 million for violating investor protections and $9.9 million for an employee discrimination suit.[20] While many shareholders will still only be interested in the company's market performance, the steady drumbeat of violations – which total in the millions virtually every year – at least provides a counterbalance to the stream of corporate happy talk owners are accustomed to hearing.

Returning for a second to those early American corporations that built roads and canals reminds me of another common chartering requirement of early American corporations: purpose. To enjoy the many unique advantages of a corporate form, corporations had to have a stated purpose, normally one that was arguably of public benefit. To be clear, "maximizing profit" is fine as the *goal* of a corporation, but it is not a *purpose*. A Federal Corporation Act should include as a chartering requirement that corporations specify a purpose, and that they can be held liable for stepping outside of the purpose's boundaries, as shown in Fig. 10.2.

Enforcement

Finally we come to the tricky area of enforcing the proposed law. Despite the SEC's recent stirrings of interest in carrying out its regulatory purpose, the Federal Corporation Act would also provide for enforcement by what is called a *private attorney general*. Essentially an informal term for any private attorney that brings a lawsuit believed to be in the public interest, private attorneys general have already played important roles in enforcing laws. Many civil rights statutes, including the Civil Rights Act of 1964 have often relied on private attorneys general for enforcement, in addition to the efforts of the Justice Department. Likewise, the Clean Water Act has a provision that provides for "any citizen" to bring a suit against any source of pollution in addition to the EPA.

This provision has several advantages, which may be particularly useful when enforcing laws against deep-pocketed corporations. Private firms often have greater financial resources to handle large enforcement cases that require a long and expensive discovery period. Even if regulators or other executive agencies like the Justice Department had the resources, they are controlled by a politicized budgeting process. Private firms are, in this sense, protected against regulatory capture. What's more, since the private attorney general is reimbursed by a fee paid for by the defendant, the enforcement action effectively costs taxpayers nothing.

20 https://violationtracker.goodjobsfirst.org/prog.php?parent=goldman-sachs&order=pen_year&sort=asc (accessed October 15, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

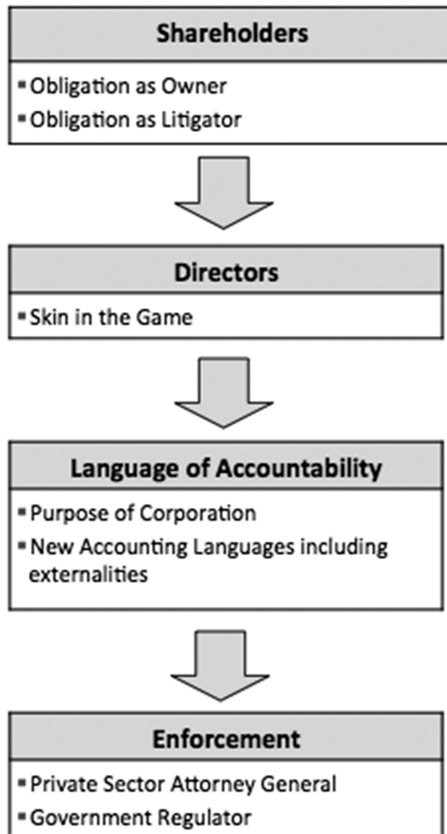


Fig. 10.2: Federal Corporation Act – Flow of Power.
Note: Power flows from owners with enforceable responsibilities, including the election of involved and motivated directors. Holding corporations to a formal Statement of Purpose, as required by a Federal Corporation Act governing all such entities with a net worth in excess of $1 billion, will also provide the basis for regulation and litigation by both government agencies and private-sector attorneys general.

The creation of a private attorney general aligns the interests of various parties: the public, the corporation, and the regulator. My proposed Federal Corporation Act would contain detailed provisions for the appropriate conduct of various corporate officers, regulators, and outside counsel in remedial lawsuits.

A Federal Corporation Act would serve as an essential counterbalance to a pro-corporate Supreme Court and a captured executive branch, helping to revitalize the traditional governance roles of owners and states using tools like ESG accounting and new enforcement options. As powerful as these changes would be, however, they don't take on the issues of corporate personhood and unlimited political giving. Those issues deserve their own chapter.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Epilogue: A 28th Amendment

> While American democracy is imperfect, few outside of the majority of this Court would have thought its flaws included a dearth of corporate money in politics. – Justice John Paul Stevens[1]

The Emperor of my previous book on this subject was an all-powerful potentate who foolishly assumed as he aged that the song of an artificial nightingale could replace that of a real one. In his later years, though, the Emperor realized the efficiencies of the mechanical bird had been bought at a terrible price and decreed that the real nightingale was to return to the palace and sing him nightly to sleep. Being a product of nature, not man-made, the nightingale had other thoughts, but in the end, he compromised to the Emperor's satisfaction and his domain's great benefit.

Like that Emperor, I also made a foolish assumption as I aged: that the rapacious greed of the man-made entity known as a corporation could be brought to heel by involved, well-meaning shareholders and that the vast corporate might in America could be turned to something more collectively meaningful than the self-enrichment of CEOs.

Like the Emperor, too, I am now in my later years, and though I have no domain other than a chunk of the Maine coastline and no throne upon which to sit, I hereby am claiming the Divine Right of Kings to ordain and establish one critical step without which any other efforts to restore a meaningful balance between corporations and the citizenry will inevitably be futile.

I call for a 28th Amendment to the US Constitution. In my original Nightingale, I identified a heroic figure – a nightingale if you will in my epilogue. Here I do so again as I introduce Jeff Clements of the Maine Campaign to Reclaim Democracy.

The Campaign was founded in the summer of 2010 by a group of attorneys, including myself, concerned about First Amendment jurisprudence – and the future of our democracy. Over the previous decade or so, citizens across the nation had formed various local groups to push back against an increasingly pro-corporate judicial climate. However, the 2010 Supreme Court's decision in *Citizens United v. FEC* was a tipping point for many more.

In essence, the decision held that the First Amendment prohibits any and all governmental restrictions on political spending so long as it is "independent" from a candidate's campaign. The reaction to *Citizens United* – one not bounded by party affiliation or ideology – was an overwhelming concern about the flood of corporate general treasury funds in candidate elections unleashed by the Supreme Court. Even for lawyers like me who had watched carefully the decades of judicial creep toward corporate personhood and unbridled political giving, *Citizens United* was

1 Dissent in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

https://doi.org/10.1515/9783110696998-011

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

stunning. My fellow Mainers and I came together in defense of a simple idea: democracy.

That organization is also where I first met Jeff Clements. Despite being several decades my junior, Jeff's background and concerns are virtually mirror images of my own – first rate college and law school education, practice of law, and ultimately partnership in excellent Boston law firms, deep connection with the State of Maine, careers in public service – state and federal – and profound commitment to maintaining Lincoln's America.

Jeff, the former assistant attorney general for Massachusetts, had been personally involved in the *Citizens United* case. On behalf of several public interest organizations, he filed an amicus brief arguing against the "remarkable – and erroneous – assumption that the Constitution provides corporations with First Amendment and Fourteenth Amendment rights equivalent to those of people for purposes of political expenditures."[2] The John Roberts court, of course, didn't see it that way. Soon after *Citizens United* found in favor of corporate personhood and unlimited giving, Clements co-founded a group – Free Speech for People – to advocate for the ultimate tool to reclaim democracy: an amendment that would overturn the Supreme Court.

The stakes in our shared quest to reverse the doctrine of corporate personhood are easy to state: it is existential for American democracy. In a 2014 opinion piece, Jeff and I ticked off some of the all-too-common corporate abuses of government – taxpayer bailouts, low corporate tax rates, subsidies for oil companies, a free pass on responsibility for gun dealers – concluding: "This is how republics fail."[3]

But Clements, whose groups I have financially supported and advised for years, is not a doomsday prophet. He is, instead, a proponent of the America that has moved toward broader democratic rights for all citizens. As Jeff puts it, "Constitutional Amendments are the story of America. With them, we have resolved and won the most epic struggles and fulfilled the best aspirations of the nation."[4] In 2016, Clements founded another organization, American Promise, to pursue that vision with the goal of ratifying a 28th Amendment to the US Constitution.

Any effort promoting an amendment to the Constitution can easily come off as pie-in-sky. Since the Bill of Rights was ratified in 1789, there have only been seventeen successful attempts to do so. Of those, several were mostly technical in detail – for example, defining the order of succession – and another two cancelled each other out by establishing and then repealing Prohibition.

Nonetheless, Clements was on to something. In 2016, the same year the country elected its first billionaire president, bipartisan voters in multiple states supported

---

2 https://www.acslaw.org/issue_brief/briefs-2007-2011/beyond-citizens-united-v-fec-re-examining-corporate-rights/ (accessed October 15, 2021).

3 http://www.ragm.com/lets-take-constitution-day-seriously/ (accessed October 27, 2021).

4 https://medium.com/@ClementsJeff/its-time-to-repair-our-constitutional-foundation-with-the-28th-amendment-eb0337b57b4c (accessed October 15, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

local propositions that, essentially, undid the work of *Citizens United*. Clements is organizing an effort on a grand scale – activity in every state, lobbying leaders of both parties, publishing opinion pieces, and organizing public events. His conception is that broad public support is necessary, notwithstanding the very demanding requirements for amending the Constitution.

Enthusiasm for the proposal has remained high. In a 2018 poll, a constitutional amendment that would effectively supersede *Citizens United* by setting reasonable limits on election donations and distinguishing between people and corporations was favored by 75 percent of Americans – 66 percent of Republicans and 85 percent of Democrats.

More recently, an August 2020 survey of voters in my home state provided further evidence of the amendment's bipartisan appeal. Maine is currently represented in Congress by a delegation split between two Democrats, a moderate Republican, and an Independent. In this "purple" state, three in four Mainers were in favor of passing and ratifying an amendment to the US Constitution to enable the nation to have reasonable limits on contributions and spending in elections. Nationally, 22 states have called on Congress to pass a 28th Amendment and, to date, over 50 senators and 230 members of Congress have supported the effort.

The fact remains, however, that passing an amendment to the Constitution requires meeting a very high bar. There are multiple options, but the most commonly traveled path is passing the Amendment through Congress with at least two-thirds of the vote in each House followed by ratification by at least three-quarters of state legislatures. By comparison, legislation that serves the same purpose needs to meet a considerably lower bar to make it out of Congress – and no action on the part of the states. Similarly, judicial appeals – though they don't face a friendly environment in today's Supreme Court – certainly involve fewer moving parts. So why is an amendment necessary? And, for that matter, is it even appropriate?

Democracy by Amendment

The short answer to both questions is an emphatic "Yes." Even if one could re-reverse the extraordinary reversal of settled law in *Citizens United*, it is doubtful if such an action would effect the changes necessary for a corporate governance system compatible with the public interest. Starting with Chief Justice Marshall's *Dartmouth* ruling – and continuing through the extension of Fourteenth Amendment protections to corporations in *Santa Clara* to *Bellotti*'s trampling over limits on political giving – the Supreme Court has created an untenable situation for American democracy. It has proven itself unreliable for anything other than pushing the country further down the road toward greater "rights" for wealthy and corporate interests. Correcting such juridical errors can be cured only by formal amendment.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

What's more, an amendment promoting the rights of Americans to have an equal say in the nation's political system is hardly out of step with the history of the United States. In fact, "political equality" is a guiding principle of our constitutional framework. American democracy can, in fact, be read as a story of constitutional amendments. It is only due to amendments that core features of our republic include the civil liberties guaranteed by the Bill of Rights, a ban on slavery, the right to vote regardless of race and gender, the elimination of poll taxes, direct election of senators by people, and progressive income taxes. In other words, the America of today is unrecognizable without amendments. Or, perhaps it is recognizable – as a nation combining the robust civil liberties of, say, China, with the gender equality of Saudi Arabia, and the racial politics of 1980s South Africa.

Amending the Constitution in this case is also appropriate because, historically, amendments have not only served as a critical step in the long slog toward greater political equality, but they have been necessary precisely because they overturned retrograde and erroneous Supreme Court rulings. For example, the 1857 *Dred Scott* decision held – by a 7-2 majority – that Black people could not become citizens and that slavery was legal. After the Civil War, which was partially sparked by *Dred Scott*, it took three amendments to fully undo that ruling. The Thirteenth, Fourteenth, and Fifteenth Amendments abolished slavery, established former slaves' rights to full citizenship, and guaranteed the right to vote to Black men.

In 1874, four years after Fifteenth Amendment was ratified, suffragists' hopes that the franchise would next be extended to women was quashed by the *Minor v. Happersett* decision. The Supreme Court ruled that, while women are fully citizens, citizenship does not guarantee the right to vote. It wasn't until 46 years later that the Nineteenth Amendment finally overturned what is today an inconceivable opinion.

The march toward equality via amendment continued throughout the 20th century. In the 1937 *Breedlove v. Suttles* decision, the Supreme Court ruled that states could impose poll taxes, which were used to disenfranchise poor people and disproportionately targeted Black voters – although the suit had been brought by a white man. It wasn't until 1964 that the last poll taxes were ended, by the 24th Amendment.

In 1970, a Supreme Court ruling in *Oregon v. Mitchell* held that states had the right to keep their voting age at 21 for state elections. The following year, the 26th Amendment codified the national voting age as 18.

So, six of the 17 amendments ratified since the Bill of Rights have overturned Supreme Court decisions in order to establish greater political equality. Another two likewise nullified erroneous or unpopular Supreme Court decisions. Clearly, a 28th Amendment – one that provides for the right to establish reasonable limits on political spending and distinguished between the rights of humans and corporations – would fit into a centuries' long dynamic of securing political equality for Americans. By overturning *Citizen United*, such an amendment would simultaneously combat systemic corruption, renew democracy, and fit seamlessly into the American story.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

The Conservative Activists

Another lesson from American legislative history is that no law is safe from a truly motivated Supreme Court – no matter how necessary, entrenched, effective, or constitutionally appropriate. Take, for example, the 1965 Voting Rights Act, a landmark legislation that addressed entrenched racial discrimination in certain parts of the United States – initially six southern states. Among the remedies prescribed by the law was Section 5, which introduced a protection called "preclearance." Essentially, Section 5 required certain states or localities to get approval from the Justice Department or the US District Court for the District of Columbia before enacting changes to existing laws regarding voting. It was an attempt to guard against backsliding or new forms of voter suppression.

The requirement was unpopular with many white southerners, but upheld by the Supreme Court. Just one year after the Voting Rights Act was passed, in 1966, South Carolina launched and lost a legal challenge to preclearance. In addition to being vetted by the Supreme Court, preclearance has enjoyed continual support from the legislative branch. Initially only intended for a five-year period, the requirement has been repeatedly extended by Congress. The requirement was also very successful. Black enrollment in areas covered by preclearance has risen significantly since 1965. Additionally, the law is widely celebrated in American textbooks and maintained solid bipartisan support for decades. It also is considered one of the crowning achievements of the only American with a federal holiday that bears his name – Martin Luther King, Jr.

Given all of these factors, preclearance and the Voting Rights Act itself would seem to be unlikely targets for judicial reversal. As with *Citizens United*, however, the willingness of the John Roberts Supreme Court to unsettle judicial precedent and legislation sometimes appears unbounded.

In June of 2013, the Supreme Court ruled 5-4 in the matter of *Shelby v. Holder* that the formula used by the Voting Rights Act to determine which areas required preclearance was outdated. Largely predicated on the premise that America had fundamentally changed, preclearance was no longer necessary and, in fact, served as a kind of punishment visited on states for previous discrimination.

Since then, facts on the ground suggest that America hadn't changed quite as much as Roberts asserted. Just five years after *Shelby v. Holder*, nearly 1,000 polling places in areas previously covered by preclearance had been closed. Multiple states continue to roll out increasingly restrictive voting rules, such as proof of citizenship, reduced hours and days of voting, reduced access to mail-in ballots, as well as extensively purging voters rolls and redistricting precincts in ways that directly weaken the impact of minority voters. All of these activities disproportionately disenfranchise Black voters. But while these results were entirely predictable back in 2013, holding Roberts solely responsible for the subsequent actions of state and local legislators is unjustified. Insisting that he defend his opinion in the case is not.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

First, there is the question of facts. Published in Roberts' opinion is a chart comparing voter registration rates between Blacks and Whites in 1965 and again in 2004 in six southern states that were subject to the preclearance requirement. The chart clearly demonstrates how dramatically Black voter registration has grown over those four decades. In Mississippi, for example, the registration went from a pitifully low 6.7 percent to a healthy 76 percent. In all but one state, Virginia, the 2004 gap between Black and White registration was less than one percent. In Georgia and Mississippi, Black registration actually exceeded White registration – a remarkable achievement, and one central to Roberts' assertion that the states subject to preclearance had changed. As it turns out, though, it was too remarkable.

A ProPublica review of data used in Supreme Court decisions between 2011–2015 found multiple examples of erroneous data used to make determinations – including a major gap in the *Shelby* case. The chart that Roberts referred to in his opinion contained what was, at best, an unorthodox arrangement of data: the category of "White" combined all non-Hispanic Whites and Hispanic Whites. This is not how numbers are typically displayed in official demographic data. In US Census information on the South Carolina electorate, for example, an asterisk denotes what "White" is comprised of – as well as a separate "Hispanic" category for comparison purposes. Nowhere on Roberts' chart does it explain how the "White" number is calculated.

