

Corporate Power and Individual Freedom: Some General Analysis and Particular Reservations

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THE political sociology of the business corporation hardly sounds promising as a topic for popular, or even semi-popular, consumption. But in the last few years, a stream of more or less scholarly literature on the subject has caught the fancy of the public in an astonishing way—some of it even rising to the dizzy heights of paperbackdom.¹ Not all these works are in full agreement, nor are they identical in emphasis. They are close enough together, however, to permit a composite to be drawn of their view of the world of the big company and the individual.

Corporations are big and growing bigger. Shareholders have been disenfranchised and no longer control these corporations. Control now rests in the hands of some 500 or 1,000 professional managers, members of a self-perpetuating power elite, who do not themselves have great property holdings. These men are accountable to no one for their vast power. Though this is obviously a dangerous situation, matters are not yet immediately critical. This is partly because the managers of the corporations are to some extent curbed by the looming presence of other organizations with countervailing power. In part they are curbed by general public opinion, by law, and their own internal desire to be good citizens. Perhaps the growing pension and mutual funds will step in with their new big blocks of stock to hold the corporate managers in line and make them accountable to the various constituencies to which they owe responsibility—consumers, shareholders, lenders, suppliers, purchasers, workers, etc. But the basic picture is one of ominous concentration of power in the hands of a few hundred

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1. Most of the basic literature in the field is cited in the notes appended to the interesting recent symposium, *THE CORPORATION IN MODERN SOCIETY* (Mason ed. 1959). Later entries include: BERLE, *POWER WITHOUT PROPERTY* (1959); HARBRECHT, *PENSION FUNDS AND ECONOMIC POWER* (1959); BLOUGH, *FREE MAN AND THE CORPORATION* (1959); Miller, *Private Governments and the Constitution*, (Occasional Paper, Center for the Study of Democratic Institutions, Fund for the Republic 1959); Berle, *Legal Problems of Economic Power: Some New Demands on the American Legal System*, XV BUS. LAW 251, (1960); Dale, *Management Must Be Made Accountable*, HARV. BUS. REV. 38 (March-April 1960). See also Levitt, *The Dangers of Social Responsibility*, HARV. BUS. REV. (Sept.-Oct. 1958). Equally interesting was the sudden emergence in the 1950's of the corporate executive as a fit subject for fiction and of the corporate scene as an acceptable backdrop for dramatic tension. See, e.g., WILSON, *THE MAN IN THE GREY FLANNEL SUIT* (1955); MARQUAND, *SINCERELY*, WILLIS WAYDE (1955); HAWLEY, *EXECUTIVE SUITE* (1952).

men, sitting at the controls of corporate engines of billion dollar thrust. Against such Corporate Power, the individual is powerless; his freedom stands in jeopardy.

This Actonian concept of Corporate Power has an undoubted appeal. It conforms to our pre-impressions. It makes our minnow's blood race a bit to contemplate the silent Titans towering among us. A synthesis of economics and evangelism, phrased in classic American terms, the Corporate Power thesis has served to draw attention to centralized economic aggregations in modern America. On this score we are in its debt. And the main point of the argument is unquestionably valid: traditional descriptions of the business enterprise in America are obsolete and false.

The question is: now what? As every successful revolutionist has learned, the grand poetic vision that inspires the Movement proves of small use when day to day action decisions are to be made. Effective poetry must be general but action is always particular. Now that we have been helped to an awareness of new problems by the literature on Corporate Power, how well will it guide us in deciding what to do? The thesis of this paper is that it will help very little, that we shall make small progress until we abandon an essentially poetic level of discourse in favor of a more concrete and particularized analysis.

This paper is titled "Corporate Power and Individual Freedom" because in the view of the author, the problem at hand is not "Corporate," is not one of "Power," and is not, so far as we are now in a position to say, a problem of "Individual Freedom."

Corporate?

The Corporate Power literature is unanimous that the problem at hand is a problem of corporations. But is it really the "corporation" that concerns us?

