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**Corporations, the Law, and Democracy**

Stocks are property, yes.  
Bonds are property, yes.  
Machines, land, buildings, are property, yes.  
A job is property,  
no, nix, nah nah.  
(Carl Sandburg, *The People Yes*)

The more we reflect upon all that occurs in the United States, the more we shall be persuaded that the lawyers... form the most powerful... counterpoise to the democratic element.... The courts of justice are the visible organs by which the legal profession is enabled to control democracy ...  
(Alexis de Tocqueville, *Democracy in America*)

At the beginning of a new century, corporations enjoy a privileged legal position in the United States. Corporations can count on the law to protect their property rights and facilitate further transformations of the political economy to their advantage, such as the contemporary shift to a globalized, capitalist economy. In conflicts between corporate economic rights and individual personal rights, the law generally favors corporate rights. Furthermore, over the past three decades, the Supreme Court has extended rights to corporations that previously had been primarily conceived of as individual political rights. These decisions have serious implications for democratic dialogue and government. As Ralph Nader and Carl Mayer state: "Equality of constitutional rights plus an inequality of legislated and de facto powers leads inevitably to the supremacy of artificial over real persons." This privileged position of corporations is primarily due to the crucial structural role corporations have played and continue to play in the U.S. economy. Ideological factors, such as the "normal" way of thinking about law, interrelate with these structural features. The way the law—the language of the state—"knows" society is an important dimension in understanding this privileged legal status.

Since the ratification of the U.S. Constitution in 1788, the development of the law has been a process of struggle among classes and groups with different interests, values, and visions. The social and economic assumptions underlying the Constitution primarily favored the property owning classes who dominated the writing and initial interpretation of the Constitution. As Supreme Court Justice William Paterson said in *Van Hornes's Lessee v. Dorrance* (1795): "The right of acquiring and possessing property, and having it protected, is one of the natural, inherent and inalienable rights of man," and preserving property "is a primary object of the social compact." But the framers' vision and that of their successors has always been contested. Reflecting on the historical development of the law, therefore, can help us understand broader political and economic developments and assess the possibilities for progressive politics today. The law is both an effect and a cause of other political, economic, and social forces—it helps constitute a society.

Structurally, corporations are the key economic institutions in society. Major decisions about what is produced by whom, when, where, and under what conditions, are largely controlled by corporations. Governments rely on corporations for revenue, job creation, and investment. Planning, to the degree it exists, is dominated by corporate decisions. Thus, governments are highly responsive to the needs and demands of corporations because the perceived success of our economy depends on ensuring a "favorable business climate."

Ideologically, the belief in the "rule of law" and its accompanying concepts of state neutrality, justice, equality before the law, and individual freedom often inhibits people from looking at the law as an arena of political and economic struggle. As Bertell Oilman points out, the law serves as a kind of "bourgeois fairy tale" in which "the struggle over the legitimacy of any social act or relationship is removed from the plane of morality to that of law. Justice is no longer what is fair but

what is legal, and politics itself is transformed into the technical wranglings of lawyers and courts." This ideological function of law limits the examination of the role that the law has played in facilitating capitalist development and corporate power. Many scholars refuse to acknowledge the insight of Thomas Gray: ". . . [F]ederal courts have through most of the country's history been the guardians of wealth and property against the excesses of democracy." This ideological attachment to the "rule of law" also has had important effects on the political strategies chosen by liberal reformers and progressives, thus functioning to organize dissent into certain types of activity.

The law is an arena of political, economic, and social struggle that reflects and helps shape those struggles. Overall, the results of the class and group struggles in U.S. history have favored corporate power. It is hard to understand how anyone today could argue otherwise. Yet the process of struggle is important. Working people, women, African Americans, gays and lesbians, and others have used the law to fight for their rights and, at times, win important gains. Nonetheless, the fundamental contradiction between political democracy and economic exploitation remains embodied in the law, and corporate power has more often prevailed than not. As Brooks Adams said early in the twentieth century: "The capitalist... regards the constitutional form of government which exists in the United States, as a convenient method of obtaining his own way against a majority."