This distinction is significant because Hispanic Whites are demographically quite distinct from the general "White" category – younger, poorer, more religious, less educated. In fact, the demographic distinction is so great that Georgia's official voter demographics data doesn't include Hispanic voters in the White category at all.

Magnifying that discrepancy, the "White" category Roberts cited included Hispanic Whites who were non-citizens – a significant group that, by definition, *cannot register to vote*. All of this plays into the fact that Hispanics are registered to vote at a rate than is 15 percent lower than non-Hispanic Whites and 8 percent lower than Blacks. For these reasons, the inclusion of Hispanic Whites is a significant drag on the voter registration rates of Roberts' "White" category. This would be particularly true in states like Georgia, where the Hispanic White population represents roughly 10 percent of the total White population. The curious decision to include Hispanics in the White category had the effect of narrowing the gap between Black and White registration rates, emphasizing Roberts' contention that America has changed.

What's more, the Voting Rights Act was created to right a historic wrong – the disenfranchisement of Blacks by non-Hispanic Whites. In fact, many Hispanics – White and non-White – faced exactly the same kind of discrimination as Black voters in 1965, and continue to be targeted for disenfranchisement. In terms of historically suppressed voters, it makes more sense to include Hispanics with Blacks in a "non-white" category – which is how South Carolina's official voter data is divided.

There is also a meaningful partisan distinction at play: In 2012, one year before *Shelby v. Holder*, Republicans were overwhelmingly – 89 percent – non-Hispanic White, while just two percent of Republicans were Black and six percent were

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Hispanic. Not surprisingly, the voting restrictions imposed since 2013 in states formerly covered by preclearance have been led by Republicans, who see discouraging voting participation as the key to extending political control.

Regardless of all these considerations and statistical anomalies, there have indeed been great strides in registration of Black voters in states that were covered under the Section 5 preclearance mandate. If one accepts the general argument that America has changed enough that the preclearance requirement is outdated, then no amount of juggling the relatively small numbers of White Hispanic voters is likely to change that contention. But this brings us to another error in Roberts' opinion: it chooses to ignore the lessons of over seven decades of American history.

Following the Civil War, Black men went from being slaves to full citizens with voting rights in fairly short order – it was a huge leap forward in equal participation. By the end of the 19th century, however, Jim Crow laws had begun systematically eroding all of these gains, a process that continued for decades. It was, in fact, this backsliding that made the Voting Rights Act necessary in the first place. The lesson is clear: the successful extension of democratic enfranchisement to a historically excluded group doesn't automatically remain locked in place. Roberts seems to have ignored this lesson.

Most troubling, though, was Roberts' willingness to veer wildly outside of existing precedent, legislation, and the Constitution itself. Whether or not one believes that the preclearance requirement is necessary today or an undue burden on the states, the Fifteenth Amendment clearly entrusts Congress with protecting Americans' right to vote "which shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." It's a fairly straightforward mandate – and one that describes exactly what the Voting Rights Act did.

The second, and last, section of the Fifteenth Amendment states: "The Congress shall have the power to enforce this article by appropriate legislation." Once again, this is exactly what Congress did in 1965.

Since then, Congress has reaffirmed its commitment to the Voting Rights Act – and extended the preclearance authorization – multiple times. Most recently, Congress passed the 2006 Voting Rights Act, which extended the preclearance authorization for another 25 years. The vote was overwhelming. The legislation passed 98-0 in the Senate and 390-33 in the House.

Nonetheless, just six years later, the Supreme Court effectively overruled a major component of that same legislation, crippling Congress' ability to fully enforce the Fifteenth Amendment. Former White House counsel Gregory B. Craig called the decision "the single greatest example of legislating from the bench in my lifetime."[5]

5 https://www.washingtonpost.com/opinions/john-lewis-and-others-react-to-the-supreme-courts-voting-rights-act-ruling/2013/06/25/acb96650-ddda-11e2-b797-cbd4cb13f9c6_story.html (accessed October 15, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

It also is reminiscent of what must be, at least, a close runner up in the "legislating from the bench" category: The *Citizens United* case, in which the Supreme Court abused the First Amendment of the Constitution and overruled years of legislative attempts to establish reasonable limits on political giving.

Here, then, is why only a 28th Amendment will suffice. If the Voting Rights Act can be hobbled by the Supreme Court, there is no doubt that federal laws restricting the rights of corporations to plow money into the political system will be targeted and, inevitably, eroded. A constitutional imperative is the only way to ensure corporate money doesn't continue to overrun the American political system.

The Language

Compared to legislation, amendments are straightforward, simple things. In just 39 words, the Nineteenth Amendment gave the vote to half the adult population. The 27 words of the Second Amendment sit at the crux of an ongoing debate over gun control. The shortest amendment, the eighth, prohibited "cruel and unusual punishment" in just 16 words.

Recognizing the importance of language in their undertaking, America's Promise has run a program called "Writing the 28th Amendment." For several years, the group has been engaging lawyers, judges, scholars, legislators, and businesspeople, and gathered input from around three dozen town hall community conversations across the country to help fine tune the amendment. The website americanpromise.net also has a link to an online survey where visitors can rate existing language and add their own suggestions. All of which is to say that the language isn't final, but its tone and issues and much of the specific language are clear in the current version:

> Section 1: We the People have compelling sovereign interests in representative self-government, federalism, the integrity of the electoral process, and the political equality of natural persons.

This section aims to create a constitutional self-consciousness with "the People" at the center, which is reinforced and enhanced through the four terms it mentions. It also uplifts the concept of group action for the common good.

> Section 2: Nothing in this Constitution shall be construed to forbid Congress or the States, within their respective jurisdictions, from reasonably regulating and limiting contributions and spending in campaigns, elections, or ballot measures.

This section aims to end the era of *Buckley v. Valeo*, the US Supreme Court ruling that initially viewed political spending as free speech and invalidated campaign finance regulations – federally, at the state level, and locally. It also would prompt a new constitutional look at *Buckley* and other cases.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

> Section 3: Congress and the States shall have the power to implement and enforce this article by appropriate legislation, and may distinguish between natural persons and artificial entities, including by prohibiting artificial entities from raising and spending money in campaigns, elections, or ballot measures.

This final section says Congress and states can enforce the amendment and potentially prohibit campaign spending by special interest groups, organizations, and nonhuman entities.

Amending the Constitution is a rare and ambitious undertaking – as is Clements' timeline, which includes passing the amendment out of Congress by 2024 and ratifying it over the next two years – but any honest appraisal of the situation today points to its necessity. The country and its democracy will continue to be diminished by any lack of action. We cannot afford to be daunted by tinkering with the sacred machinery of the Constitution. Ultimately, if amendments can't be used to guarantee a freely and fairly elected representative government, then what use are they?

After two centuries of the Supreme Court empowering corporations by turning them into legal persons, after decades of court decisions opening the floodgates to the money sloshing around the country's political system, the work of Clements and America's Promise offers a solution. In just 103 words, this proposed 28th Amendment offers us a tool to resurrect a government of, by, and for the people.

The need is great; the hour, late.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Appendix A

October 2, 2020
Jeanne Klinefelter Wilson
Acting Assistant Secretary
Employee Benefits Security Administration
United States Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

RE: RIN 1210-AB91

Dear Acting Assistant Secretary Wilson,

In the long, dismaying history of regulatory capture, when agencies set up to provide oversight instead issue rules entrenching and subsidizing corporate insiders, disregarding the public interest in transparency, accountability, and robust market forces, it is hard to think of an example as discreditable as this proposal on proxy voting by ERISA fiduciaries.

We object to this proposal in the strongest terms, both in substance and in process. We have signed the comment letter drafted by Keith Johnson and Jon Lukomnik and endorse it fully. This letter supplements it by adding our own perspective, including those of a former head of EBSA's predecessor agency, PWBA. We note for the record that we have no financial ties to proxy advisors or ERISA fiduciaries and have not been paid by anyone to express these views. We trust EBSA will carefully scrutinize all comments for possible hidden conflicts of interest, which have been rampant in the DOL and SEC filings relating to proxy proposals and proxy voting.

EBSA, like the fiduciaries it regulates, is charged with acting for the sole benefit of pension plan participants. This shoddy, last-minute, unsubstantiated proposal, rushed through in the middle of a pandemic and at the end of a Presidential term without any evidence of adequate research, no public hearings, and a truncated comment period, is contrary to the interests of plan participants, the capital markets, and the economy as a whole.

The rhetoric claiming that it clarifies the current rule does not disguise its actual purpose, which is to destabilize shareholder oversight. If it becomes law, it will drastically reduce the value of equities held on behalf of pension plan participants, limit the ability of pension fund fiduciaries to act on behalf of beneficial owners, and impose costly new burdens on both managers and plan participants. As with EBSA's proposed ESG rules, this proposal is not supported by any credible cost-benefit analysis or estimate of the additional paperwork burden, ignoring less burdensome alternatives and failing to meet the minimum statutory requirements of the Administrative Procedure Act and the Paperwork Reduction Act. If the rule

https://doi.org/10.1515/9783110696998-012

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

becomes final in anything like the proposed version, it will be very vulnerable to challenge in court.

This proposal subverts the interests of both plan participants and fund manager fiduciaries for the benefit of the corporate insiders at portfolio companies. The proposed rule is bad for plan participants, bad for fund manager fiduciaries, and obstructs the market forces that are the foundation of a robust economy. It does not benefit corporate employees or their shareholders. Its only beneficiaries are entrenched, entitled CEOs. These are the people who love to rhapsodize about the purity of the free market until they feel its effects. They get weak in the knees over a non-binding, advisory proxy vote on their pay or on climate change risk or disclosure of the very kind of dark money expenditures that are clearly responsible for this proposal. The millions of dollars from the corporate treasury spent on lobbyists and political contributions that led to this proposal should have been used for employees, R&D, marketing, and other expenditures that contribute to sustainable growth. This proposal will perpetuate and increase these diversions of corporate assets contrary to shareholder value.

This proposed rule is wrong on the facts, wrong on the law, wrong on the cost-benefit analysis, wrong on regulatory policy, and in every way contrary to EBSA's mission and its duty to plan participants.

The claim that there is "confusion" about the obligation of pension fund fiduciaries with regard to proxy voting is simply false and unsupported by any evidence. There is no confusion on the part of ERISA fiduciaries/fund managers. There is no belief, widespread or otherwise, that every proxy has to be voted or that every vote or non-vote has to be separately and explicitly evaluated. The pretense of confusion is merely rhetoric to attempt to justify the unjustifiable.

The Department's policy has been quite clear for decades. Even before the Avon letter, it should have been self-evident that like all aspects of share ownership, including the right to buy, lend, or sell, the right to file and participate in litigation, the right to submit a shareholder proposal, and the right to engage with management or obtain access to corporate records, the right to vote a proxy is a fiduciary act and must be exercised for the exclusive benefit of plan participants. If there are any examples of EBSA findings that either the casting or the failure to cast a proxy vote has been investigated as a possible violation of fiduciary duty for cost-benefit or conflict of interest reasons, that information (without identifying details) should be disclosed so that we can see how it supports this proposal.

The issues that led to the Department's first guidance on proxy voting are even more pressing today. Back in the late 1980s, the shift from proxy votes on routine matters like votes in favor of unopposed directors and approval of the auditors to hostile takeover-era proposals from management, activists then known as "raiders" and fiduciary institutional shareholders made it important to remind ERISA fiduciaries that proxy voting had to be conducted for the exclusive benefit of plan participants. So, let's start with some history.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Conflicts of Interest. It is important to remember that the "Avon Letter" guidance issued in 1988 was a response to a series of letters sent by CEOs to other CEOs to solicit their support in opposing shareholder proposals on the antitakeover device known as poison pills. These came just as reports from IRRC and others demonstrated the massive conflicts of interest in proxy voting by fund managers. As Vanguard founder John Bogle admitted, from the fund manager's perspective there are only two kinds of portfolio companies: clients and potential clients. And so, fund managers, including ERISA fiduciaries, would vote with management even when it was contrary to the interests of the beneficial holders, in order to ingratiate themselves with portfolio companies who were clients or potential clients. Or, they would not vote, knowing even a non-vote can be beneficial to management. This was in an era when the CEOs knew how the funds voted, but the beneficiaries did not, creating a dangerous information asymmetry that undermined market forces.

The 1988 guidance was specifically intended to address these conflicts of interest and remind pension fiduciaries of their obligation to act "for the exclusive benefit of plan participants" even when it meant that they might alienate a current or prospective customer.

Failing to recognize this dangerous conflict of interest, which history has shown will result in proxy votes cast contrary to the interest of pension plan participants, in and of itself invalidates the basis for this proposal. Without a strong statement to make it clear that voting proxies is a fiduciary act for the benefit of plan participants and not to promote business relationships and fees, fund managers' assessments of the value of a proxy vote will be tainted by the same conflicts of interest that led to the issuance of the Avon letter.

This relates to the "exclusive" statutory obligation.

Collective Choice. Equally important, is the "benefit" statutory obligation. It is essential to understand the difference between proxy voting and other share ownership rights like buying and selling when it comes to making calculations of the benefit to plan participants. This proposal entirely overlooks the foundational defining characteristic of the value of proxy voting: the mathematical concept of *collective choice*. See for example *Proxy voting and the SEC: Investor Protection Versus Market Efficiency*, John Pound, *Journal of Financial Economics*, Volume 29, Issue 2, October 1991, pages 241–285, incorporated in full here by reference.

What that means is that a rational fund manager could conclude, say, that the cost of evaluating any individual CEO pay plan is greater than the pro rata share of any return from that vote, whether in favor or (an advisory only vote) against. Each individual investor, individual and institutional, could rationally decide that it is not "worth it" to evaluate any proxy issue, with results that are contrary to the interests of all of them. In a worst-case scenario, ERISA fiduciaries could rely on this rulemaking to free them from any obligation to vote proxies, leaving portfolio companies in limbo for failure to achieve a quorum. That is just the most obvious and concrete concern.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

The more serious, systemic concern is that removing any oversight from what can constitute a significant block or even a majority of the stock holdings of the nation's publicly held companies will be immensely disruptive. Instead of having proxy votes cast by massive, stable, expert, fiduciary shareholders, they will be voted by individuals who are not experts (though data show that individual investors do not vote proxies) or by activist extremists and predatory hedge fund managers. They may even be voted by activists who have no underlying holdings but merely borrow stock over the record date. In at least one case a hedge fund made just such a transaction in support of its short position. Clearly that was not in the interest of ERISA beneficiaries who might be holders of the stock. Any of these consequences would destabilize the capital markets. Indeed, we would argue that a significant part of the appeal of the US capital markets, still by far the most robust and efficient in the world, is based on the transparency and accountability of the proxy voting system, with sophisticated financial professionals subject to the law's strictest standard of responsibility, making buy, sell, and vote decisions. As other countries move in the opposite direction to improve corporate governance, the US cost of capital will be much less appealing.

Failing to recognize, much less address this essential underlying issue is in and of itself grounds for overturning the rule should it go into final form when it is challenged in court.

Portfolio Theory. ERISA's sole substantive requirement is diversification. Yet this proposed rule shows no understanding of modern portfolio theory, particularly with respect to the particular issues pertaining to long-term, essentially permanent holders like pension funds. Jon Lukomnik's work is of particular importance in this area and we incorporate by reference the article he wrote with Jim Hawley, *The Long and Short of It: Are We Asking the Right Questions? Modern Portfolio Theory and Time Horizons*, 41 SEATTLE U. L. REV. 449 (2018). Basically, it shows that long-term holders get more reliable long-term returns from including beta analysis as a better way to create value over the kind of time horizon a working person with decades until retirement needs. To use an extreme but prevalent example, index funds cannot manage risk by trading; their only options if a company is underperforming are engagement, from proxy voting to shareholder proposals to direct communication with board members or executives or doing nothing and watching it fall off of the index. Actively managed funds must consider the costs and benefits of selling a stock versus communicating with management via proxy vote, letter, request for meeting or coordinating with other investors. This proposed rule puts that calculus out of whack in a manner that depresses value for plan participants and the market as a whole.

Furthermore, this proposed rule is contrary to the facts of fund management and shareholder engagement as it has evolved over the past 40 years. It was the era of EBSA's Avon letter that marked the beginning of shareholder engagement as an essential part of fund management, the result of two powerful forces. First, the development

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

of securities that made any size of takeover possible created opportunities for massive damage to shareholder interests by both corporate raiders (for example, coercive two-tier tender offers) and entrenched insiders (for example, greenmail and outsize golden parachutes). The second was the creation, through ERISA itself and vehicles like mutual funds and index funds, of investors smart enough to understand these abuses, big enough to respond effectively, and, as fiduciaries, required to do so when it was the most effective way to protect share value.

Over the past few decades, as proxy issues have become even more significant and even more complicated, institutional investors have become much more sophisticated about using share ownership rights, including proxy voting and shareholder proposals, to protect and increase the value of securities, especially as their positions have grown too large to sell efficiently and pervasive corporate governance concerns mean that even if they could justify the transaction costs of a sale it is far more cost-effective to engage on those issues. Any rulemaking by EBSA must reflect that.

Cost-benefit Analysis and Paperwork Reduction. The signers of this comment met while working on President Ronald Reagan's Task Force on Regulatory Relief. We are very familiar with what an authentic cost-benefit analysis looks like. There is no evidence of any evidence-based cost-benefit analysis supporting this proposal. Preposterously, the proposal itself imposes massive new expenses that undermine its stated goal. If the proposed rule goes into effect, the cost of performing the analysis and documentation of literally hundreds of thousands of proxy votes is so staggering it is difficult to imagine any fund manager finding the time and resources to justify any votes at all. Instead, they may well conclude that other forms of communication are more cost effective, meaning more shareholder proposals and requests for meetings.