A "corporation" is a legal form in which men do business. It is one legal form of doing business just as, to name a few others, the limited partnership, the partnership, the joint stock company, the joint venture, the Massachusetts Trust, the société anonyme, the Gesetzgebund Managieren Beshränkten Haftung and the Sociedad de Responsibilidad Limitada are legal forms of doing business. A "corporation" is a way of filing papers, attended by certain more or less predictable special legal consequences of an increasingly narrow significance. A "corporation" is not an organization of men or an economic unit; it is one of many possible legal categories by which, for limited legal purposes, we distinguish certain organizations of men. If our freedoms are jeopardized by General Motors, it is not because General Motors is a "corporation."

It is because General Motors is a vast centralized economic and social organization, whatever its legal form under American or foreign law.

For a variety of reasons most of our major economic organizations today happen to be in the form we call stock corporations. But many of them are not; witness the unions, the powerful citrus growers cooperatives, the sprawling partnerships of accountants nationally and internationally interlocked, the vast new real estate syndicates in the form of limited partnerships, and the vaulting accumulations of wealth centering in non-stock corporations and trusts. If any of these poses a social problem, it is a result of the size of its economic leverage, not a consequence of the legal form through which that leverage is exercised. The other side of the same proposition is that probably 90% of all businesses operating in corporate form are closely held, corner grocery store affairs—made no more formidable by filing articles of incorporation with the local Secretary of State's office.

It is important that we stop thinking of the problem of economic concentration as though it were a problem of "corporations." The reason is not an urge for semantic nicety. There is no cause to complain against anti-monopoly laws being called "anti-trust laws" so long as no one seriously thinks the problem has anything to do with trusts or trust law. But in the present field, rudimentary mis-description—misidentification of the human organization with the legal form—has led many writers to think, and more readers to assume, that the forces at work are in some way involved with the accidents of the legal structure, the legal theory, and the legal history of the "corporation."

In its worst manifestation, concentration on the "corporation" has led some commentators off into a medieval spirit-hunt in a murky wilderness of "corporateness"—and inspired some to find a social significance in the asserted "nature" of the corporation as an "entity" or "person" and in its alleged perpetual existence. Fortunately writing of this stripe is no longer common.

The more common disease carried by the "corporation" bug, however, is not platonism, but irrelevance. It tempts us to focus upon the peculiar internal aspects of the corporate form rather than upon the impact of the enterprise upon society. An endlessly repeated theme of current literature on the individual and big industry is that shareholders no longer control the management. This conclusion is commonly elaborated in extended discussions of shareholder voting rights, the asserted disenfranchisement of shareholders and the ineffectiveness of the proxy electoral system. The conclusion is that since managements are no longer restrained by

shareholders, are no longer "accountable" to them—the social threat of the corporation is greatly increased.

From this line of analysis it is usually argued that we must redouble our efforts to restore, or impose, something called Shareholder Democracy. I have argued elsewhere, at some length, that this crusade is misdirected, romantic and certain to continue to fail.² The point of importance here, however, is different. Assuming the facts of shareholder impotency, in what way is the problem of the disenfranchised shareholder relevant to the question of the corporate threat to the rest of society? It is relevant if, but only if, it is assumed that shareholders when in power keep managers in line to the benefit of all society, *i.e.*, if there is a substantial community of interest between the shareholders and the other groups affected by the corporation's actions.

Is there any basis for such an assumption? Are managers who are under the thumb of shareholders less disposed to threaten the freedoms of the rest of us, and *vice versa*? The management of Ford Motor Company is immediately identified with the will of its major voting shareholders, the Ford family; this has been to a lesser extent true in the case of General Motors and the Dupont phyle; it is not at all true in the case of publicly held AT&T. Is there any evidence or argument that our society is more safe at the hands of the Ford Motor Company than at the hands of General Motors or AT&T? So far as I am aware, the literature offers none.

Just to underscore the point, the possibility should be considered that the public may be *less* in jeopardy from a large business enterprise run by an unpropertied professional management—one said not to be "accountable"—than from a large enterprise personally owned and operated by an individual or a small family group. To whom is such an individual or small family group "accountable?" It is perhaps unfair to recall that before World War II the managers of the basic industry of Germany and of Japan were directly "accountable" to their shareholders—the Krupps and the four Zaibatsu families.