In this article I focus on the role of the courts, especially the Supreme Court, in facilitating the development of a capitalist economy and enhancing corporate power. First, I examine key legal developments related to property rights in the nineteenth century. I also survey the metamorphosis in property and related jurisprudential accommodations during the late nineteenth and early twentieth centuries. The second part of the article focuses on the transformation of economic doctrines by the Supreme Court to legitimate a consolidating corporate-administrative state during and after the New Deal. Within this context, I examine the attempt to extend property rights concepts to the poor and contrast this with the recrudescence of property protections for corporations and the wealthy beginning in the 1970s. I also look at the trend of extending First Amendment free speech rights to corporations and the wealthy. Finally, I conclude with a discussion of the implications of these developments for politics and democracy.

### **Courts and Property Rights Before the New Deal**

There were three important dimensions of the relationship between the law, property rights, and capitalist development during this period. First, in the conflict between slave labor and free labor, legal decisions both protected the system of slavery and, at the same time, fostered the growth of a capitalist economy. Second, in the conflicts between labor and capital, the courts were hostile to the attempt of workers to act collectively. Finally, and most importantly, federal courts, state civil law courts, and legislatures incrementally developed the law to favor the interests of dynamic, entrepreneurial, commercial capital over land-based, vested capital. The courts were the most influential economic policymakers during this period. It was their responsibility, in the words of Stephen Skowronek, "to nurture, protect, interpret, and invoke the state's prerogatives over economy and society as expressed in law."

Slavery was firmly written into the U.S. Constitution. James Ely states: "No other type of property received such detailed attention from the framers." Slaves were an important form of personal property and a major source of wealth for the antebellum South as well as for those Northern economic interests involved in the trans-Atlantic slave trade, the coastal cotton markets, and the manufacture of textiles. The courts protected this form of property. Individual slaves rarely won freedom in cases in which they contested their condition. The system of slavery itself was never seriously questioned by the federal courts. At the same time, courts recognized the power of states to limit the right of owners to maim and kill their slaves. These regulatory laws were passed not so much out of humanitarian concerns but rather because states recognized the value of slave property for the South's economy, and because states were responding to slave rebellions, sabotage, and other forms of collective actions by African Americans protesting their conditions. In this regard, these slave regulations were similar to much other economic regulation upheld by the

courts during this period of time under the broad "police powers" of states to legislate for the health, safety, and welfare of the community.

The second major property rights issue of the period involved the conflict between organized labor and capital. After the Civil War, the courts' general hostility toward labor unions would be graphically demonstrated through their authorization of the widespread use of police and military force against striking and picketing workers, their use of the infamous labor injunction, and their hostility toward social welfare legislation that benefited working Americans. The judiciary used the labor injunction not just to control strikes and demonstrations but to limit the associative and expressive activities of workers and their unions. Over 4,300 injunctions were issued against the labor movement between 1880 and 1930, forbidding a wide variety of associative activities including picketing, striking, holding union meetings, communicating through the mail, saying specific words such as "scab" or "fair," and even supplying food to starving workers and their families. In addition to the use of the injunction, courts struck down social welfare laws such as those establishing minimum wages and maximum hours, requiring safe conditions at work, and forbidding child labor. Between 1900 and 1937, the judiciary ruled unconstitutional over two hundred state social welfare laws or laws regulating business on the grounds that they violated the "due process" or "equal protection" of corporations or individuals with property rights claims. Furthermore, between the 1880s and 1920s courts struck down almost three hundred labor laws aimed at protecting workers.

The third category of significant legal developments during this period was the efforts by the courts and legislatures to promote economic development and stimulate investment by favoring the dynamic use of property. J. Willard Hurst calls it "property in motion or at risk rather than property secure and at rest." State legislatures sold or gave away public lands; subsidized businesses; sponsored internal improvement projects, especially in transportation; and passed a variety of other forms of promotional legislation to stimulate commercial activities. States even went so far as to delegate their own governmental powers of eminent domain to business corporations. The Supreme Court under Chief Justice John Marshall (1801-1835) was especially sympathetic to business and propertied interests. Marshall was very committed to creating a national market and distrusted those state regulations that he feared would interfere with the productive use of economic resources. The contract clause was used to protect the nascent form of corporate organization from excessive state regulation, especially in the banking sector, as well as to limit the ability of states to provide relief to debtors and grant exemptions from taxation. The Marshall Court also relied on a broad interpretation of the national commerce power to encourage the growth of a national market system particularly in transportation. Under Roger Taney (1836-1863), the Supreme Court continued this approach, although it was more inclined to permit states greater latitude in shaping economic policy that stimulated commercial activities and promoted competition. Also, corporations were constitutionally recognized as "persons" for the first time for the purpose of suing in diversity of citizenship cases in the federal courts.