This proposal is not just inadequately justified in terms of cost-benefit analysis; there is no foundation for it whatsoever. How many times does a fund manager have to determine that there is value in whether a CEO compensation package should be voted on annually or every two or three years? In approving the same auditor who failed to identify a massive fraud? A shareholder proposal calling for more diversity on the board? One annual determination that proxy voting is cost-effective should be more than adequate.

The paperwork required by this proposed rule alone is a massive new cost as well as a violation of the Paperwork Reduction Act. Has it been cleared by OMB as a new imposition of extensive new record-creating and keeping requirements? There is no possible way to move forward with this rulemaking without establishing a public record with hearings to establish what it costs to vote proxies – and what it costs not to vote them.

We note that if it goes final, this rule will certainly be a bonanza for proxy advisory firms as fund managers outsource the calculus on proxy voting to reduce costs and ensure independent analysis.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Contrary to EBSA History and Policy. Since the enactment of ERISA, EBSA and its predecessor agency PWBA have wisely regulated process, not substance for ERISA fiduciaries. This proposed rule crosses the line into substance by shifting the burden of proof to fund managers to justify proxy voting. This is a decision that should be left entirely to the judgment of the sophisticated financial professionals who are acting as fiduciaries. This proposed rule, making each vote a potential violation and creating a safe harbor for failing to vote, means EBSA is not just putting a thumb on the scale; it is shoving an elephant onto it. Without a single example of a pension fund fiduciary making a "wrong" call on whether or how to vote any proxy, there is simply no justification for this nanny state intrusion into decisions made by sophisticated financial professionals subject to both market forces and the strictest standard ever developed by our legal system.

EBSA, like the fund managers it oversees, must act for the exclusive benefit of plan participants. It is in the interests of working people hoping for retirement income security to have proxies voted on their behalf and for their benefit; even if the benefit to any individual fund is not clear within the context of its own percentage of shares, in part because the manager does not know and has no say over the votes of other investors, the benefit is inarguable if all fiduciary fund managers vote.

Return to the Avon letter, for example. The issue there was shareholder proposals asking that the recently developed antitakeover provisions known as "poison pills" should not be adopted without shareholder approval. The CEOs who wrote to each other urging them, acting as ERISA fiduciaries for their employees' plans, to vote against these proposals, did not even try to pretend that it was for the benefit of plan participants. If poison pills had to be put to a shareholder vote, then only provisions like a "chewable pill" that benefited shareholders would be approved. It would avoid the most virulent, insider-entrenching versions.

It was clear that a vote in favor of shareholder approval was moderate, valuable, and in the interest of shareholders, including plan participants. But without Avon letter-style reminders that voting proxies is a fiduciary act, a manager could decide not to bother. On an individual basis, that might be a rational choice, but taken as a whole, the result for the shareholders is a loss of value. The same applies to the issues on proxies today, from stock-based compensation to business combinations, approval of auditors, and shareholder proposals. Failure to consider this essential element of proxy voting invalidates the rationale for this proposed rule.

It was his experiences as the head of EBSA's predecessor agency, PWBA, that led one of the signers of this comment to found Institutional Shareholder Services, specifically to address the collective choice and conflict of interest problems by making independent analysis and recommendations on proxy issues available to a wide range of fund managers. He understood that while there was a premium for exclusivity in buy/sell recommendations, with proxy issues the opposite was the case. Access to a proxy advisory service greatly reduced the cost of analyzing proxy issues and the more fund managers who had access to the analysis, the more likely

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

the votes would reach critical mass and have an effect. [We note that we left ISS in 1989 and 1990, respectively, and have had no financial interest in the company or in any other entity connected with proxy voting for decades.]

As with the proposed ESG rule, this is a cynical, rushed, superficial, unsubstantiated proposal with rhetoric that does not match its real-life consequences. It fails to meet the most basic regulatory requirements of cost-benefit analysis, public disclosure of the basis for the rule, and consideration of other alternatives. A rulemaking this significant should not be conducted without extensive research and hearings, and without disclosure of all meetings and memoranda submitted by outside groups that were considered in preparing the proposal or without the typical 90-day comment period for rulemakings of even a fraction of this level of controversy and impact. We ask you to withdraw the proposal and do some real-world cost-benefit analysis based on data on proxy voting by pension fund professionals.

Sincerely,

Robert A.G. Monks, Chairman (and former Administrator of PWBA)
Nell Minow, Vice Chair

cc: Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N-5655, US Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Appendix B

US Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

July 5, 2021

Re: Public Input on Climate Change Disclosures

Dear Chair Gensler, Commissioner Lee, and Secretary Countryman:

Thank you for requesting comments on the Division of Corporation Finance's March 15, 2021 request for public input on reporting requirements for registrations relating to certain disclosures relating to climate change and ESG. I have co-signed the Shareholder Commons comment letter already and I endorse many of the recommendations you have already received from Scott Stringer and other institutional investors, but I would like to add some additional perspective and a few responses to some of the other comments filed.

As a general point, I note that some of the comments are not clear about who is funding them, what is paid advocacy, and how suggested changes would benefit their organizations. This is of particular concern following the "fishy" comments,[1] sock puppets,[2] and CEO-funded dark money fake front groups[3] distorting the proxy advisory rulemaking. For example, the comment from the generically-named Texas Public Policy Foundation, which cherry-picks data to pretend climate change is not a problem, does not mention that its funders include energy companies Chevron, ExxonMobil, and other fossil fuel interests.[4] The FreedomWorks comment is especially misleading because it appears to be signed by a long list of anonymous individuals (last names omitted), but the comment fails to disclose that the group is funded by major corporations and groups related to the ultra-wealthy, anti-regulation Scaife and Koch families. We consider these to be material omissions because basic law and

---

1 https://www.bloomberg.com/news/articles/2019-11-19/sec-chairman-cites-fishy-letters-in-support-of-policy-change (accessed October 16, 2021).

2 https://valueedgeadvisors.com/2018/11/06/more-useless-sock-puppet-bluster-from-fake-front-group-main-street-investor-coalition/ (accessed October 16, 2021) and note the overlap in the comments between groups with the same members/funders like the Business Roundtable and the World Business Council.

3 https://www.nytimes.com/2020/11/11/climate/fti-consulting.html (accessed October 16, 2021).

4 Their use of the inaccurate and inapposite term "cartel" to describe the proxy contest at ExxonMobil is a hint of their lack of credibility as well. One would think that they might conclude the successful election of three dissident directors was an indicator of investor frustration at the inadequacy of the company's communications about climate change (as well as its $22 billion loss last year).

https://doi.org/10.1515/9783110696998-013

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

economics shows that knowing who is paying for a source is necessary to evaluate its purpose and objectivity.

The disclosure requirement I would love to see implemented is one that would insist anyone filing a comment explain what their financial interest is in the outcome, but since that is unlikely, I encourage the staff to consider that question as you evaluate each comment.[5]

For that reason, I want to make clear that no one is paying me to file a comment or has asked me to do so. Neither my firm or I have any financial interests in the outcome of any potential Commission guidance or rulemaking on climate change or ESG disclosures. We do not produce or evaluate ESG data or ratings. I have no financial or other connection to any of the sources I cite. I write solely as someone who has followed the world of corporate governance closely and worked exclusively on behalf of shareholders for more than three decades. The views I express are my own.

As additional background, before I began to work in corporate governance in 1986, I spent four years at the Environmental Protection Agency and four years in the Office of Information and Regulatory Affairs in the Office of Management and Budget. I learned from those experiences looking at both the trees (sometimes literally) and the forest of federal regulation that the most important role the government can play is where there are externalities and collective choice problems, because those are the issues the market cannot resolve. Both are the case here.

The accountability processes of government and business are each ideal for optimizing different policy issues, and we get into trouble when we let one take on the role of the other. What has made the US capital markets the most robust and respected in the world is the combination of market- and government-based structures and especially the comprehensive transparency of our public companies. The nature of capitalism is to maximize profits, and it is up to the government to make sure that happens without externalizing costs onto the public who have no capacity to provide a market-based response. Corporate executives would always prefer less disclosure. Investors would prefer more. Because of the collective choice problem, there is no way for investors to make a market-based demand for more information as effectively and efficiently as having the government set the floor for what must be disclosed.

It is within this context that the questions will always arise about when it is time to add more to the already extensive information that issuers must provide to investors. As the request for comments and Commissioner Lee's outstanding presentation on materiality suggest, that time has come for ESG. The reason it is the fastest-growing sector of investment vehicles[6] is a reflection of increasing concerns about

5 No one can be surprised that PricewaterhouseCoopers believes that accounting firms are uniquely capable of any new disclosure requirements.

6 Every major financial institution and every significant institutional investor now has one or more ESG options. US ESG index funds reached over $250 billion in 2020. More significantly, ESG factors are permeating every aspect of even the most traditional investment vehicles. A 2020 survey of 809

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

the inadequacy of GAAP numbers in assessing investment risk. Let me emphasize that; ESG and climate change disclosure concerns are entirely and exclusively financial. That is what makes them a have-to-have, not a nice-to-have.

This is not surprising. After more than a century of working with GAAP, there is still a lot of inconsistency in the way accounting rules are applied. GAAP may allow for a lot of options in disclosing the value of factory equipment, but at the end of the process, hard assets are something you can count and the tax code is helpful, too, in validating those numbers. And GAAP is based on data that corporations are already required to disclose in fairly consistent apples-to-apples form. ESG, which is a recent response to the inadequacy of GAAP in assessing investment risk, is still in its earliest stages. ESG factors are inadequately and inconsistently disclosed and harder to quantify. Even so, they are already vitally important in providing guidance that traditional GAAP cannot. GAAP is focused on what values are today. ESG is about evaluating the risks of tomorrow and five and ten years from now.

There is one thing ESG is unequivocally not: nonfinancial. Imperfect and inconsistent as ESG data are, they are entirely and exclusively methods for better assessing investment risk and return. The comments that claim otherwise, like those of the fossil fuel companies, have failed to provide a single example to prove that there is any trade-off in shareholder value. And when it comes to what shareholders need, the Commission should rely more on what investors say they need than what issuers would prefer to give them. As a matter of law and economics, investors have the fewest conflicts of interest in determining what they need to make a buy/hold/sell decision.

ESG is focused on factors that will affect the enterprise as a sustainable concern. BlackRock, for example, announced that it has added 1200 "sustainability metrics" to its calculus in 2020. The UK's Task Force on Climate-Related Financial Disclosure (TCFD) was created by the Financial Stability Board (FSB) to develop consistent climate-related financial risk disclosures for use by companies, banks, and investors in providing information to stakeholders. In the US, the Sustainability Accounting Standards Board (SASB) is merging with the International Integrated Reporting Council (IIRC) to provide investors and companies a comprehensive corporate reporting framework to drive global sustainability performance.

---

institutional asset owners, investment consultants and financial advisers found that 75 percent of them use ESG factors in their investment strategies, up from 70 percent in 2019. Nearly 13 percent of respondents were pension plan sponsors. The largest institutional investor in the US is BlackRock, which has announced that 100 percent of its approximately 5,600 active and advisory BlackRock strategies are ESG integrated—covering US $2.7 trillion in assets. Reflecting the demand, BlackRock introduced 93 new sustainable solutions in 2020, helping clients allocate US $39 billion to sustainable investment strategies, which helped increase sustainable assets by 41 percent from December 31, 2019.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Admittedly, there is no consensus and a lot of inconsistency in defining what ESG is, which is another reason to be grateful for the Commission's involvement. The interest in ESG is far ahead of the capacity to assess or evaluate it. And, as with any topic that has reached the tipping point, a lot of people and organizations are slapping ESG labels on themselves to get a piece of the action, all the more reason for additional guidance from the Commission.

I have a brokerage account. The online interface now includes what they call an "ESG" analysis and a separate "impact analysis" tied to goals like ethical leadership and racial equality. It is not clear what data or which data providers are used for these assessments. There are ads on television now for "ESG-neutral" investment 2ndVote Funds. "ESG-neutral" is a meaningless term. The offerings include pro-gun and antiabortion ETF filters that can only be categorized as Social. These are unquestionably ESG funds; the managers just assign different weights to the ESG factors than funds based on analysis that gun stocks, for example, may be a suboptimal investment.[7] That is fine, of course. Just as some portfolio managers may be buying a stock as others, even in the same organization, are selling it. What is important is making sure that investors have a clear idea of what factors and investment goals are the basis for those decisions. I note that despite repeated requests, 2ndVote has not provided me with their proxy voting policies or records of past votes, but it is likely that ESG analysis is involved in at least some of those votes. I look forward to reviewing their N-PX forms.

All of this further shows why we need clearer, more consistent information. When consumers demanded organic foods, government standard-setting was the only way to make sure that term was used only when it meets some consistent and supportable standard. That is where we are with ESG. The exponential increase in the use of ESG and related terms in investment and corporate communications makes it an urgent priority for guidance from the Commission to prevent misleading or confusing investors.

E, S, and G

We sometimes forget that E, S, and G are three very different categories, with very different levels of consensus and understanding about them.

For example, look at one small part of the almost catch-all category, S, for Social. The annual reports that accompany proxy statements almost always claim that the company's greatest asset is its people. But GAAP tells us almost nothing about how to assess their value. How many PhDs? How many economists/MBAs/programmers/sales

---

7 https://www.forbes.com/sites/palashghosh/2021/03/24/gun-sales-are-soaring-so-why-are-gun-stocks-languishing/?sh=48b709f72f8f (accessed October 17, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

representatives? What incentives are provided for worker education and promotion? How is diversity supported by management? Other questions that might fall into the S of ESG could pertain to whistleblower protection, supply chain issues like the ones highlighted in the July 7, 2020, statement issued by four cabinet agencies,[8] cybersecurity, and the increasingly controversial issue of political contributions. Or the possibility of a pandemic, a risk only a small fraction of issuers were prepared for in 2020.

The E can be misleading. Companies that have to disclose problems, violations, and fines may appear higher-risk than those that have not (yet) been the subject of investigations. As some of the commenters have already said, it is important that the E not be limited to a company's carbon footprint. Every company has environmental risk, whether it is the direct result of operations or products, as in the fossil fuel industry, or the impact of climate change on supply chains, coastal properties, or insurance.

There is more consensus at the moment around the G factors. Many are thoroughly covered by state law and current SEC disclosure rules, like those pertaining to executive compensation, related party transactions, board member stock ownership and meeting attendance. I find, though, that the best way to judge governance effectiveness is to look at the results, rather than the policies, and "resume independence" does not always translate to more effective oversight. So, some improvement there might also be called for.

In all three categories, the Commission must make sure the focus is on what counts, not just what can be counted.

Evidence about the increasing sophistication of institutional investors in using ESG indicators to evaluate risk and return and the increasing importance of those factors:

Just a few examples:

1. The Environmental Protection Agency published a 150-page document about coping with the debris from natural disasters across the country, which said, "Start planning for the fact that climate change is going to make these catastrophes worse. This is an essential issue for every element of corporate strategy, from supply chain issues to core operations and risk management."

2. A study published in *Sustainability Accounting, Management and Policy Journal* by Michael Magnan and Hani Tadros found that better disclosure of environmental performance correlated with better performance at the 78 companies in environmentally sensitive industries that they examined.

8 On July 1, 2020, the US Department of State, along with the US Department of the Treasury, the US Department of Commerce, and the US Department of Homeland Security, issued a Xinjiang Supply Chain Business Advisory (Business Advisory) to caution businesses about the risks of supply chain links to Chinese entities that engage in human rights abuses, including forced labor, in the Xinjiang Uyghur Autonomous Region (Xinjiang) and elsewhere in China.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

> In this paper, we aim to bridge the gap in the literature about the association between environmental disclosure and environmental performance by analyzing the motivation of firms with high or low environmental performance to disclose proprietary environmental information that could compromise the firm's competitive position or have direct impact on its cash flow. Consistent with some prior research, we argue that economic- and legitimacy-based incentives both drive a firm's environmental disclosure. However, revisiting prior research, we put forward the view that a firm's environmental performance (either high or low) moderates the effects of these incentives on environmental disclosure in a differential fashion.

Of course, you do not have to be an economist to conclude that companies will be more transparent when there is good news to report. What matters here is what investors can conclude from the level of transparency in these disclosures, and what it means about the potential—or necessity—for engagement. We point the Commission to the work of Tensie Whelan of NYU Stern Center for Sustainable Business on ESG data as a key indicator of supply chain risk, and to *ESG Shareholder Engagement and Downside Risk* by Andreas G.F. Hoepner, Ioannis Oikonomou, Zacharias Sautner, Laura T. Starks, and Xiao Y. Zhou, which found that investor engagement on ESG issues can significantly reduce investment risk.

3. The Bank of England takes note of climate-related investment risk:

> [A] speech by Sarah Breeden, head of international banks supervision, suggests . . . that time is running out to prevent catastrophic climate change and previous efforts to combat the problem have been nowhere near vigorous enough.
>
> Breeden's message to the financial sector was that they need to incorporate climate change into their corporate governance, their risk management analysis, their forward planning and their disclosure policies or face the prospect of losing a heck of a lot of money.
>
> The financial markets have a term for a sudden drop in assets prices known as a Minsky moment (after the economist Hyman Minsky). Breeden said a climate Minsky moment was possible, in which losses could be as high as $20tn (£15.3tn).