Overconcentration on the legal form and internal categories of the corporate form is apt to produce some strange refractions. On the topic of the relations between shareholders and managers, an important point of historical perspective has been put to odd use.

In our basic industrial organization, we are doubtless moving out of a system that can be adequately described in terms of "property." By a series of semi-conscious mechanisms, we have diluted

2. Manning, Book Review, 67 YALE L.J. 1477 (1958). The review is of a piece with the present article and may be considered a part of it.

beyond recognition the whole concept and significance of "ownership" in large scale enterprise; no one "owns" AT&T in any classical sense of the term, any more than anyone "owns" the TVA. Marx was right in thinking that something would happen to halt the progressive concentration of the 19th century "ownership" of basic elements of production in the hands of a few. But it did not necessarily follow that "ownership" had to go to the state; another possibility was that "ownership" might just disappear as a relevant concept in dealing with the basic resources and organizational structures of a society. The last, and perhaps the next, century will be seen by future historians as a period of wide-ranging social experimentation in search of workable legal and organizational arrangements for supplanting the "ownership" concept in a mass-production society.

This important general observation has been assigned an unusual role in one version of the shareholder disenfranchisement thesis. It is first noted that power today—Corporate Power in particular—is no longer linked to property. By this loss, it is said, power has lost its socially approved basis for authority, its "legitimacy." Corporate Power has therefore become illegitimate power, and we must be alarmed at the threat of the corporation and the unlegitimated acts of an unpropertied management, no longer "accountable" to propertied shareholders, the owners.

This involuted-Marx-upside-down-argument is not easy to get hold of. It assumes what must be challenged—that the rest of society need not worry about corporations so long as the "owners" are running them. Then it challenges what may be assumed—that corporate policies socially satisfactory when set by shareholders are no less so when set by others. The argument is based on *a priori* conceptions of right and legitimacy in a particular distribution of decision-making power within the corporate legal structure. Our concern about the large business enterprise is made to hinge upon the degree of dislocation from this ordained internal legal order, rather than upon the functional social consequences of corporate policies. Again we forsake substance for form.

There is still one more powerful reason why problems of aggregated economic organizations cannot be adequately handled in terms of "corporations." Precisely because "corporation" is only the name of a legal form, and because it is a term on a very high level of abstraction, it serves admirably to conceal the real actors in a given situation. In most of the literature in the field, references to the "corporation" probably mean the corporate manage-

ment group (whoever that may be) of large enterprises (somehow defined). But at any given time or on any given issue, the voice heard by the public as the voice of the "corporation" may be that of the board of directors, or of the senior management, or a rebellious junior management, or the shareholders, or a particular class of shareholders or other producers in the field, or suppliers, or a union, or the government—or some faction of any of these. And not only do the nation's corporations range in size from the local barbershop to AT&T, but they reveal an astonishing variety in internal structures, administrative relationships, business and non-business policies, and economic and political influence. The accident of their legal form offers no rational basis for classification. Surely we can—and if we wish to be effective, we must—do something better in localizing the sources of our concerns than to point to "corporations."

Threats to freedom require threateners. A legal form never threatened anybody. If we are not concerned about "corporations" as social threats, what are we concerned about in this field?

There is no term in general use to designate the kind of institution we have in mind. For now, let us call it, or them, something totally neutral—say Alpha Institutions—and prescribe as the main features of an Alpha Institution centralized control, large scale organization, substantial capital resources and relative independence of formally constituted government. It will be readily seen that even this classification, though a marked advance over "corporation," is too general to be useful. We shall have to classify further among Alpha Institutions, depending upon our particular center of interest, whether price policy, or political influence, or employment practices, or membership relations or whatever. For some purposes of investigation, but not others, we may wish to include, restrict our attention to, or exclude, business enterprises, unions, charitable foundations, universities, churches, mass media, "non-profit" enterprises or particular industries. Or we may wish to arrange any of these Alpha Institutions on scales of size of investment, or sales, or degree of centralization of management, number of employees or members, geographic distribution, or any other convenient standard. Only through use of groupings of conscious relevance to our particular interest at hand, can we inquire into, or say anything significant about these institutions, or the groups of human actors working through them.