If the Bank of England is calling on companies to address the risks of climate change, then the Commission should recognize that investors need this information to assess investment risk.

4. A July 2020 report from GAO documents the financial/"pecuniary" priority of institutional investors use of ESG factors in calculating investment risk. We incorporate that entire report by reference in this document. An excerpt:

> Institutional investors with whom we spoke generally agreed that ESG issues can have a substantial effect on a company's long-term financial performance. All seven private asset managers and representatives at five of seven public pension funds said they seek ESG information to enhance their understanding of risks that could affect companies' value over

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

> time. Representatives at the other two pension funds said that they generally do not consider ESG information relevant to assessing companies' financial performance. While investors with whom we spoke primarily used ESG information to assess companies' long-term value, other investors also use ESG information to promote social goals. A 2018 US SIF survey found that private asset managers and other investors, representing over $3.1 trillion (of the $46.6 trillion in total U.S. assets under professional management), said they consider ESG issues as part of their mission or in order to produce benefits for society. . . .
>
> These investors added that they use ESG disclosures to monitor companies' management of ESG risks, inform their vote at shareholder meetings, or make stock purchasing decisions. Most of these institutional investors noted that they seek additional ESG disclosures to address gaps and inconsistencies in companies' disclosures that limit their usefulness. [emphasis added, footnotes omitted]

RGAO has done the kind of thorough analysis that can be helpful to the Commission in understanding the way investors are looking at ESG factors. And what we learn is that not one of the investors surveyed made any "pecuniary" trade-offs and the overwhelming majority look at ESG exclusively in financial terms.

5. Pensions and Investments reported on an ISS study:

A link exists between a company's ESG performance and its financial performance, according to a study published from ISS ESG, the responsible investment arm of Institutional Shareholder Services.

> Firms with high or favorable ISS ESG corporate ratings tend to be more profitable through an economic value-added lens, the study found.
>
> "While one can argue that the relationship between ESG and financial performance is perhaps due to the fact that more profitable firms have the resources to invest in areas that positively influence ESG, it could also be that profitability rises as a result of a company better managing its material ESG risks, or it could be a little bit of both," the study said. "If it is a little bit of both, then this means that good-ESG initiatives drive up financial performance, which then provides the monetary resources to invest to be an even better ESG firm, which then drives up performance again, and so on."

Moreover, companies with better ESG ratings are also less volatile, noted Anthony Campagna, global head of fundamental research at ISS EVA.

6. A January 2021 report produced by the United Nations in collaboration with 22 major insurance firms found that the insurance industry needs to adopt an integrated approach in order to manage future climate change risk. The report is making a "ground-breaking, yet still preliminary" effort to develop a methodology to assess climate-change related litigation risk, encompassing potential costs, fines and penalties, prosecutions of executives, impacts on valuation and credit ratings, policyholder claims and exclusions between the insured and insurer.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

> As society's early warning system, the insurance industry has the unique opportunity to become its global navigation system—an industry that will help society manage the risks of today, navigate the risk landscape of tomorrow, and reap the opportunities along the way.

A few responses to a few of the comments already submitted, with thanks to Tulane professor Ann M. Lipton for highlighting some of these issues:

- There is no possible definition of "solicitation" that can be stretched and distorted to include independent evaluations voluntarily purchased or obtained by investors and therefore no possible reason to include ESG ratings or analyses within the regulatory restrictions imposed on firms hired as advocates. The reason for regulation of solicitors is that they are paid by corporate insiders to make the best case for one side, and therefore not objective. Providers of research and analysis purchased (or not) by financial professionals are market-tested. But ESG claims made by financial professionals to investors, like solicitations, are likely to be self-serving and may require some standard-setting.
- The suggestion that ESG policies be included with codes of ethics (see comment of Morrison Foerster) seems to be just a way of making sure that investors will have no meaningful oversight or response as failure to follow the code is not necessarily disclosed or actionable.
- Obviously, the comments that attempt to remind the Commission that any guidance or regulation on ESG should depend on materiality are creating a straw man. Commenters in favor of ESG disclosures may differ in their ideas of what is material, which is the reason for undertaking this inquiry, and that includes portfolio-based materiality. But no one is asking for disclosures that are anything but vitally financially material to investment risk and return.
- Many of the industry comments recognize that they can no longer pretend that some kind of ESG is not inevitable, so they begin with assertions that they are on board then quickly move to suggest approaches that undermine any meaningful disclosure, most often a "go slowly and trust us" or "furnished rather than filed" approach that will make it impossible to get reliable and consistent data. While we support a first step that allows for some flexibility and innovation (see below), we hope the Commission will be cautious in evaluating comments with rhetoric that obscures efforts to, well, obscure climate and ESG risks.
- There are still a few holdouts who put quotation marks around climate "risk" to show that they are not yet willing to accept that such a thing is real. That has led to some self-owns, as when the National Mining Association admitted that what they fear from climate risk disclosures is that the information will make them look like a less attractive investment. ("NMA is concerned that mandatory disclosure rules—particularly related to non-material climate-related risks—could proliferate investment bias and practices by investors and financial institutions to exclude certain energy-intensive companies and sectors from investment portfolios or restrict access to or significantly increase the cost of capital." Needless to

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

say, they provide no evidence or examples to show that "non-material" climate risk indicators exist.) This is, of course, the actual purpose of disclosure and the meaning of materiality. Indeed, to keep this information from investors is to give these companies a government-authorized subsidy that is contrary to efficient markets and capital formation. In summary, *investors are in a far better and less conflicted position to determine what is material to their evaluation of investment risk and return than issuers or service providers*.

Next steps

The consensus on the need for ESG and climate change disclosures is ahead of anyone's capacity to provide them. For that reason, I recommend that the Commission approach this question in stages, coordinating with international groups to promote consistent standards while continuing to keep the United States as the most comprehensively transparent capital markets in the world. The first stage should have two goals: encouraging innovation and transparency of process, with a "comply or explain" approach whenever possible. Ideally, I'd like to see some move toward widespread adoption of SASB disclosures within five years in an XBRL format (we reiterate our plea for XBRL reporting of proxy votes by fund managers), unless the issuer explains why a different approach is better for their company. But even I would not support guidance or rulemaking along those lines without further study, beginning with hearings so that we can better understand the strengths and weaknesses of current ESG reporting and ratings.

In the meantime, guidance on disclosure should focus on clarity about how each reporting entity defines ESG, with care to avoid the problem of boilerplate, near-identical disclosures as we now have in the CD&A language from board compensation committees. The Commission can be helpful here by releasing a list of sample questions that each company should answer, including: Which board committee is responsible for evaluating ESG risk? What does the board consider its primary ESG vulnerabilities and opportunities and what steps are they taking to address them? What ESG priorities are reflected in the incentive compensation of the top executives? How is the company preparing for the prospect of regulatory changes from agencies other than the SEC, for example the Consumer Product Safety Commission, the Department of Transportation, OSHA, the FTC, and EPA? How about regulatory changes from the EU or other trading partners?[9]

9 Detailed new guidance on ESG from the EU makes clear that any effort to limit investor access to ESG in evaluating risk and return will put US investors and issuers at a serious disadvantage in global markets if we do not do as well or better.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Disclosure of any ESG related campaign contributions and lobbying expenditures, direct or indirect, should be a top priority for guidance. The recent release of recordings by Keith McCoy, senior director of ExxonMobil for federal relations[10] makes absolutely clear the gulf between what some companies tell their customers and investors and what they advocate and support with undisclosed campaign contributions and lobbying. This kind of material misdirection and outright misrepresentation is made possible by lack of transparency.

I concur with the comments asking that private companies and investment managers should be covered as well.

I conclude with a reminder that ESG is not new. I took this photograph of a jar from the early 19th century in the British Museum (Fig. B.1).

Fig. B.1: Nineteenth-century Jar Showing Corporate Social Conscience.

The ESG disclosure from the East India Sugar Company is larger than the name of the country or the identification of the product. It was produced in a time of the first major consumer boycotts, which would lead to the abolition of slavery in England decades before it took a war to abolish it in the US. Today's investors and consumers are continuing in a tradition that goes back to the earliest days of capitalism. It is now up to the Commission to make sure the ESG disclosure of investors needs are as accurate and reliable as materiality requires.

10 https://www.nytimes.com/2021/06/30/climate/exxon-greenpeace-lobbyist-video.html (accessed October 18, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

I appreciate the opportunity to comment and may file one or more supplements to respond to any new information. If the Commission holds hearings on this matter, I would be happy to provide testimony and answer any questions.

Sincerely,

Nell Minow, Vice Chair, ValueEdge Advisors
nminow@valueedgeadvisors.com

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Appendix C

December 12, 2021

Office of Regulations and Interpretations
Employee Benefits Security Administration, Room N-5655,
U.S. Department of Labor
200 Constitution Avenue NW, Washington, DC 20210

Attention: Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights

Docket Number: EBSA-2021-0013

Docket RIN: 1210-AC03

We are grateful for the opportunity to comment on the excellent proposal from DOL/EBSA, which addresses the concerns we raised about the previous rulemakings on proxy voting and ESG investing by pension fiduciaries.

Proxy Voting and Other Rights of Share Ownership

The issue of proxy voting by pension fiduciaries has been of interest to one if the signers of this comment, Robert A.G. Monks, since before he served as the head of EBSA's predecessor agency, PWBA, in the 1980s. He had served as a fiduciary responsible for voting proxies on behalf of beneficial owners and he had unsuccessfully tried to get the government to take action when, due to conflicts of interest, the trustee of Carter Hawley Hale's ESOP supported management entrenchment of the executives who retained it over a better offer from outsiders.[1] Later, as EBSA staff is aware, CEOs who were trustees for company ERISA plans wrote letters to other CEOs asking them to vote the shares of those plans against shareholder proposals. There was no attempt to make a case for these votes based on benefit to plan participants. The letter asked for support because of the benefits of poison pills and other obstacles to market-based transactions, for corporate insiders. This led to the February 23, 1988 Avon letter pointing out that proxy voting, like buy/hold/sell decisions, is a fiduciary act, and must be for "the exclusive benefit of plan participants."

Since that time, proxy voting has become an even more vital element of fiduciary obligation, and one that continues to be subject to conflicts of interest. As documented in an Investor Responsibility Research Center report in 1987 and

1 We included a detailed case study of this failure of oversight in all five editions of *Corporate Governance* (Blackwell), our MBA textbook.

https://doi.org/10.1515/9783110696998-014

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

extensively covered by Vanguard founder John Bogle in many books and articles, there are only two kinds of portfolio companies, those that are clients and those that are prospective clients.

If fund managers are trying to get 401(k) business from a company, perhaps they will think twice about voting against the CEO's pay plan. The SEC's decision to require disclosure of proxy votes by fund managers came only after a Deutsche Bank fund switched its vote after Hewlitt-Packard gave it a million-dollar fee in order to secure majority support for the Compaq merger. (That deal later led to an SEC fine,[2] a $1.2 billion write-down, and inclusion in a worst-ever tech merger list,[3] so apparently the original "no" vote was the correct one). Corporate insiders can easily find out how funds vote on proxy issues while plan participants cannot. This also helps tilt the balance toward making portfolio companies happy at the expense of plan participants.

We strongly endorse an explicit statement from EBSA making clear that proxy voting *and* exercise of all share ownership rights are governed by the fiduciary standard and must be exercised for the exclusive benefit of plan participants. We would encourage EBSA to consider requiring easily accessible disclosure of proxy voting policies and proxy votes to help pension plan participants make more informed choices and keep managers more focused on shareholder value than commercial prospects.

Clear guidance from EBSA on exercise of share ownership rights is especially important when it comes to voting proxies and other exercise of shareholder rights between the buy and the sell, including engagement with portfolio companies (shareholder proposals, meetings, and other forms of communication) and litigation. Unlike buy/sell decisions, which can be evaluated solely in terms of the costs and benefits to each fund or even each account[4], proxy voting in our gigantic capital market is sub-optimally efficient due to the collective choice problem.[5] Even multi-billion-dollar funds can be "rationally apathetic" because the cost of doing the research and analysis on any given proxy issue plus the cost of overcoming the kind of conflicts of interest described by John Bogle is likely to outweigh the marginal benefits of a "correct" proxy vote. That is, unless there are explicit standards in place making clear that exercise of share ownership rights, including proxy voting, is a fiduciary obligation, there is a significant risk of sub-optimal proxy votes.

2 https://www.plansponsor.com/deutsche-hit-with-750000-for-h-p-compaq-deal-conflict/?layout=print

3 https://www.zdnet.com/article/worst-tech-mergers-and-acquisitions-hp-and-compaq/

4 I note that while it is justifiable to make different buy/sell/hold decisions in different portfolios depending on the stated goals of each fund, the same calculus does not apply to proxy voting. As most investment managers recognize, the interest of fund clients is better served by an enterprise-wide approach to proxy voting.

5 We highly recommend this important scholarship on a related/analogous issue. https://theshareholdercommons.com/wp-content/uploads/2018/07/Taking-a-Benefit-Stance.OXREP-ArticleSSRN.Vers1_.pdf

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

A ”hold” decision on a security is not a license to go the beach, any more than a trustee/fiduciary responsible for real property can ignore the obligations and expenses of maintenance. Even a manager of an index fund cannot just watch a stock lose value until it drops out of the index when the benefits of engagement outweigh the costs, whether that calculation concerns an individual security or the fund as a whole.

ESG

The avalanches of corporate money, including CEO-funded dark money fake front groups,[6] fake social media profiles,[7] and fake "news" sites[8] promoting restrictions on ESG factors in making investment decisions were attempted distractions from the key omission: they were unable to provide a single example of an investment decision made by an ERISA fiduciary or any other professional fund manager that was not driven exclusively by financial considerations. This was exemplified by the comment letter from the Western Energy Alliance.

First, they claimed that they support ESG, which one might think would lead them to conclude that they should be able to attract ESG-oriented investors. On the contrary, though, they claim that they understand what ESG means better than pension fund fiduciaries, among the most sophisticated financial professionals in the world and subject to the strictest standards of care and loyalty our legal system imposes. Again, they failed to come up with a single example of a "wrong" or "non-pecuniary" or "political" investment decision by a pension fiduciary.

Here is their real issue: "We have observed how ESG advocacy has negatively affected the industry's access to capital over the last few years." What the industry is saying here is that they want pension funds to subsidize otherwise market-unworthy investments. If ERISA directed plan fiduciaries to act for the exclusive benefit of corporate insiders, that might be worth considering. But EBSA's duty is to protect pension beneficiaries, and that is the opposite of what the Western Energy Alliance and the other critics of ESG are asking for.

The industry trying to suppress a market-based shareholder response to investment risk is not even able to pretend that its position supports retirement income security or investing for the *exclusive* benefit of pension plan participants. The comment is explicit about its priorities: what essentially amounts to a subsidy by diverting pension assets into securities that would not normally qualify.

6 https://www.nytimes.com/2020/11/11/climate/fti-consulting.html

7 https://www.motherjones.com/environment/2020/12/these-ladies-love-natural-gas-too-bad-they-arent-real/ https://www.insider.com/oil-consultant-fake-page-to-spy-on-environmental-activists-nyt-2020-11

8 https://www.ft.com/content/e23b1e17-6a5a-4e18-bd0a-5ad289dfc05c

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

The argument they made about the legitimacy of their own ESG commitments is one they should be making to the market, not to regulators. It is not DOL's job to evaluate claims about concerns about climate change, but if it was, the assertions of self-interested industry executives should be viewed with the greatest possible skepticism, especially when they are in conflict with overwhelming evidence to the contrary.

We recognize that ESG is still an evolving discipline. But it is not a fad. ESG has passed the tipping point. For investors, it has gone from a nice-to-have to a have-to-have. ESG is the fastest growing area of investment, with every major financial institution and every significant institutional investor having one or more ESG options. US ESG index funds reached over $250 billion in 2020. More significantly, ESG factors are permeating every aspect of even the most traditional investment vehicles. A 2020 survey of 809 institutional asset owners, investment consultants and financial advisers[9] found that 75 percent of them use ESG factors in their investment strategies, up from 70 percent in 2019. Nearly 13 percent of respondents were pension plan sponsors. Corporate executives and board members are scrambling to catch up.

There are two major factors behind the new centrality of ESG. The first is the growing recognition that current financial reporting according to GAAP is not adequate. The upheavals of the dot.com bubble, the Enron-era accounting scandals, the financial meltdown, the failed public offering of WeWork and so much more remind us that there is a reason that accounting principles are called "generally accepted" and not "certifiably accurate." GAAP is fairly good at reporting the value of hard assets and computing present value of future income. It is less reliable in evaluating the worth of today's key assets like intellectual property and not of much use in informing investors about the asset almost all companies claim is their most valuable: their employees. GAAP is structured to externalize costs off the books as much as possible, driving corporate strategy in that direction. ESG is about the information GAAP leaves out or underweights.

The second major factor is market-driven, based on demographics. Millennials and the generation that follows them are vastly more concerned with ESG issues like climate and social justice than their parents, harking back more to the boomer generation activism that led to the creation of the Environmental Protection Agency, OSHA, and other regulatory agencies devoted to health and safety concerns. As employees, consumers, and investors, they are insisting on better information and more explicit strategy relating to ESG.

The problem is that the market for ESG is far ahead of the ability to supply it. We are better at understanding the importance of ESG than we are at computing and understanding the data. There is no consensus and a lot of inconsistency in

9 https://www.pionline.com/esg/esg-integration-grows-globally-does-gap-between-us-and-others-survey

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

defining what ESG is. That has led to a lot of opportunistic grabs for fees and market share for services and products that are based on what can be counted, not on what counts. It has led to a lot of push-back from corporations and their service providers, including efforts to distort the market by promoting restrictions on ESG-based assessments. Th answer is not to try to ignore the growing understanding of ESG factors, just to be clear that pension fiduciaries have to evaluate them with the same due diligence they bring to other data about investment risk and return.

ESG is nothing new. In the collection of The British Museum is a blue glass jar dating back to the early 19th century. The label identifies the company and the product: East India sugar. And then, in bigger letters, it has an ESG disclosure: "not made by SLAVES." The East India Company distinguished itself from its competition in the West Indies in response to the world's first grass-roots political movement and consumer boycott. This led to the abolition of slavery in the United Kingdom more than 30 years before it took a war to stop it in the United States. ESG is sometimes similarly dismissed as a fad. While fads are very popular in finance and investing, ESG is unlikely to disappear. It will continue to be refined, and its influence will increase. For example, the largest institutional investor in the US is Black Rock, which has announced that 100 percent of its approximately 5,600 active and advisory BlackRock strategies are ESG integrated – covering U.S. $2.7 trillion in assets. Reflecting the demand, BlackRock introduced 93 new sustainable solutions in 2020, helping clients allocate U.S. $39 billion to sustainable investment strategies, which helped increase sustainable assets by 41 percent from December 31, 2019. As it consistently has throughout its history, EBSA's assessment of pension fiduciaries making ESG investments should be based on process and due diligence rather than results.

ESG is not monolithic. It is critical to remember that ESG encompasses three enormous categories: environment, governance, and a catch-all category we call social. Each is a moving target with constantly evolving ideas about what information is relevant and reliable and each has to be evaluated separately. "Social" is the wild card in the group. Rising on the list in recent years are #metoo and #blacklivesmatter concerns, plus increasing attention on political contributions and lobbying expenditures following news stories from Judd Legum[10] and others about contributions contrary to public statements about ending funding for elected officials who supported the January 6 insurrection or to those who get poor ratings from women's groups and racial equity groups. EBSA should be careful to make sure that its rules promote rather than restrict the development of ESG metrics.[11]

10 https://popular.info

11 https://www.responsible-investor.com/articles/i-want-to-make-an-official-request-of-regulators-and-the-esg-community-stop-it

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

ESG is never "non-pecuniary" – adjacent to or conflicting with financial goals. Again, we note that neither the Department nor any of the corporate executive and trade associations have documented a single example of a pension fiduciary making any financial trade-off in ESG-qualified investments. Quite the contrary. It is a reflection of the increasing recognition, following the dot.com collapse, the Enron era accounting failures, the security analyst corruption scandal, the financial meltdown, and many other examples, showing the inadequacy of GAAP in estimating investment risks and returns. GAAP is still based in 19th century notions and is better at estimating the value of property, equipment, and other hard assets than it is at valuing what most corporations claim is their most important asset, human capital. ESG can provide significant data about employee turnover, the resources devoted to employee development and education as well as information about compliance with regulatory risk relating to climate change and other E, S, and G issues.

To provide some context for these concerns, here are just a few of the extensive and compelling developments and evidence on ESG as a meaningful risk factor that not only can but must be a part of any fiduciary's responsibility to evaluate and act on:

1. The Environmental Protection Agency[12] published a 150-page document about coping with the debris from natural disasters across the country, which said, "Start planning for the fact that climate change is going to make these catastrophes worse. This is an essential issue for every element of corporate strategy, from supply chain issues to core operations and risk management." EPA also has a sustainability initiative[13] on better disclosure of investment risk.

2. A study published in *Sustainability Accounting, Management and Policy Journal* by Michael Magnan and Hani Tadros[14] found that better disclosure of environmental performance correlated with better performance at the 78 companies in environmentally sensitive industries that they examined.

> In this paper, we aim to bridge the gap in the literature about the association between environmental disclosure and environmental performance by analyzing the motivation of firms with high or low environmental performance to disclose proprietary environmental information that could compromise the firm's competitive position or have direct impact on its cash flow. Consistent with some prior research, we argue that economic- and legitimacy-based incentives both drive a firm's environmental disclosure. However, revisiting prior research, we put forward the view that a firm's environmental performance (either high or low) moderates the effects of these incentives on environmental disclosure in a differential fashion.

12 https://www.epa.gov/homeland-security-waste/guidance-about-planning-natural-disaster-debris
13 https://www.epa.gov/sites/default/files/2019-12/documents/esgmetricsreportingtemplate_pam_lacey.pdf
14 https://www.emerald.com/insight/content/doi/10.1108/SAMPJ-05-2018-0125/full/html

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Of course, you do not have to be an economist to conclude that companies will be more transparent when there is good news to report. What matters here is what investors can conclude from the level of transparency in these disclosures, and what it means about the potential – or necessity – for engagement. We point the EBSA staff to the work of Tensie Whelan of NYU Stern Center for Sustainable Business on ESG data as a key indicator of supply chain risk, relating to the State Department release cited below.

3. The Bank of England takes note of climate-related investment risk:

> [A] speech by Sarah Breeden,[15] head of international banks supervision, suggests . . . that time is running out to prevent catastrophic climate change and previous efforts to combat the problem have been nowhere near vigorous enough.
>
> Breeden's message to the financial sector was that they need to incorporate climate change into their corporate governance, their risk management analysis, their forward planning and their disclosure policies or face the prospect of losing a heck of a lot of money.
>
> The financial markets have a term for a sudden drop in assets prices known as a Minsky moment (after the economist Hyman Minsky). Breeden said a climate Minsky moment was possible, in which losses could be as high as $20tn (£15.3tn).

If the Bank of England is calling on companies to address the risks of climate change, then the Department of Labor should recognize that pension fund managers' similar assessment of risk is consistent with their obligation as fiduciaries.

4. A July 2020 report from GAO[16] documents the financial/"pecuniary" priority of institutional investors use of ESG factors in calculating investment risk. We incorporate that entire report by reference in this document. An excerpt:

> Institutional investors with whom we spoke generally agreed that *ESG issues can have a substantial effect on a company's long-term financial performance*. All seven private asset managers and representatives at five of seven public pension funds said they seek ESG information *to enhance their understanding of risks* that could affect companies' value over time. Representatives at the other two pension funds said that they generally do not consider ESG information relevant to assessing companies' financial performance. While investors with whom we spoke primarily used ESG information to assess companies' long-term value, other investors also use ESG information to promote social goals. A 2018 US SIF survey found that private asset managers and other investors, representing over $3.1 trillion (of the $46.6 trillion in total U.S. assets under professional management), said they consider ESG issues as part of their mission or in order to produce benefits for society. . . .

15 https://www.bankofengland.co.uk/-/media/boe/files/speech/2019/avoiding-the-storm-climate-change-and-the-financial-system-speech-by-sarah-breeden.pdf
16 https://www.gao.gov/assets/710/707949.pdf

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

> These investors added that they use ESG disclosures to monitor companies' management of ESG risks, inform their vote at shareholder meetings, or make stock purchasing decisions. Most of these institutional investors noted that they seek additional ESG disclosures to address gaps and inconsistencies in companies' disclosures that limit their usefulness. [emphasis added, footnotes omitted]

Not one of the investors surveyed made any "pecuniary" trade-offs and the overwhelming majority look at ESG exclusively in financial terms.

5. Pensions and Investments[17] reported on an ISS study:

A link exists between a company's ESG performance and its financial performance, according to a study published from ISS ESG, the responsible investment arm of Institutional Shareholder Services.

Firms with high or favorable ISS ESG corporate ratings tend to be more profitable through an economic value-added lens, the study found.

> "While one can argue that the relationship between ESG and financial performance is perhaps due to the fact that more profitable firms have the resources to invest in areas that positively influence ESG, it could also be that profitability rises as a result of a company better managing its material ESG risks, or it could be a little bit of both," the study said. "If it is a little bit of both, then this means that good-ESG initiatives drive up financial performance, which then provides the monetary resources to invest to be an even better ESG firm, which then drives up performance again, and so on."

Moreover, companies with better ESG ratings are also less volatile, noted Anthony Campagna, global head of fundamental research at ISS EVA.

6. Corporations are increasingly providing ESG disclosures[18] to respond to investor demand and to assist in their own strategic planning, and those that do tend to outperform. Whether that is cause or effect is not clear, but for investment risk assessment purposes, that makes little difference.

Since July 2017, following the release of the Task Force on Climate Related Disclosure (TCFD) guidelines, more than 500 large businesses, investors and industry groups have signed on to provide this type of forward-looking financial disclosure. Companies in the financial services industry are leading the way in their support of the TCFD recommendations, including BlackRock, State Street and S&P Global, along with the Association of Chartered Certified Accountants.

It is not limited to the financial services industry. Other sectors are signing on, including Statoil and Shell in the energy sector, consumer product companies such

17 https://www.pionline.com/esg/iss-study-links-esg-performance-profitability
18 https://www.greenbiz.com/report/2019-state-green-business-report

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

as H&M and Nestlé, materials companies such as BASF and DowDuPont, as well as industrial companies such as Saint-Gobain and Ingersoll Rand.

7. On July 1, 2020 the U.S. Department of State, along with the U.S. Department of the Treasury, the U.S. Department of Commerce, and the U.S. Department of Homeland Security issued a business advisory to caution businesses about the risks of supply chain links to entities that engage in human rights abuses, including forced labor, in the Xinjiang Uyghur Autonomous Region (Xinjiang) and elsewhere in China. DOL/EBSA should not issue a rule that fundamentally undermines this critical policy advisory from four other Departments. EBSA should coordinate with the other federal agencies to ensure that pension fiduciaries are not discouraged from making the appropriate calculations about supply chain risk.

8. A new global alliance of financial institutions, investors and businesses,[19] is launching a new central source for accessible, digital, corporate sustainability information in support of the 10 principles of the UN's Global Compact.[20]

9. President Biden's wide-ranging initiatives on ESG issues include an Executive Order on Climate-Related Financial Risk.[21] As the Department is aware, it will impose new obligations and create new opportunities for assessing investment risk based on climate and other ESG factors.

> It is therefore the policy of my Administration to advance consistent, clear, intelligible, comparable, and accurate disclosure of climate-related financial risk (consistent with Executive Order 13707 of September 15, 2015 (Using Behavioral Science Insights to Better Serve the American People)), including both physical and transition risks; act to mitigate that risk and its drivers, while accounting for and addressing disparate impacts on disadvantaged communities and communities of color (consistent with Executive Order 13985 of January 20, 2021 (Advancing Racial Equity and Support for Underserved Communities Through the Federal Government)) and spurring the creation of well-paying jobs; and achieve our target of a net-zero emissions economy by no later than 2050. This policy will marshal the creativity, courage, and capital of the United States necessary to bolster the resilience of our rural and urban communities, States, Tribes, territories, and financial institutions in the face of the climate crisis, rather than exacerbate its causes, and position the United States to lead the global economy to a more prosperous and sustainable future.

Another Executive Order focuses on creating opportunities for clean energy[22] that will affect the investment risk assessment in many sectors.

19 https://www.ft.com/content/304f9a1f-cb31-4c83-81bd-d814aa211c26

20 https://www.unglobalcompact.org

21 https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/20/executive-order-on-climate-related-financial-risk/

22 https://www.whitehouse.gov/briefing-room/presidential-actions/2021/12/08/executive-order-on-catalyzing-clean-energy-industries-and-jobs-through-federal-sustainability/

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

10. “ESG: Shareholder Engagement and Downside Risk”[23] finds that “successful engagement [on ESG factors] reduces the firm’s exposure to a downside-risk factor.”

11. In the Harvard Business Review article, An ESG Reckoning is Coming[24], Michael O’Leary and Warren Valdmanis write that companies have been better at promising to meet ESG goals than delivering on them, which underscores the vital importance of shareholder oversight to protect loss of shareholder value.

12. The SEC’s Asset Management Advisory Committee recommended meaningful, consistent, and comparable disclosure of material environmental, social, and governance ESG disclosures earlier this year.[25] Increasing adoption of TCFD[26] and SASB[27] disclosure standards will provide critical information for all investors, including pension fiduciaries, to factor into their assessments of investment risk.

The Department already has not just the enforcement authority but the obligation to use it if a pension fiduciary makes an investment decision for any reason other than “the exclusive benefit of plan participants.” There is a lot still to be determined about ESG and some arguments to be had over long-and short-term calculations, but it is always, always financial, and we appreciate EBSA’s clarity on that point, in regulation and enforcement.

One more note: because of the widespread efforts to distort the rulemaking process through undisclosed financial ties between some of the groups and individuals filing comments, we want to make it clear that no one is paying us to comment on the proposed rule and neither we nor our clients have any financial interest that will be affected by this rule. This comment is based entirely on our own views, based on more than 30 years in this field. To protect the quality of the notice and comment procedure, we recommend that the Department include in all future rulemakings language like this:

> We encourage commenters to state clearly whether they are directly or indirectly receiving payment or subsidies for submission of the comment and any financial ties they have to those who are likely to be affected by the rule. These disclosures are not required but failure to include them will be a factor in determining the credibility of the comments.

We will be reviewing other comments and will file additional materials if we believe there is something requiring a response. We are happy to provide further information

23 https://www.researchgate.net/profile/Xiaoyan-Zhou-7/publication/318002428_ESG_Shareholder_Engagement_and_Downside_Risk/links/5e6769ce299bf1744f6f12f6/ESG-Shareholder-Engagement-and-Downside-Risk.pdf
24 https://hbp.az1.qualtrics.com/CP/File.php?F=F_e4XeHWSIIMVXsRo
25 https://www.sec.gov/files/amac-recommendations-esg-subcommittee-070721.pdf
26 https://www.fsb-tcfd.org
27 https://www.sasb.org

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

or answer questions on any of the points made in this comment or issues presented by the proposed rule.

/s/

Robert A.G. Monks
Chair, ValueEdge Advisors and former Administrator of EBSA predecessor PWBA
ragmonks@ragm.com

/s/

Nell Minow
Vice Chair, ValueEdge Advisors
nminow@valueedgeadvisors.com

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

List of Figures

Fig. 1.1 Shadow Permanent Government —— **5**
Fig. 3.1 Union Busting —— **38**
Fig. 3.2 Shifting the Pension Burden —— **40**
Fig. 3.3 Externalizing Health Costs —— **42**
Fig. 4.1 Take the Money and Run —— **51**
Fig. 5.1 Super Soaring PACs —— **68**
Fig. 6.1 Big Ideas, Narrow Perspective —— **79**
Fig. 6.2 Comparison of "Davos Man" to Humans and Corporations —— **81**
Fig. 6.3 Bipartisan Boom —— **88**
Fig. 10.1 A Very Special Personhood —— **140**
Fig. 10.2 Federal Corporation Act – Flow of Power —— **150**
Fig. B.1 Nineteenth-century Jar Showing Corporate Social Conscience —— **178**

https://doi.org/10.1515/9783110696998-015

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Bibliography

Alberta, Tim. *American Carnage: On the Front Lines of the Republican Civil War and the Rise of President Trump* (Harper, 2019).
Albright, Madeleine. *Fascism: A Warning* (Harper, 2018).
Allen, Paul. *Idea Man: A Memoir by the Cofounder of Microsoft* (Portfolio, 2011).
Andersen, Kurt. *Evil Geniuses: The Unmaking of America: A Recent History* (Random House, 2020).
Applebaum, Anne. *Twilight of Democracy: The Seductive Lure of Authoritarianism* (Doubleday, 2020).
Avery, Michael and Danielle McLaughlin. *The Federalist Society: How Conservatives Took the Law Back from Liberals* (Vanderbilt University Press, 2013).
Bacevich, Andrew. *The New American Militarism: How Americans are Seduced by War* (Oxford University Press, 2005).
Bainbridge, Stephen M. *Corporate Governance after the Financial Crisis* (Oxford University Press, 2012).
Bainbridge, Stephen M. and Todd Henderson. *Limited Liability: A Legal and Economic Analysis* (Edward Elgar, 2016).
Bakan, Joel. *The New Corporation: How "Good" Corporations are Bad for Democracy* (Knopf Doubleday, 2020).
Bakan, Joel. *The Corporation: The Pathological Pursuit of Profit and Power* (Free Press, 2005).
Banks, Christopher and John Blakeman. *The U.S. Supreme Court and New Federalism: From the Rehnquist to the Roberts Court* (Rowman & Littlefield, 2012).
Barak, Gregg. *Unchecked Corporate Power: Why the Crimes of Multinational Corporations Are Routinized Away and What We Can Do About It* (Routledge, 2017).
Barton, David. *Separation of Church & State: What the Founders Meant* (Wallbuilder, 2007).
Baum, Lawrence and Neal Devins. *The Company They Keep: How Partisan Divisions Came to the Supreme Court* (Oxford University Press, 2019).
Baumgartner, Frank; et al. *Lobbying and Policy Change: Who Wins, Who Loses, and Why* (University of Chicago Press, 2009).
Bavaria, Steven. *Too Greedy for Adam Smith: CEO Pay and the Demise of Capitalism* (CreateSpace, 2015).
Bean, Elise J. *Financial Exposure: Carl Levin's Senate Investigations into Finance and Tax Abuse* (Palgrave MacMillan, 2018).
Benen, Steve. *The Impostors: How Republicans Quit Governing and Seized American Politics* (William Morrow, 2020).
Berenson, Alex. *Pandemia: How Coronavirus Hysteria Took Over Our Government, Rights, and Lives* (Regnery Publishing, 2021).
Berlatsky, Noah. *Judicial Activism (Opposing Viewpoint Series)* (Greenhaven Press, Second Edition, 2011).
Birkmose, Hanne S. and Konstantinos Sergakis. *Enforcing Shareholders' Duties (Elgar Financial Law Series)* (Edward Elgar, 2019).
Biskupic, Joan. *The Chief: The Life and Turbulent Times of Chief Justice John Roberts* (Basic Books, 2019).
Bloom, Peter. *Authoritarian Capitalism in the Age of Globalization* (Edward Elgar, 2016) *CEO Society: The Corporate Takeover of Everyday Life* with Carl Rhodes (Zed Books, 2018).
Blumenthal, Sidney. *The Rise of the Counter-Establishment: The Conservative Ascent to Political Power* (Union Square Press, 2008).
Blumenthal, Sidney. *The Strange Death of Republican America: Chronicles of a Collapsing Party* (Union Square Press, 2008).

https://doi.org/10.1515/9783110696998-016

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Boggs, Carl. *Empire Versus Democracy: The Triumph of Corporate and Military Power* (Routledge, 2011).