We shall make no progress in this direction so long as we try to categorize the assertedly threatening institutions by one of their least relevant aspects—their legal form as "corporations."

Power?

By conventional argument, the large corporation is a reservoir of vast Power. Since Power corrupteth, and Freedom prospers only in a pluralistic environment, the situation is pregnant with danger.

There are a good many dangers in even discussing problems in terms of "Power." "Power" is a fever spot in all jurisprudential and political writing, forever breaking out with its aggravants "authority" and "sovereignty." Sometimes it appears as a descriptive term expressing an estimated potential of achievement, as in "horsepower." Sometimes it is a general policy prescription, as in the "federal commerce power." Sometimes it states a legal conclusion in the Hohfeldian sense, as in "the agent had the power to sign his principal's check." In its Latin armor of *ultra vires*, "power" has for centuries bedeviled the corporation lawyer and only quite lately been discovered to have been a noisy nothing all along. And always it tends to shift and dodge among these and other uses without warning to the reader—or the writer. We should all be better off if the word were outlawed absolutely, on pain of reading the complete works of Von Gierke.

But the major objection to current discussions of "Power" in the corporate context is not ambiguity and shifting usage, serious though that is. A more serious difficulty lies again in the level of abstraction at which the discussion is carried on.

The Corporate Power thesis conceives of Power as though it were Mercantilist gold bullion—physically piled on someone's desk, infinitely fungible unit for unit, and indifferently expendable to achieve any result. Yet all our experience is squarely to the contrary. Power to do A is not power to do B. The management of a particular company may be so free of shareholder control that it can pay itself salaries beyond the dreams of avarice. Here is power indeed; but what may be inferred from it as to that management's power to do other things? Can it control prices?—elect a Senator—prevent its workers from voting—secure the passage of a constitutional 25% income tax limit—beat a union strike—or even stop dividend payments? We don't know. On the other hand, a management that can muster the economic leverage to peg a market price may or may not be under iron stockholder control, may or may not have any substantial political influence, may or may not be at the mercy of a stronger union, and may or may not have to turn over the bulk of its earnings to a retired patentee rocking on his veranda at Cannes.

We cannot deduce any of these facts. We can only ask the questions one at a time, then go find out. Except as poetry, "Power" is not usable in the gold bullion sense. Power becomes a usable

analytic conception only when used in a complete statement—a statement of someone's power to do something, affecting someone in some way. Without an infinitive, "Power" is a bell without a clapper.

Power to do one thing may sometimes, of course, be used to acquire power to do another. Cleopatra's case springs to mind. The railroad managers were once able to use their economic power to buy legislators outright—though it is interesting to observe that they could then think of no other use for the political power than to make money, thus producing a kind of closed-system power exchanger. And, conversely, many have discovered the elixir that converts political power to gold. But though Power Number 1 may sometimes be used to achieve Power Number 2, there is no automatic equivalence whatever. Whether General Motors' management controls the Michigan or the Mississippi or the federal legislature cannot be inferred from an ascertained power of General Motors' management to set auto prices, or even from its greater power to set styles in fashion, or to shape the investment rate of the economy. Power is differentiated, not homogeneous; individuated, not fungible; particularized, not general.

The preceding paragraphs say only what is obvious. But obviousness has never been a guarantee of adoption. Failure to use rudimentary rigor in the use of the idea of Power corrupts much of the comment passing current on the topic of the modern business enterprise. It is in large part the premise of fungible power that seduces us into believing that the public has less to fear when managements are responsive to the control of—are under the Power of—shareholders. The same false premise produces the notion of "Countervailing Power"—the cheering prognosis that public protection from misuse of concentrated managerial Power will accrue from the countering Power of other large organizations.

In fact, so far as consumer protection is concerned, the strong union and the strong management are more apt to jam production, then join to kick the wage-price spiral, than to protect the rest of the public. And every cartel demonstrates that organizations of Power may prefer to cooperate than to countervail. As for the protection of the individual, history yields small ground for confidence that the interests of the individual member of an organization will be at one with that of the organizational bureaucracy controlling the uses to which the organization's Power is put.³ On first reading it seems plausible enough that Power will counter

3. In addition to the analytic weaknesses of the notion of countervailing organizational power, there remains at the end the fundamental but seldom asked question whether—assuming the mechanism works as advertised—we *want* basic social policy decisions to be arrived at this way, and why.

Power. It sounds comfortably like Montesquieu. But to the resplendent abstraction "Power" add a couple of lowly infinitives: Union Power (to win an organization strike) will check Management's Power (to control a monopoly price). The plausible becomes the ridiculous. The shining garb of Power is revealed as having no Emperor in it.

Yet the most serious objection to discussing our topic in terms of "Power" is not emptiness. The real vice is that it stifles examination of the real questions of substantive policy. In any society, important economic and political decisions must be made and someone has to make them. The tough problem is how to allocate decision-making power on particular kinds of issues to the persons or institutions most likely to exercise it to produce the policy results we want. The management of Continental Can, or an individual proprietor, may be in a position to close a plant and wreck a town. That's a power to decide something all right. But in saying this, we have said nothing. The real questions are: Who should make this decision? What policy standards should be set to guide the decision? What, if anything, should be done to ameliorate the consequences? These are highly specific policy questions requiring specific answers. We will not even find out what these questions are if we halt inquiry at the point announcing that Continental Can, or the individual proprietor, has "Power."

It is not "Power" we fear, but the power to effectuate particular policies to which we object. The question is—what are they and who is in a position to carry them out. Until we find out, we cannot design defenses.

The question is not Power; it is policy.⁴

Individual Freedom?

Something general must be said of "Freedom" preliminary to discussing it in the corporate context. The next stretch of road takes us through a stretch of politico-jurisprudential swamplands where it is easy to lose one's way, and floundering, sink forever from the sight of men. We shall drive fast to be the sooner out.

More often than not, whatever the context, "Freedom infringed!" is an evocative bugle call and is intended as little more. One may not quarrel with this usage—it is essential only that the hearer identify it as such. But if, by a statement about infringement of freedom, we desire to inform a listener of what is going on, we

4. When a threat has been identified, it is frequently essential to step in to break up the source before the threat becomes actions. In this sense we must be concerned at "power," or potentiality, but the need for advance preventive action heightens, rather than diminishes, the need for clear identification of *what* it is that is feared.

find that we require a quite complex statement. A complete, or well-formed, statement of this kind involves at least five steps or components: (i) there must be an actor to do the infringing; (ii) the actor must be in a position to take an identified action, and either do it or threaten to do it; (iii) there must be an identified victim or group of victims; (iv) some special field of the victim's activities must be designated—to indicate in what respect he will be victimized; and (v) the speaker must be shocked by the consequences under the circumstances and expect, or hope, that others will be equally shocked.

Consider the First Amendment language: "Congress shall make no law . . . a bridging the freedom of speech. . . ." With unparal-leled economy, these ten words give us four of the five needed components. The actor is Congress. The act is legislation. The victim is not identified; here is the missing element (perhaps omitted deliberately) and potential litigation is left to decide whether the language covers citizens only, everybody, non-resident aliens, minors, etc. The affected, or sensitive, field of activity of the victim is speech. Finally, the mandatory form of statement, and its inclusion in the Bill of Rights, bespeak the special importance normatively assigned to this particular set of events.

Conversely, an informative statement about an infringement of freedom of speech calls for these same elements. A full statement would take the form, for example: "(i) Congress (ii) has passed a law forbidding (iii) strikers (iv) from picketing with placards, and (v) under the circumstances, I am shocked and say this is an invasion of a 'freedom'—namely, freedom of speech,—and I urge you to think so too."

In normal usage, of course, we do not talk in such a formal and careful way. So long as we are dealing in a familiar environment with others equally familiar with it, we are able to assume many things without having to state them expressly. We know that our listener in the same culture is making roughly the same assumptions, and we are able thus to communicate. In this way, we normally make many assumptions about the concept of "freedom" when we talk of it. It is important for present purposes to identify some of these assumptions of common discourse about "freedom."