Bogle, John C. *The Battle for the Soul of Capitalism* (Yale University Press, 2006).

Bolton, John. *The Room Where It Happened: A White House Memoir* (Simon & Schuster, 2020).

Booth, Danielle DiMartino. *Fed Up: An Insider's Take on Why the Federal Reserve is Bad for America* (Portfolio, 2017).

Bower, Leonard, et al. *Capitalism at Risk: Rethinking the Role of Business* (Harvard Business Review, 2011).

Brands, H.W. *Heirs of the Founders: The Epic Rivalry of Henry Clay, John Calhoun and Daniel Webster, the Second Generation of American Giants* (Doubleday, 2018).

Bremmer, Ian. *The End of the Free Market: Who Wins the War Between States and Corporations* (Portfolio, 2010).

Breyer, Stephen. *The Authority of the Court and the Peril of Politics* (Harvard University Press, 2021).

Breyer, Stephen. *The Court and the World: American Law and the New Global Realities* (Vintage 2016).

Brill, Steven. *Tailspin: The People and Forces Behind America's Fifty-Year Fall – and Those Fighting to Reverse It* (Knopf, 2018).

Brookhiser, Richard. *John Marshall: The Man Who Made the Supreme Court* (Basic Books, 2018).

Brooks, Arthur. *The Battle: How the Fight between Free Enterprise and Big Government Will Shape America's Future* (Basic Books, 2011).

Buell, Samuel. *Capital Offenses: Business Crime and Punishment in America's Corporate Age* (W.W. Norton & Co., 2016).

Burckart, William and Steven Lydenberg. *21st Century Investing: Redirecting Financial Strategies to Drive Systems Change (*Berrett-Koehler Publishers 2021).

Buthe, Tim. *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton University Press, 2011).

Califano Jr., Joseph A. *Our Damaged Democracy: We the People Must Act* (Atria Books, 2018).

Caplan, Lincoln. *American Justice 2016: The Political Supreme Court* (University of Pennsylvania Press, 2016).

Carney, Timothy P. *Obamanomics: How Barack Obama Is Bankrupting You and Enriching His Wall Street Friends, Corporate Lobbyists, and Union Bosses* (Regnery Publishing, 2009).

Carreyrou, John. *Bad Blood: Secrets and Lies in a Silicon Valley Startup* (Knopf, 2018).

Charan, Ram and Julia Yang. *The Amazon Management System: The Ultimate Digital Business Engine That Creates Extraordinary Value for Both Customers and Shareholders* (Ideapress Publishing, 2019).

Chayes, Sarah. *On Corruption in America: And What Is at Stake* (Knopf, 2020).

Chayes, Sarah. *Thieves of State: Why Corruption Threatens Global Security* (W.W. Norton & Company, 2016).

Chemerinsky, Erwin. *The Case Against the Supreme Court* (Penguin Books, 2015).

Chemerinsky, Erwin. *We the People: A Progressive Reading of the Constitution for the Twenty-First Century* (Picador, 2018).

Chernow, Ron. *Alexander Hamilton* (Penguin Books, 2005).

Chomsky, Noam. *Profit Over People: Neoliberalism and Global Order* (7 Stories Press, 1998).

Chomsky, Noam. *Requiem for the American Dream: The 10 Principles of Concentration of Wealth & Power* (7 Stories Press, 2019).

Clarke, Richard and Robert Knake. *The Fifth Domain: Defending Our Country, Our Companies, and Ourselves in the Age of Cyber Threats* (Penguin Press, 2019).

Clifford, Steven. *The CEO Pay Machine: How it Trashes America and How to Stop It* (Blue Rider Press, 2017).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Coffee, Jr., John C. *Corporate Crime and Punishment: The Crisis of Underenforcement* (Berrett-Koehler, 2020).
Coffee, Jr., John C. *Entrepreneurial Litigation: Its Rise, Fall and Future* (Harvard University Press, 2015).
Cohen, Adam. *Supreme Inequality: The Supreme Court's Fifty-Year Battle for a More Unjust America* (Penguin Press, 2020).
Cohen, Michael. *Disloyal: A Memoir: The True Story of the Former Personal Attorney to President Donald J. Trump* (Skyhorse, 2020).
Cohen, Ronald. *Impact: Reshaping Capitalism to Drive Real Change* (Ebury, 2020).
Cole, David. *Engines of Liberty: The Power of Citizen Activists to Make Constitutional Law* (Basic Books, 2016).
Collier, Paul. *The Future of Capitalism: Facing the New Anxieties* (Harper, 2018).
Colombo, Ronald J. *The First Amendment and the Business Corporation* (Oxford University Press, 2014).
Comey, James. *A Higher Loyalty: Truth, Lies, and Leadership* (Flat Iron, 2018).
Connaughton, Jeff. *The Payoff: Why Wall Street Always Wins* (Prospecta Press, 2012).
Conti-Brown, Peter. *The Power and Independence of the Federal Reserve* (Princeton University Press, 2016).
Cost, Jay. *A Republic No More: Big Government and the Rise of American Political Corruption* (Encounter Books, 2016).
Cotchett, Joseph W. *The People vs Greed: Stealing America: Main Street vs Wall Street: The Continued Erosion of Ethics in Our Professions, Business, and Government* (Patson Press, 2016).
Crawford, Curtis. *Compliance & Conviction: The Evolution of Enlightened Corporate Governance* (XCEO, Inc., 2006).
Cressman, Derek. *When Money Talks: The High Price of "Free" Speech and the Selling of Democracy* (Berrett-Koehler Publishers, 2016).
Cummine, Angela. *Citizens' Wealth: Why (and How) Sovereign Funds Should be Managed by the People for the People* (Yale University Press, 2016).
Dalrymple, William. *The Anarchy: The East India Company, Corporate Violence, and the Pillage of an Empire* (Bloomsbury, 2019).
Davidow, William. *The Autonomous Revolution: Reclaiming the Future We've Sold to Machines* (Berrett-Koehler Publishers, 2019).
Davis, Gerald. *The Vanishing American Corporation: Navigating the Hazards of a New Economy* (Berrett-Koehler Publishers, 2016).
Davis, John P. *Corporations: A Study of the Origin and Development of Great Business Combinations and of their Relation to the Authority of the State (A Capricorn Giant)* (G.P. Putnam Sons, 1905).
Dayen, David. *Monopolized: Life in the Age of Corporate Power* (The New Press, 2020).
de Tocqueville, Alexis. * *Democracy in America* (University of Chicago Press, 2002).
Dentch, Milton P., and Carol Chubb. *Fall of an Icon: Polaroid after Edwin H. Land: An Insider's View of the Once Great Company* (Riverhaven Books, 2012).
Dieter, Wolfe. *Other Men Will Come: How the Military-Industrial Complex Gained Control of the U.S. Government* (CreateSpace, 2015).
DiIulio, John. *Bring Back the Bureaucrats: Why More Federal Workers Will Lead to Better (and Smaller!) Government (New Threats to Freedom!)* (Templeton Press, 2014).
Dolgon, Corey. *Kill it to Save it: An Autopsy of Capitalism's Triumph over Democracy* (Policy Press, 2017).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Drutman, Lee. *The Business of America is Lobbying: How Corporations Became Politicized and Politics Became More Corporate (Studies in Postwar American Political Development)* (Oxford University Press, 2017).

Edmans, Alex. *Grow the Pie: How Great Companies Deliver Both Purpose and Profit* (Cambridge University Press, 2020).

Ehrenreich, John. *Third Wave Capitalism: How Money, Power, and the Pursuit of Self-Interest Have Imperiled the American Dream* (Cornell University Press, 2016).

Eisinger, Jesse. *The Chickenshit Club: Why the Justice Department Fails to Prosecute Executives* (Simon & Schuster, 2017).

Enrich, David. *Dark Towers: Deutsche Bank, Donald Trump, and an Epic Trail of Destruction* (Custom House, 2020).

Estes, Ralph. *Fight the Corpocracy, Take Back Democracy: A Mad as Hell Guide for the 99%*. Foreword by Ralph Nader (BookBaby, 2011).

Executive Office of the President. *Economic Report of the President 2018: Transmitted to the Congress January 2018: Together with the Annual Report of the Council of Economic Advisers* (Washington, DC: Government Printing Office, 2018).

Ferguson, Charles. *Predator Nation: Corporate Criminals, Political Corruption, and the Hijacking of America* (Currency, 2013).

Fierstein, Ronald K. *A Triumph of Genius: Edwin Land, Polaroid, and the Kodak Patent War* (Ankerwycke, 2015).

Foner, Eric. *The Second Founding: How the Civil War and Reconstruction Remade the Constitution* (W. W. Norton & Company, 2019).

Foroohar, Rana. *Makers and Takers: The Rise of Finance and Fall of American Business* (Currency, 2016).

Friedman, Milton. *Capitalism and Freedom* (University of Chicago Press, 2002).

Frum, David. *Trumpocalypse: Restoring American Democracy* (Harper, 2020).

Frum, David. *Trumpocracy: The Corruption of the American Republic* (Harper 2018).

Garratt, Bob. *Stop the Rot: Reframing Governance for Directors and Politicians* (Routledge, 2017).

Gasparino, Charles. *Bought and Paid For: The Hidden Relationship Between Wall Street and Washington* (Portfolio, 2012).

Gehl, Katherine M., et al. *The Politics Industry: How Political Innovation Can Break Partisan Gridlock and Save Our Democracy* (Harvard Business School, 2020).

Gilder, George. *Life After Google: The Fall of Big Data and the Rise of the Blockchain Economy* (Regnery, 2018).

Gingrich, Newt. *Trump's America: The Truth about Our Nation's Great Comeback* (Center Street, 2018).

Giridharadas, Anand. *Winners Take All: The Elite Charade of Changing the World* (Knopf, 2018).

Giroux, Gary. *Executive Compensation: Accounting and Economic Issues* (Business Expert Press, 2018).

Gourevitch, Peter and James Shinn. *Political Power and Corporate Control: The New Global Politics of Corporate Governance* (Princeton University Press, 2007).

Gramm, Jeff. *Dear Chairman: Boardroom Battles and the Rise of Shareholder Activism* (Harper Business, 2016).

Grayling, A.C. *Democracy and Its Crisis* (OneWorld Publications, 2017).

Greenfield, Kent. *The Failure of Corporate Law: Fundamental Flaws and Progressive Possibilities* (University of Chicago Press, 2007).

Greenspan, Alan, and Adrian Wooldridge. *Capitalism in America: A History* (Penguin Press, 2018).