In the first place, in the United States the term "freedom" generally connotes political liberties only. This assumption sets an immediate frame of reference for the discussion. Within this frame, our received political tradition has, by a series of built-in assumptions, excluded from consideration all but a tiny fraction of the possibilities for choice, as a check through the five components listed above will show.

(i) *Institution acting*: Products of 18th Century political theory, we have first narrowed the problem by assuming that problems of freedom are problems of relationships between the individual and Government. We have thereby automatically excluded all other institutions as sources of infringements. Non-government actors are said to be "private"—a term that by assumption puts them outside the range of consideration. Litigation and debate in this area do not attack the premise that only Government may be a source of "freedom" infringement; the debate is cast in terms of whether particular action taken was "in fact," as we are pleased to call it, "State action." The adequacy of this classical premise is, of course, being increasingly questioned—as illustrated by the very symposium of which this paper is a part. But in the past, and still in emotional connotation, we have been able to assume that when an American talked of invasion of a "freedom," he was talking about something the government had done. The infinite number of possible acting institutions is thus cut down to one.

(ii) *Action taken*: As has often been remarked in late years, 18th Century Liberalism considered freedom entirely in terms of protection against interference. Totally alien was the notion that, in addition to this negative kind of freedom "from," men might be entitled to a variety of freedoms "to"—freedom to, for example, fulfill his aspirations for a job, for education, or for a full belly. By excluding such a concept of affirmative freedoms "to," we have historically severely restricted the *kinds* of governmental action that could be said to constitute a violation of "freedom." Only negative, or interfering action counts—no argument will be heard that a man's freedom was violated because the Government failed to undertake affirmative action. Thus again, the range of possible "freedoms" is slashed to a fraction of the potential.

(iii) *Affected area*: The third major way in which we have hitherto restricted the scope of the topic of freedom is by selecting out of the full range of all human activities no more than a handful for apotheosis to the level of freedoms. We have singled out perhaps a dozen areas of activity we deem of central importance—speech, press, religion, property, etc.—and leave unprotected against governmental interference the rest of the thousands of "non-freedom" activities that occupy man's day—employment, retirement, marriage, leisure, study, etc.

(iv) *Protected persons*: This fourth of our components is the only one that the classical theory of freedom has left all-inclusive. Whatever we may have done in practice, we have in our political theory drawn no lines among groups of Man in recognizing basic

freedoms. And in our law we have not narrowly restricted protection to our own national citizens.

(v) *Normative consensus*: In isolated areas, most notably race relations, the Nation has been sorely tried in its search for consensus in interpreting its concepts of "freedom." But the more remarkable fact is how much consensus there is in the United States on what "freedom" is—what "freedoms" are to be recognized as entitled to legal protection. It would be shockingly un-American—indeed unthinkable—to challenge any one of the freedoms listed in the Bill of Rights; it is only slightly less so to suggest that the catalogue in the Constitution may not be complete and should be augmented. Here, in the inherited premises of 18th Century political philosophy is the deep consensus on basic norms that makes the emotive shorthand of "freedom" possible in conversation among Americans. Without it, "freedom of speech" is no more a communicating and stirring symbol than "freedom of recreation."

Although, through common heritage, and through ruthless philosophic restriction of the possible actors, actions, affected activity, persons protected and norms adopted, we are able to talk of "freedom" with other Americans and with the products of other Western cultures of substantially common traditions, and to do so with a reasonable likelihood that we will be understood. Whenever we are unable to draw upon this community of premises—when, for example, we talk with a person from another culture—our efforts to discuss "freedom" dissolve in repeated frustrating failure. Our listener is not filling in the blanks in the same way we are—and until we bring the conversation down to a specific and concrete level, communication proves impossible. We return now to the topic billed.

Corporate Power and Individual Freedom?

Within our shared culture we are able to make reasonably communicative and complete statements about our political liberties, such as "freedom of speech." How far can we now go in putting together the necessary five components for communicative statements about Corporate Power and Individual Freedom? Comparison is helpful.