Gryta, Thomas, and Ted Mann. *Lights Out: Pride, Delusion, and the Fall of General Electric* (HMH Books, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Hacker, Jacob, and Paul Pierson. *American Amnesia: How the War on Government Led Us to Forget What Made America Prosper* (Simon & Schuster, 2016)
Hacker, Jacob, and Paul Pierson. *Winner-Take-All Politics* (Simon & Schuster, 2011).
Haidt, Jonathan. *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (Vintage, 2013).
Hamilton, Alexander. * *The Federalist Papers with the United States Constitution: The Eighty-Five Federalist Articles and Essays, Complete and Unabridged* (CreateSpace, 2018).
Handlin, Oscar. *Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774–1861* (Oxford University Press, 1947).
Hartmann, Thomas. *The Hidden History of Monopolies: How Big Business Destroyed the American Dream* (Berrett-Koehler, 2020).
Hartmann, Thomas. *The Hidden History of the Supreme Court and the Betrayal of America* (Dreamscape Media, 2019).
Hasen, Richard. *Plutocrats United: Campaign Money, the Supreme Court, and the Distortion of American Elections* (Yale University Press, 2016).
Heinberg, Richard. *The End of Growth: Adapting to Our New Economic Reality* (New Society Publishers, 2011).
Henderson, Rebecca. *Reimagining Capitalism in a World on Fire* (Public Affairs, 2020).
Hertel-Fernandez, Alex. *State Capture: How Conservative Activists, Big Businesses, and Wealthy Donors Reshaped the American States – and the Nation* (Oxford University Press, 2019).
Hettena, Seth. *Trump/Russia: A Definitive History* (Melville House, 2018).
Hirsh, Michael. *Capital Offense: How Washington's Wise Men Turned America's Future Over to Wall Street* (Wiley, 2010).
Holdsworth, John Thom. *The First and Second Banks, of the United States* (Wentworth Press, 2019).
Hollis-Brusky, Amanda. *Ideas with Consequences: The Federalist Society and the Conservative Counterrevolution (Studies in Postwar American Political Development)* (Oxford University Press, 2015).
Hurst, James Willard. *The Legitimacy of the Business Corporation in the Law of the United States, 1780–1970* (University of Virginia Press, 2015).
Isaac, Volcker, et al. *Senseless Panic: How Washington Failed America* (Wiley, 2012).
Isikoff, Michael, and David Corn. *Russian Roulette: The Inside Story of Putin's War on America and the Election of Donald Trump* (Twelve, 2018).
Jarrett, Greg. *The Russia Hoax: The Illicit Scheme to Clear Hillary Clinton and Frame Donald Trump* (Broadside Books, 2018).
Jeffries, Jr., John C. *Justice Lewis F. Powell, Jr*. (Scribner, 1994).
Jenkins, John A. *The Partisan: The Life of William Rehnquist* (Public Affairs, 2012).
Johnston, Robert D. *The Radical Middle Class: Populist Democracy and the Question of Capitalism in Progressive Era Portland, Oregon* (Princeton University Press, 2006).
Kahneman, Daniel. *Noise: A Flaw in Human Judgment* (Little, Brown Spark, 2021).
Kaiser, Robert G. *So Damn Much Money: The Triumph of Lobbying and the Corrosion of American Government* (Vintage, 2010).
Kaplan, David A. *The Most Dangerous Branch: Inside the Supreme Court's Assault on the Constitution* (Crown, 2018).
Kelton, Stephanie. *The Deficit Myth: Modern Monetary Theory and the Birth of the People's Economy* (Public Affairs, 2020).
Kendzior, Sarah. *Hiding in Plain Sight: The Invention of Donald Trump and the Erosion of America* (Flatiron Books, 2020).
Klarman, Michael J. *The Framers' Coup: The Making of the United States Constitution* (Oxford University Press, 2020).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Koch, Charles G., and Brian Hooks. *Believe in People: Bottom-Up Solutions for a Top-Down World* (St. Martin's Press, 2020).
Korten, David. *When Corporations Ruled the World*, 20th Anniversary Edition (Barrett-Koehler, 2015).
Kotz, David. *The Rise and Fall of Neoliberal Capitalism* (Harvard University Press, 2015).
Kuhner, Timothy. *Money in Politics and the Free Market Constitution Capitalism v. Democracy* (Stanford Law Books, 2015).
Kuhner, Timothy. *Capitalism v. Democracy: Money in Politics and the Free Market Constitution* (Stanford Law Books, 2014).
Kuttner, Robert. *Can Democracy Survive Global Capitalism?* (W. W. Norton & Company, 2018).
Lapham, Lewis H. *Age of Folly: America Abandons Its Democracy* (Verso, 2016).
Leamer, Laurence. *The Price of Justice: A True Story of Greed and Corruption* (St. Martin's Griffin, 2014).
Lemann, Nicholas. *Transaction Man: The Rise of the Deal and the Decline of the American Dream* (Farrar, Straus and Giroux, 2019).
Leonard, Christopher. *Kochland: The Secret History of Koch Industries and Corporate Power in America* (Simon & Schuster, 2019).
Lepore, Jill. *These Truths: A History of the United States* (W.W. Norton, 2018) *This America: The Case for the Nation* (Liveright, 2019).
Lessig, Lawrence. *America, Compromised* (University of Chicago Press, 2018).
Lessig, Lawrence. *They Don't Represent Us: Reclaiming Our Democracy* (Dey Street Books, 2018).
Levitsky, Steven, and Daniel Ziblatt. *How Democracies Die* (Crown, 2019).
Lewis, Hunter. *Crony Capitalism in America: 2008–2012* (AC2 Books, 2013).
Lind, Michael. *The New Class War: Saving Democracy from the Managerial Elite* (Portfolio, 2020).
Lofgren, Mike. *The Deep State: The Fall of the Constitution and the Rise of a Shadow Government* (Viking, 2016).
Lynn, Barry C. *Cornered: The New Monopoly Capitalism and the Economics of Destruction* (Wiley, 2011).
Lynn, Barry C. *Liberty from All Masters: The New American Autocracy vs. the Will of the People* (St. Martin's Press, 2020).
MacGillis, Alec. *The Cynic: The Political Education of Mitch McConnell* (Simon & Schuster, 2014).
MacLean, Nancy. *Democracy in Chains: The Deep History of the Radical Right's Stealth Plan for America* (Viking, 2017).
Maddow, Rachel, and Michael Yarvitz. *Bag Man: The Wild Crimes, Audacious Cover-Up, and Spectacular Downfall of a Brazen Crook in the White House* (Crown, 2020).
Madrick, Jeff. *Age of Greed: The Triumph of Finance and the Decline of America, 1970 to the Present* (Knopf, 2011).
Maggor, Noam. *Brahmin Capitalism: Frontiers of Wealth and Populism in America's First Gilded Age* (Harvard University Press, 2017).
Mander, Jerry. *The Capitalism Papers: Fatal Flaws of an Obsolete System* (Counterpoint, 2012).
Mayer, Colin. *Firm Commitment: Why the Corporation Is Failing Us And How To Restore Trust In It* (Oxford University Press, 2014).
Mezrich, Ben. *Bitcoin Billionaires: A True Story of Genius, Betrayal, and Redemption* (Flatiron Books, 2019).
Micklethwait, John. *The Fourth Revolution: The Global Race to Reinvent the State* (Penguin Press, 2015).
Midanek, Deborah. *The Governance Revolution: What Every Board Member Needs to Know, NOW! (The Alexandra Lajoux Corporate Governance Series)* (De/G Press – DeGruyter, 2018).
Monks, Robert A. G. *Citizens DisUnited: Passive Investors, Drone CEOs and the Corporate Capture of the American Dream* (Miniver Press, 2013).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Monks, Robert A. G. *Corpocracy: How CEOs and the Business Roundtable Hijacked the World's Greatest Wealth Machine – And How to Get It Back* (Wiley, 2007).
Monks, Robert A. G. *Corporate Governance, Fifth Edition*, with Nell Minow (Wiley, 2011).
Monks, Robert A. G. *Corporate Valuation for Portfolio Investment: Analyzing Assets, Earnings, Cash Flow, Stock Price, Governance, and Special Situations*, with Alexandra Lajoux (Bloomberg, 2010).
Monks, Robert A. G. *The Emperor's Nightingale: Restoring Corporate Integrity in the Age of Shareholder Activism* (Capstone and Addison-Wesley, 1998).
Monks, Robert A. G. *The New Global Investors* (Capstone, 2001).
Monks, Robert A. G. *Power and Accountability* (Harper Business, 1991).
Monks, Robert A. G. *Watching the Watchers: Corporate Governance for the 21st Century*, with Nell Minow (Wiley, 1996).
Mitchell, Cleta Deatherage. *Setting Limits: The Truth about Why Congress Defeated the Term Limits and Balanced Budget Amendments in 1995 (*Americans Back in Charge Foundation, 1996).
Mizruchi, Mark S. *The Fracturing of the American Corporate Elite* (Harvard University Press, 2013).
Morris, Charles. *Tesla Motors: How Elon Musk and Company Made Electric Cars Cool, and Remade the Automotive and Energy Industries* (Charles Morris, 2020).
Nader, Ralph. *Corporate Power in America* with Mark Green (Grossman Publishers, 1973).
Nader, Ralph. *Getting Steamed to Overcome Corporatism* (Common Courage Press, 2011).
National Commission on The Causes of The Financial And Economic Crisis In The United States, *The Financial Crisis Inquiry Report* (U.S. Government Printing Office, 2011).
Noetzel, Sigmund. *Your Ignorance is our Strength: The Supreme Court Overrules Democracy* (Faulcourt Press, 2016).
Norman, Jesse. *Adam Smith: Father of Economics* (Basic Books, 2018).
Lamoreaux, Naomi R., and William J. Novak *Corporations and American Democracy* (Harvard University Press, 2017).
Obama, Barack. *A Promised Land* (Crown, 2020).
O'Brien, Brian. *The Tyranny of the Federal Reserve* (Create Space, 2015).
O'Connor, James R. *The Corporations and the State: Essays in the Theory of Capitalism and Imperialism* (Harper Collins, 1974).
Oller, John. *White Shoe: How a New Breed of Wall Street Lawyers Changed Big Business and the American Century* (Dutton, 2019).
Osnos, Evan. *Joe Biden: The Life, the Run, and What Matters Now* (Scribner, 2020).
Paul, Ron. *End the Fed* (Grand Central Publishing, 2009).
Pearlstein, Steven. *Moral Capitalism: Why Fairness Won't Make Us Poor* (St. Martin's Griffin, 2020).
Perkins, John. *The Secret History of the American Empire: The Truth About Economic Hit Men, Jackals, and How to Change the World* (Plume, 2008 reprint ed.).
Perrow, Charles. *Organizing America: Wealth, Power, and the Origins of Corporate Capitalism* (Princeton University Press, 2005).
Philippon, Thomas. *The Great Reversal: How America Gave Up on Free Markets* (Belknap Press, 2019).
Piketty, Thomas, and Arthur Goldhammer (translator from the French). *Capital and Ideology* (Harvard University Press, 2020).
Plender, John. *Capitalism: Money, Morals, and Markets* (Biteback Publishing, 2016).
Potter, Wendell. *Nation on the Take: How Big Money Corrupts Our Democracy and What We Can Do About It* (Bloomsbury Press, 2017).
Price, Ben. G., *How Wealth Rules the World: Saving Our Communities and Freedoms from the Dictatorship of Property* (Berret Kohler Publishers, 2019).
Prins, Nomi. *All the Presidents' Bankers: The Hidden Alliances that Drive American Power* (Nation Books, 2014).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Prins, Nomi. *Collusion: How Central Bankers Rigged the World* (Bold Type Books, 2018).
Rajan, Raghuram. *The Third Pillar: How Markets and the State Leave the Community Behind* (Penguin Press, 2019).
Rakoff, Jed S. *Why the Innocent Plead Guilty and the Guilty Go Free: And Other Paradoxes of Our Broken Legal System* (Farrar, Straus and Giroux, 2021).
Rappaport, Alfred, with foreword by John C. Bogle. *Saving Capitalism from Short-Termism: How to Build Long-Term Value and Take Back Our Financial Future* (McGraw-Hill, 2011).
Reads, Cliff. *Summary: The Soul of America: The Battle for Our Better Angels Prosperity: Better Business Makes the Greater Good* (Oxford University Press, 2021).
Reich, Robert B. *Beyond Outrage: Expanded Edition: What Has Gone Wrong with Our Economy and Our Democracy, and How To Fix It* (Knopf Doubleday Publishing Group, 2012).
Reich, Robert B. *Saving Capitalism: For the Many, Not the Few The System: Who Rigged It, How We Fix It* (Vintage, 2015).
Rendtorff, Jacob Dahl. *Responsibility, Ethics and Legitimacy of Corporations* (Copenhagen Business School, 2009).
Rhodes, Ben. *The World as It Is: A Memoir of the Obama White House* (Random House, 2018).
Richardson, Heather. *How the South Won the Civil War: Oligarchy, Democracy, and the Continuing Fight for the Soul of America* (Oxford University Press, 2020).
Rockwell, Llewellyn. *Fascism versus Capitalism* (Ludwig von Mises Institute, 2013).
Rose-Ackerman, Susan. *Corruption and Government: Causes, Consequences, and Reform* (Cambridge University Press, 1999).
Rosen, Jeffrey. *Louis D. Brandeis: American Prophet (Jewish Lives)* (Yale University Press, 2016).
Rothkopf, David. *Power, Inc.: The Epic Rivalry Between Big Business and Government – and the Reckoning That Lies Ahead* (Farrar, Straus and Giroux, 2016).
Rothkopf, David. *Traitor: A History of American Betrayal from Benedict Arnold to Donald Trump* (Thomas Dunne Books, 2020).
Seward, Brice. *A Treatise on the Doctrine of Ultra Vires: Being an Investigation of the Principles Which Limit the Capacities, Powers, and Liabilities of Corporations, and More Especially of Joint Stock Companies* (FB&C, Ltd., 2017 reprint ed.).
Shaxson, Nicholas. *The Finance Curse: How global finance is making up all poorer* (Grove Press, 2019).
Simpson, Glen, and Peter Fritsch. *Crime in Progress: Inside the Steele Dossier and the Fusion GPS Investigation of Donald Trump* (Random House, 2019)
Singer, Thomas. *Cultural Complexes and the Soul of America: Myth, Psyche, and Politics* (Routledge, 2020).
Sirota, David. *Hostile Takeover: How Big Business Bought Our Government and How We Can Take It Back* (Crown, 2006).
Sitaraman, Ganesh. *The Great Democracy: How to Fix Our Politics, Unrig the Economy, and Unite America* (Basic Books, 2019).
Skeel, David. *Icarus in the Boardroom: The Fundamental Flaws in Corporate America and Where They Came From* (Oxford University Press, 2006).
Smith, Hedrick. *Who Stole the American Dream?* (Random House, 2013).
Sorkin, Andrew Ross. *Too Big to Fail: The Inside Story of How Wall Street and Washington Fought to Save the Financial System – and Themselves* (Penguin Books, 2010).
Soros, George. *In Defense of Open Society* (Public Affairs, 2019).
Srinivasan, Bhu. *Americana: A 400-Year History of American Capitalism* (Penguin Press, 2017).
Standing, Guy. *The Corruption of Capitalism: Why Rentiers Thrive and Work Does Not Pay* (Biteback Publishing, 2021).

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Stevens, John Paul. *Six Amendments: How and Why We Should Change the Constitution* (Little, Brown, and Company, 2014).
Stewart, James B. *Deep State: Trump, the FBI, and the Rule of Law* (Penguin Press, 2019).
Stiglitz, Joseph E. *People, Power, and Profits: Progressive Capitalism for an Age of Discontent* (W. W. Norton & Company, 2019).
Stoller, Matt. *Goliath: The 100-Year War Between Monopoly Power and Democracy* (Simon & Schuster, 2019).
Stout, Lynn A. *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (Berrett-Koehler Publishers, 2012).
Stout, Lynn A. *Citizen Capitalism: How a Universal Fund Can Provide Influence and Income to All* (Berrett-Koehler Publishers, 2019).
Streeck, Wolfgang. *How Will Capitalism End?: Essays on a Failing System* (Verso, 2016).
Streeck, Wolfgang. *Buying Time: The Delayed Crisis of Democratic Capitalism* (Verso, 2017).
Suarez-Villa, Luis. *Corporate Power, Oligopolies, and the Crisis of the State* (State University of New York, Press, 2016).
Taub, Jennifer. *Big Dirty Money: The Shocking Injustice and Unseen Cost of White Collar Crime* (Viking, 2020).
Teachout, Zephyr. *Break'Em Up (Recovering Our Freedom from Big AG, Big TECH and Big MONEY* (All Points Books, 2020).
Teachout, Zephyr. *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United* (Harvard University Press, 2016).
Tett, Gillian. *Anthro-Vision: A New Way to See in Business and Life* (Simon & Schuster, 2021).
Tobe, Chris. *Kentucky Fried Pensions 2018* (CreateSpace, 2013).
Tombs, Steve and David Whyte. *The Corporate Criminal (Why Corporations Must be Abolished – Key Ideas in Criminology)* (Routledge, 2015).
Toobin, Jeffrey. *True Crimes and Misdemeanors: The Investigation of Donald Trump* (Doubleday, 2020).
Toobin, Jeffrey. *The Nine: Inside the Secret World of the Supreme Court* (Anchor, 2008).
Tooze, Adam. *Crashed: How a Decade of Financial Crises Changed the World* (Viking, 2018).
Torres-Spelliscy, Ciara. *Corporate Citizen? An Argument for the Separation of Corporation and State* (Carolina Academic Press, 2016).
Tribe, Laurence. *Uncertain Justice: The Roberts Court and the Constitution* with Joshua Matz (Picador, 2015).
Trump, Mary L. *Too Much and Never Enough: How My Family Created the World's Most Dangerous Man* (Simon and Schuster, 2020).
Tudway, Richard. *The Looming Corporate Calamity: Restoring Corporate Legitimacy* (Centre for International Economics Ltd., 2014).
Turner, Adair. *Between Debt and the Devil: Money, Credit, and Fixing Global Finance* (Princeton University Press, 2015).
Turner, William Bennett. *Free Speech for Some: How the Supreme Court Is Weaponizing the First Amendment to Empower Corporations and the Religious Right* (Roaring Forties Press, 2019).
Valsan, Calin. *The Nature of the Corporation: A Tale of Economic Complexity* (CreateSpace, 2016)
Van Biljon, Peet, and Alexandra Lajoux. *Making Money: The History and Future of Society's Most Important Technology* (De Gruyter, 2020).
Vianello, Mino. *A Psychoanalytical-Historical Perspective on Capitalism and Politics* (Routledge, 2020).
Wallerstein, Immanuel. *Does Capitalism Have a Future?* (Oxford University Press, 2013).
Wedel, Janine. *Unaccountable: How Elite Power Brokers Corrupt our Finances, Freedom, and Security* (Pegasus Books, 2014).

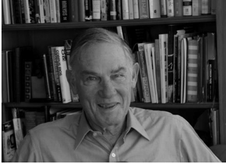
EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Whitehouse, Sheldon, and Melanie Wachtell Stinnett. *Captured: The Corporate Infiltration of American Democracy* (The New Press, 2017).
Wilentz, Sean. *No Property in Man: Slavery and Antislavery at the Nation's Founding (The Nathan I. Huggins lectures Book 18)* (Harvard University Press, 2018).
Wilkinson, J. Harvie. *Serving Justice: A Supreme Court Clerk's View* (Charterhouse, 1974).
Wilks, Stephen. *The Political Power of the Business Corporation* (Edward Elgar, 2013).
Wilmarth Jr., Arthur E. *Taming the Megabanks: Why We Need a New Glass-Steagall Act* (Oxford University Press, 2020).
Winkler, Adam. *We the Corporations: How American Businesses Won Their Civil Rights* (Liveright, 2018).
Wolff, Michael. *Fire and Fury: Inside the Trump White House* (Henry Holt & Co., 2018) *Siege: Trump Under Fire* (Henry Holt & Co., 2019).
Wolin, Sheldon. *Democracy Incorporated: Managed Democracy and the Spector of Inverted Totalitarianism* (Princeton University Press, 2010).
Woodard, Colin. *Union: The Struggle to Forge the Story of United States Nationhood* (Viking, 2020).
Woodward, Bob. *Fear: Trump in the White House* (Simon & Schuster, 2018).
Wright, Tom and Bradley Hope. *Billion Dollar Whale: The Man Who Fooled Wall Street, Hollywood, and the World* (Hachette Books, 2018).
Writers of The Atlantic, *The American Crisis: What Went Wrong. How We Recover* (Simon & Schuster, 2020).
Wu, Tim. *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports, 2018).
Yergin, Daniel. *The New Map: Energy, Climate, and the Clash of Nations* (Penguin Press, 2020).
Yosifon, David. *Corporate Friction: How Corporate Law Impedes American Progress and What to Do about It* (Cambridge University Press, 2018).
Youn, Monica. *Money, Politics, and the Constitution: Beyond Citizens United* (The Century Foundation, 2011).
Young, Suzanne. *Institutional Investors' Power to Change Corporate Behavior: International Perspectives (Critical Studies on Corporate Responsibility, Governance and Sustainability)* (Emerald Publishing Limited, 2013).
Zinn, Howard. *A People's History of the United States* (Harper Perennial Modern Classics, 2015).
Zirin, James. *Plaintiff in Chief: A Portrait of Donald Trump in 3,500 Lawsuits* (All Points Books, 2019).
Zuboff, Shoshana. *The Age of Surveillance Capitalism: The Fight for the Future at the New Frontier of Power* (Public Affairs, 2019).

*Publication dates for these reprints of foundational classics by Alexander Hamilton (1755–1805) and Alexis de Tocqueville (1805–1859) are (obviously) posthumous.

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

About the Author



Robert A. G. Monks, a shareholder activist who once waged a high-profile and prophetic proxy fight to save Sears Roebuck by serving on its board, began his career as an attorney and investment banker, but soon entered industry and public service. He served as CEO of Sprague, an old-line oil and gas company and then as director of the United States Synthetic Fuels Corporation under Ronald Reagan. He went on to head the Pension and Welfare Benefits Administration in the Department of Labor, where he was instrumental in the development and impact of the famed Avon letter, which successfully argued that pension fund trustees have a fiduciary duty to vote their proxies actively.

Monks, who makes his primary home in Cape Elizabeth, Maine, ran three Republican primary races to become the state's US Senator, winning the 1976 primary but losing in the general election to popular Democrat Edmund Muskie. His opponents in the other primaries, Margaret Chase Smith and Susan Collins went on to make history as long-serving female senators.