(i) *Institution acting*: The First Amendment identifies an acting human institution, Congress. By contrast, as the first segment of this piece is at some pains to develop, "corporation" has only a legal form as a referent, and leaves us with no identifiable acting institution as a subject.

If, by hidden assumption, "corporation" is to be taken to mean "large business enterprise," a step toward identification has been taken, but we are left with no particularization either of the characteristics of the enterprise that underlie the classification, or what group is operating through it.

(ii) *Action taken*: The First Amendment forbids Congress to take particular identifiable action—forbids it to make a law; the Amendment also squarely takes sides in favor of the view that Freedom is freedom "from" interference. No information on either of these points is provided us by statements to the effect that corporations threaten because they have "power." Such statements do not help us decide what it is we do not want an institution to do, or how to go about blocking it, or what it is we want the institution to do, or how to go about stimulating it. Here bears the second part of this article.

(iii) *Area affected*: The First Amendment, with a subject and a verb, also specifies the area of sensitivity concerned—free expression of opinion. The reader knows what we are worried about, and the acting institution has some guide for action. Talk of the dangers of "corporate power," already handicapped by having no subject and no verb, further diminishes the likelihood of communication by simply omitting this essential reference to the respect in which someone is adversely affected.

(iv) *Persons protected*: Though the First Amendment is an incomplete statement in not specifying who is covered by it, some general guidance on its coverage may be drawn from its place in the federal Constitution, and from the fact that it is Congress that is restricted. When we turn to "corporate power," however, we are given no lead at all, express or implied, as to *who* it is we are worried about. Several possibilities spring to mind—customers of the business enterprise, employees, executives, junior executives, shareholders, some classes of shareholders, suppliers, creditors, some classes of creditors, other institutional bodies such as the legislatures, the churches, the schools, the press, etc. The nature and the intensity of our concern about each of these will vary. Without specification, however, we remain quite uninformed of whose ox is being gored.

(v) *Normative consensus*: Freedom is Policy writ large—a policy sufficiently familiar, understood, and agreed to, that we can talk about it in monosyllables. When we try to talk of individual freedom and corporate power, we are laboring under double difficulty. When we speak only of "power" we have no idea what policies are at stake. But we are little further along even when we particularize with something like: "It violates a worker's freedom

of employment if the management of a large enterprise does not find other employment for him after a plant shutdown," or "It violates a Negro worker's freedom of employment for an employer to discriminate racially in hiring." These statements communicate as sentences; but they lead us, not into an area of normative consensus where we may talk in shorthand of "freedom," but into the thick of the most hotly contested, divisive issues in contemporary economic and political debate.

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The conclusion seems to me inescapable that in our present posture of knowledge, analysis and disagreement, we are far from ready to deal with anything so abstract as the asserted Problem of Corporate Power and Individual Freedom. We have *none* of the necessary elements under intellectual control. We cannot categorize the actors—cannot say what they do or do not do that is contrary to our desires—do not know who is affected—do not know in what respect they are affected—and have no common set of norms or criteria by which to judge whether we think particular results are good or bad—or how intensely we feel about it. Every link in this chain vies to be the weakest.

When we do not know what the problems are, we are hardly in a position to Constitutionalize about it.

The point must not be misunderstood as a license to complacency or as a defense of the *status quo*. The American economy is growing more and more out of its ideological clothes. The simple categories of *laissez faire* and primitive socialism, neatly dividing "governmental" and "private," are absurdly inadequate to cope descriptively with large enterprise of today. The rules, the vocabulary, the inherited symbols are all awry.

We talk, and sometimes even act, as though General Motors were a private person, as for example in the area of charitable contributions. We talk solemnly of the entrepreneurial risks of corporate management and the necessary consequent rewards, in a world where corporate managers come up through a kind of snug interior civil service more security oriented—and more secure—than that of the Prussian postoffice. We proclaim the advantage of "private" contracting out of defense work by the Government, when a \$45 billion defense budget turns much of the economy into a kind of job shop for the Government—a monumental re-creation of the cottage industrial system. Through Government we subsidize, guarantee, reguarantee, finance, provide security for, regulate, control, manage, price support, and economically dominate whole segments of that part of the economy we call "private." It suits our fancy to talk of negotiations between Big Steel and Big Steel Union as

just another example of Mr. White and Mr. Green bargaining over the price of Blackacre. We describe shareholders as "owners" of enterprises and managers as hired hands and insist that shareholders are an electorate. We seem mainly intent upon making ourselves ludicrous before the rest of the world by grimly insisting upon a verbal orthodoxy of "capitalism" that bears increasingly little resemblance to our own industrial system.

Our modern economic organization surrounds us with serious policy problems—most of which we undoubtedly do not yet discern. Is the present allocation of industrial decision-making producing an adequate capital accumulation and production growth rate? Is it yielding a socially desirable mix of products? Is the hereditary epilepsy of the business cycle under adequate control? What can be done to offset the present accidental power of managers of publicly held manufacturing enterprises to use their King-of-the-Hill position to pay themselves, in the name of "Entrepreneur," on a scale with which government, the professions, educational organizations, the military, the sciences and social service agencies cannot compete—to the consequent distortion of talent and skill allocation throughout the economy? How can we provide for equal economic opportunity for all? What can be done to moderate and spread the losses of exploding technology on suddenly obsoleted communities or skill groups without committing the economy to sure and fatal stagnation? How do we work out an integrated and coordinated clearing house to prevent atomistic health, welfare and security plans from clotting the flow of a mobile manpower pool. What can be done to inhibit, and equitably allocate the costs of, irresponsible use of bankrupted central cities as dumping grounds for the social problems of industrially imported labor unconditioned to an urban environment? How can we integrate our domestic and foreign economic activities—each as an extension of the other? It is hardly difficult to add to this list.

Still, American society has been coping with threats from its own industrial machine for a long time. We have a pretty good record of meeting new pains with new remedies. Administrators and courts are engaged in daily counterattack against price rigging, monopoly and unfair competition. Where investors were found duped, securities regulation arose. Bilking by false labeling and adulterated goods led to pure food and drug laws and standards. In the age of steel and steam, labor maimed, children and women sweated, company-store scrip paid on delayed paydays, unions smashed as against the laws of nature, epidemic unemployment—each in turn generated legislative counteraction. Again, this list is easier to extend than to cut off.

Some of these older problems are today under fair control; others are clearly not. They are listed merely as a reminder that the problem of coping with "corporate power" is hardly new in this country—and that where we have isolated the particular problems and brought them to public attention, we have been able to move against them. One so disposed could have viewed any of these problems as problems of infringed "freedoms" of corporate "constituents": freedom of enterprisers to compete, freedom of investors to know, freedom of customers to buy in peace of mind, or freedom of workers to lead a healthy life of self-respect. But calling these groups by political analogues like "constituents," and labelling their problems "freedoms," would do little to move things along. Nothing could be done to work out countermeasures until the facts were developed on who was hurting whom and how.

Wherein do we gain by importing into analysis of the new Alpha Institutions old preconceptions of "freedom" from the special historical context of American government? We are certain to raise temperatures by it. We are certain to look for the wrong problems. We are certain to become unwarrantedly excited when we detect an accidental area of overlap such as appeared in *Marsh v. Alabama*.⁵ We are certain to impose a narrower set of definitions than the situation demands. And we are certain to throw virtually insurmountable obstacles in the path of communication. When norms are most jumbled and disputed the dangers of emotive analogy are at their greatest—and the need for specificity at its most urgent.

Concentration, not on Corporate Power and Individual Freedom, but upon particular acting institutions, particular acts, particular victims, and particular injuries will continue to produce for us usable policy solutions. In time, enough instances and enough solutions taken together may enable us to put together a new general theory of the relationship of men to groups of men, and to break out of the mental match boxes into which Locke and Marx would put us. At such time, with a set of new institutional arrangements hand-built to accommodate the Demipublic Alpha Institution, we may find that we have not only learned how to cope with the Alpha Institution. We may also have helped ourselves to a better theory of Individual Freedom and Government.

5. 326 U.S. 501 (1946).