With longtime coauthor Nell Minow, he founded Institutional Shareholder Services (ISS), the first and still the leading proxy advisory service. He has written more than a dozen books on corporate governance, including landmark titles he coauthored with Nell Minow, *Power and Accountability*, and *Corporate Governance*, now in its fifth edition. Also of note are *The Emperor's Nightingale*, the prequel to *The Emperor's Nightmare*; *Corporate Valuation for Portfolio Investment* (with Alexandra Lajoux), and *Citizens Disunited*, an exposé on corporate greed.

https://doi.org/10.1515/9783110696998-017

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

About the Series Editor

Alexandra Reed Lajoux is Series Editor for Walter De Gruyter, Inc. The series has an emphasis on governance, corporate leadership, and sustainability. Dr. Lajoux is chief knowledge officer emeritus (CKO) at the National Association of Corporate Directors (NACD) and founding principal of Capital Expert Services, LLC (CapEx), a global consultancy providing expert witnesses for legal cases. She coauthored *Making Money: The History and Future of Society's Most Important Technology* with Peet van Biljon (Walter de Gruyter, 2020). She has served as editor of *Directors & Boards, Mergers & Acquisitions, Export Today*, and *Director's Monthly*, and has coauthored a series of books on M&A for McGraw-Hill, including *The Art of M&A* and eight spin-off titles on strategy, valuation, financing, structuring, due diligence, integration, bank M&A, and distressed M&A. For Bloomberg/Wiley, she coauthored *Corporate Valuation for Portfolio Investment* with Robert A. G. Monks. Dr. Lajoux serves on the advisory board of Campaigns and Elections, and is a Fellow of the Caux Round Table for Moral Capitalism. She holds a B.A. from Bennington College, a Ph.D. from Princeton University, and an M.B.A. from Loyola University in Maryland. She is an associate member of the American Bar Association.

https://doi.org/10.1515/9783110696998-018

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

Index

28th amendment 151–154, 156–159

accountability XIII, 8, 15–28, 42–43, 59, 88, 96, 122, 144–145, 148, 161, 164, 170
Act of the Sovereign 136
activism XIII, 9–10, 121, 127, 184
activist 10, 44, 77, 81, 127, 141, 164
Administrative Procedure Act 20, 161
agencies 8, 19–20, 27, 32, 34, 45, 61–62, 82, 91, 100, 106, 111, 121, 124, 129–130, 147, 149–150, 161, 173, 177, 184, 189
agriculture 48, 110
amendments (to the US Constitution) 3, 6–7, 11–12, 63, 69, 109, 138–139, 141, 151–154, 156–159
American Bankers Association 48
American corruption 19
American court system 127
American Legislative Exchange Council 93
Americans for Prosperity 94, 97, 101, 105, 114–117, 119

bailouts 36, 86, 152
banks 17, 19, 21–22, 24, 34–36, 44–48, 63, 70, 83–85, 122–126, 130, 147, 171, 174, 187
beneficiaries 27, 36, 39, 43, 47, 162–164, 183
Big Business 3, 12, 21, 30, 41, 62–63
bipartisan efforts 76, 87–88, 114, 118, 126, 152–153, 155
Brexit referendum 80
Bubble Act 136
Business Roundtable 4, 10, 17, 56–57, 60, 62, 75, 91, 130, 143, 169

campaigns XIV, 1, 21, 32, 67, 74, 80, 87–89, 91, 96–97, 102, 105–106, 119, 127, 130–131, 151, 158–159, 178
candidates 1–2, 4, 51, 58, 63, 66–67, 87–89, 97–98, 101–102, 104–105, 120, 127
capital markets 27, 161, 164, 170, 177
capitalism 3, 6, 15, 21, 32–33, 46, 49, 78–79, 129, 170, 178
Citizens for Responsibility and Ethics in Washington 120
civil rights 107, 149
Clean Air Act 15
clean energy 116
Clean Water Act 15, 149
climate 2, 12, 26–27, 43–44, 61, 76–77, 81, 85, 87, 109–118, 120, 127–130, 151, 162, 169–171, 173–178, 183–184, 186–189
climate change 2, 12, 27, 43, 61, 77, 87, 109–115, 117–118, 120, 127–129, 162, 169–171, 173–175, 177, 184, 186–187
Chamber of Commerce (US) 1–4, 13, 16–18, 33, 56, 68–71, 91, 94
Commodities Futures and Trading Commission 23
Commodity Futures Modernization Act 23
Communist 107
compensation XIV, 26, 40, 49–60, 67, 87, 129, 142, 165–166, 173, 177
competitiveness 28, 31, 80, 87, 102–103, 144, 147, 174, 186
conflicts of interest 9, 27, 125, 161, 163, 171, 181–182
Congress (US) XIV–XV, 4–6, 9, 12, 15, 17, 19, 23, 25, 32, 37, 43, 52, 69–70, 109, 113, 117–118, 120, 124–125, 130, 132, 141, 153, 155, 157–159
Congressional Review Act 70
Consumer Product Safety Commission 15, 177
conspiracy 107, 110, 113, 116, 118, 120, 123
Constitution (US) XV, 6–7, 30, 64, 71, 109, 137–139, 145, 151–154, 157–159, 161, 167, 181
Constitutional framework XV, 154
consulting companies 4
consumers 2, 10, 15–18, 21, 104, 142, 177–178, 185, 188
consumer protection 10, 17–18, 21
consumerism 18
contribution 40, 70, 88
Corpocracy 60, 63
Corporate America 15, 18, 20–21, 33, 57, 62, 66, 68–69
corporate hegemony 3, 6, 64, 71, 75–77
corporate power 1, 9, 11, 24, 30, 34, 37, 63, 91, 96, 113, 116, 122, 134, 136–138, 141, 148
corporate system XIII–XIV, 8, 143
corporation law 7, 141
corporations XIII–XV, 2–4, 6–7, 9, 11–13, 15–16, 25, 28, 31, 33, 37, 39, 41, 43,

https://doi.org/10.1515/9783110696998-019

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

49–50, 54, 60–68, 71–72, 75, 77, 79, 81, 84, 86, 94, 96, 120–121, 126–128, 130–134, 136–144, 146–154, 158–159, 169, 171, 185–186, 188
cost-benefit analysis 165, 167
crisis 12, 25, 31, 36, 41, 47, 55, 70, 74, 79, 82–83, 85, 98, 111, 114, 132, 134, 147, 189

data collection 11, 40, 57, 61, 68, 73, 104–105, 111, 113, 121, 126, 128–129, 156, 164, 167, 169–172, 174, 176, 184–187
Davos XIV, 75–84, 86, 94, 107, 121, 126, 132
de-nationalization 134
debate 12, 62, 76, 106–107, 158
democracy XIV, 3, 7–8, 11, 15, 47, 74, 86, 107–108, 110, 112, 114, 116, 118, 120–121, 125, 132–133, 151–154, 159
democrat 21, 60, 62, 87, 100, 113
Department of Justice 24, 82, 131
deregulation 21, 25, 93–94
Development 26, 73, 75, 112–113, 123, 164, 185–186
disclosure 27, 44, 58, 66–67, 119, 129, 148, 162, 167, 170–171, 173–174, 176–178, 182, 185–190
disenfranchisement 156

economic crisis 47, 82
economic indicators 86
economy 8–9, 16–17, 27, 31–32, 34, 36, 39, 43, 45, 49, 74, 77, 94–95, 108, 110, 112, 115, 131–132, 139, 142, 146, 161–162, 189
educational institutions 4
Employee Retirement Income Security Act 39
employment rate 86
environment XIII, 72, 79, 97, 112, 115–116, 120, 127–128, 153, 183, 185
environmental degradation 15
environmental laws 127
environmental regulation 79
environmental 15, 20, 25–26, 44, 61, 70, 79, 98–102, 111, 115–116, 121, 127–129, 142, 148, 170, 173–174, 183–184, 186, 190
EPA 15, 19–20, 26, 99–101, 109, 116, 149, 177, 186
equity 36, 44, 46, 130–132, 145, 185, 189
executives 9, 24–25, 29, 33, 35–36, 46, 49–50, 53, 56–57, 76, 81–82, 84–86, 91, 94, 98, 111–112, 128–130, 142, 164, 170, 175, 177, 181, 184
ExxonMobil XIV–XV, 10, 12, 112, 127, 130, 169, 178

Federal Communications Commission 20, 66
Federal Corporation Act 141, 145, 147–150
Federal Reserve 23, 31, 35, 40, 44–47, 59
Federal Reserve Act 31
Federal Trade Commission 20, 131
Federal Water Pollution Control Act 15
fees 23, 46–48, 58, 62, 72, 84, 122, 146, 163, 185
fiduciary 9, 27, 52, 64, 100, 145, 162–164, 166, 181–183, 186, 190
finance capitalism 6
financial crisis 12, 25, 36, 70, 74, 83, 85, 114, 134, 147
financial risk 171, 189
financial sector 12, 34, 82, 124, 174, 187
Financial Stability Board 171
fraud 24–25, 33, 36, 45, 83, 123, 125, 165
freedom 2, 11, 19, 26, 33, 70, 94, 102, 104–107, 109, 119,131
Freedom of Speech 11, 131

gains 15, 46, 86, 132, 157
Gallup poll 1, 117
Glass-Steagall Act 22, 31, 34, 36, 86
global pandemic 78
globalists 77
governance XIII, XV, 3, 10, 19, 44, 56, 58–59, 72, 79, 121, 123, 127–129, 132, 138, 141–148, 150, 153, 164–165, 170, 173–174, 181, 185, 187, 190
Goldman Sachs 22–23, 34–36, 44, 47, 63, 82, 122–123, 125, 147–149
government 1, 3–5, 7–8, 15, 17–20, 22–24, 28, 30–35, 39, 43, 48, 60, 62–64, 68, 79, 81, 83, 85, 92–94, 96, 100, 102–107, 109–110, 114–116, 121–123, 126, 128, 132–134, 137–139, 141, 150, 152, 158–159, 170, 172, 177, 181, 189
– Federal government (US) 8, 15, 18–19, 22, 31, 39, 48, 62, 93, 100, 103, 121, 139, 189
– Government Accountability Office 23
– government entities 83
– government expenditures 19

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

– government regulations 79
– Reagan government 20
– US government 35, 48, 107
grassroots organizations 92
Great Depression 16, 30, 35, 46, 82
Great Recession 24
Gross Domestic Product 49

health 15, 20, 37, 41–42, 48, 50, 54, 61, 65–66, 79, 84–85, 111, 184
hegemony 3, 6, 26, 63–64, 71, 75–77
hyper-partisan 118

IMF 77, 80
impeachment 136–137
infrastructure 25, 56, 96, 137
Institutional Shareholder Services XIII, 126, 130, 166, 175, 188
International Financial Reporting Standards Foundation 129
International Integrated Reporting Council 171
International Sustainability Standards Board 129
investment 1–2, 9, 15, 22, 24, 31, 34–36, 44–45, 63, 83, 100, 117, 124–126, 128–130, 170–172, 174–178, 182–190
investments 8, 27, 67, 123, 175, 181, 183, 185–186
investors 37, 44, 48, 52, 127–129, 136, 144–145, 148, 164–166, 169–178, 183–184, 187–190

JPMorgan 44, 46–47, 73, 79, 82–85, 122–125
judicial 7, 14, 65, 93, 141, 151, 153, 155
justice 3, 6–8, 11, 13–14, 24–26, 30, 34, 42, 60, 62–67, 82–86, 89, 94, 100, 103, 105, 109, 122–123, 131, 138–139, 141, 149, 151, 153, 155, 184
Justice Department (US) 25, 34, 83–86, 100, 103, 122–123, 149, 155

keiretsu 133

Labor Department 26, 34
labor union 37
lawmakers 109–110, 117–121, 124
laws 7–8, 15, 20–21, 25, 28, 34, 38–39, 84–85, 90–91, 93, 96, 106, 108, 112, 119, 122, 127, 129, 138–139, 141, 146–149, 155, 157–158
leaders XIV, 1, 9–10, 16, 18, 32–33, 44, 62, 76–81, 102, 153
leadership 13, 55, 59, 62, 71, 74–75, 92, 100, 148, 172
libertarian 91–93, 96, 99, 102–106, 108–109, 115, 140
Libertarian Party 104, 140
libertarianism 92, 103, 107
litigation XIII, 69, 145, 150, 162, 175, 182
lobbying 2, 4–5, 17, 62, 69–70, 92, 106, 124, 153, 178, 185
lobbyist 4, 26, 69, 113, 178
lobbyists 2, 4–5, 18, 20, 27, 37, 41, 43, 63, 82, 131, 162
local chambers 2

management 3, 9–10, 20, 25–26, 36, 41, 49, 59, 62, 64, 72–73, 75, 97–98, 103, 128, 133, 135, 162–164, 170, 173–175, 181, 186–188, 190
media 2, 6, 41, 43, 66, 76–77, 94, 104, 108–109, 113–114, 118, 125, 183, 187
mission 2, 26, 55, 93, 131, 162, 175, 187
monopolies 34, 130

National Rural Lenders Association 48
New Efficiency 37
non-profits 6, 97, 101, 129

Occupational Safety and Health Administration 15
OSHA 20, 25–26, 98, 177, 184
ownership 8–10, 15, 46, 56, 59, 66, 127–129, 144–145, 148, 162–163, 165, 173, 181–182

pandemic 12, 27, 50, 78, 122, 161, 173
Paperwork Reduction Act 161, 165
pensions 9, 27, 37, 39–41, 53–55, 58, 128, 161–164, 166–167, 171, 174–175, 181–187, 189–190
pension fund fiduciaries 161–162, 183
performance XIV, 8, 32, 46, 50, 55, 59, 72, 75, 125, 127–128, 145, 149, 171, 173–175, 186–188
platforms 78, 91, 104, 115
policies 35, 39, 41, 44, 61–62, 109–110, 129, 172–174, 176, 182, 187
Politics XIV–XV, 2–4, 12, 16–18, 21, 27, 36, 38–39, 43, 53, 63–64, 66–68, 70–71,

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use

75–77, 82, 87–89, 91–92, 94, 96–102, 105, 107–108, 110, 112–115, 117, 119–122, 124, 129, 133–138, 140–141, 150–154, 157–159, 162, 173, 183, 185
– political groups 87
– political influence 88
– political system 63, 67, 75, 87–89, 107, 154, 158–159
– social-political spectrum 4
politicians 6, 43, 47, 75–77, 89, 92, 115, 117, 124
population 19–20, 31, 40–41, 116–117, 146, 156, 158
populists 82
Powellism 6, 76
private companies 19, 178
production 8, 37, 74, 96, 99, 127, 133, 148
profit XIV, 8, 10–11, 26, 31–33, 41, 56, 60, 62, 64–65, 67, 71–74, 97–98, 101, 103, 129, 135, 147–149
prosecution XIV, 65, 73, 83–86, 123–124
proxy 27, 44, 87, 126, 130, 143, 161–167, 169, 172, 177, 181–182
public hearings 27, 117, 161
public relations 82

racial issues 44, 114, 118, 154–155, 172, 185, 189
regulations 8, 19–20, 22, 26–28, 34, 39, 70, 79, 92, 100, 111–112, 135, 148, 158, 167, 181
regulatory system XIV, 7–8, 15, 20–21, 26–32, 69, 82–83, 91, 99–100, 102, 121, 124, 130–131, 147–149, 161–162, 165, 167, 170, 176–177, 184, 186
regulatory bureaucracies 15
Republican candidates 1, 97–98, 120
right-wing elements 92–93, 96–97, 108, 114, 118
rulemaking 69, 163, 165, 167, 169–170, 177, 190

Sacred Nine 13
safety 15, 20, 25, 28, 32, 37, 72, 79, 98–100, 102, 177, 184
safety standards 20, 37
securities 8, 24–26, 31, 44–45, 85–86, 91, 124–125, 142, 146–147, 165, 169, 183
Securities and Exchange Commission 8, 31, 91, 169
Securities Exchange Act 31, 86, 142
shareholders XIII–XV, 3, 8–11, 19, 25–27, 31–32, 37, 44, 49–50, 52, 59, 64, 66, 72, 84, 95, 121–124, 126–128, 130, 132, 135, 137, 141, 143–146, 148–149, 151, 161, 162, 164, 166, 169, 170–171, 174, 175, 181, 183, 188, 190
– public shareholders 19
– shareholder control 11
Social Security 16, 18, 23, 39, 52
State Policy Network 93, 102
supply chains 173
surveillance 104–105, 142
sustainability 129, 171, 173, 186, 189
Sustainability Accounting Standards Board 171

Task Force on Climate-Related Financial Disclosure 171
taxpayers 19, 21, 35, 44, 116, 149
Tea Party 114–120, 137
transparency 2, 27, 66, 70, 125, 161, 164, 170, 174, 177–178, 187
Treasury (US) 22–23, 27, 35–36, 47, 60, 64, 78, 151, 162, 173, 189

US Constitution 6, 64, 137, 151–153
US law 15
US media 76
US Supreme Court XIV, 3, 7, 30, 43, 63, 66, 158
US Trade Representative 35

Vigilant Resources International 105
violations 20, 25, 97–102, 109, 129, 148–149, 173
violence 36, 118–119, 121
voter registration 156
voters 4, 8, 23, 47, 60, 104–105, 117, 152–157
Voting Rights Act 15, 155–158

wealth XIV, 9, 12, 43, 49, 88, 90, 106, 109, 135, 138, 141, 14
whistleblower 83, 129, 131, 142, 173
workers 16–17, 25, 37–38, 40, 42, 50–51, 59, 74, 76, 79, 87, 88
World Economic Forum 76–80

zeitgeist 12

EBSCOhost - printed on 2/8/2023 12:49 PM via . All use subject to https://www.ebsco.com/terms-of-use