State courts also played a major role in promoting economic growth through the legal system, instead of the tax system. Private law judges interpreting the common law promoted economic development and carried out a major transformation of the legal system. According to Morton Horwitz, their decisions "enabled emergent entrepreneurial and commercial groups to win a disproportionate share of wealth and power in American society." Judges came to view the ownership of property as conferring the right, and indeed obligation, to develop the property. Eminent domain was one of the most potent legal weapons used to further this process of redistributing "old" property for the benefit of the "new." Land was taken for the purposes of building roads, canals, and railroads. Compensation for these takings was limited because entrepreneurial groups resisted full compensation as a threat to low cost economic development. Another method of encouraging economic growth was changing the common law doctrines on liability to force those injured by economic activity to bear many of the costs of growth. Personal or property damage increasingly became seen as an inevitable cost of doing business, largely to be absorbed by the injured. Finally, the law of contract was transformed, ridding it of medieval

concepts of fairness and shifting it to principles compatible with a market economy, such as *caveat emptor* (let the buyer beware).

The courts' role in fostering economic development for the advantage of the more powerful continued after the Civil War. Initially, the Supreme Court upheld broad use of government powers over the economy during the Civil War. Furthermore, courts upheld many state laws regulating the economy during the 1870s and 1880s. However, during the 1870s and 1880s, certain judges and lawyers conducted a vigorous campaign to develop the legal doctrine of laissez-faire constitutionalism to protect corporations from regulatory activity. A key decision was the 1886 *Santa Clara County v. Southern Pacific Railroad* ruling that corporations were "persons" within the meaning of the Fourteenth Amendment, having the same rights as natural persons. After this, the Supreme Court regularly struck down the state and national regulatory regulation that it felt to be unduly restrictive of property rights.

While the legal foundation of the corporate-administrative state was laid between 1900 and 1932, the Court's negative reaction to many of the New Deal programs reflected contradictory nineteenth century visions of free enterprise, competitive capitalism, and "free" labor. However, in 1937 the Court underwent a miraculous change of heart and mind and began to uphold regulatory schemes it had just recently rejected. By 1939, FDR had appointed a majority of the Court, and according to conventional wisdom, the new Roosevelt Court rejected those old economic doctrines that had been selectively used to defeat a great deal of regulatory legislation for over half a century. The Court supposedly washed its hands entirely of economic policy making and slowly took up a new agenda of individual political and civil rights. However, the conventional wisdom is substantially misplaced.

### **The Modern Role of the Law: Legitimizing the New Corporate-Administrative State**

The idealized conception of the modern Supreme Court as the guardian of individual rights and defender of transcendental constitutional values has been problematic even for some mainstream political scientists. To Robert Dahl the Court was a legitimator of the political system not a defender of rights. He argued that the Court had "used the protections of the Fifth, Thirteenth, Fourteenth, and Fifteenth Amendments to preserve the rights and liberties of a relatively privileged group at the expense of the rights and liberties of a submerged group, chiefly slaveholders at the expense of slaves, white people at the expense of colored people, and property holders at the expense of wage earners and other groups." Yet subsequent assessments of the Court by political scientists have tended to stress the Court's role as "guardian of the Constitution." Even mildly debunking analyses still assume the Court is democratic because it plays a vital legitimizing role in a fundamentally fair, pluralistic political system. However, a more realistic assessment of the role of law and the Supreme Court must place the change in the Court's agenda and doctrines within the context of the changes in the modern capitalist economy, especially the relationship among corporations, government, and organized labor.

After 1937, the Court transformed judicial doctrine to ratify the new social contract of big business, the state, and the unions. Under its terms unions became junior partners in return for recognition and protection of their right to organize, promises of higher wages and better working conditions, and various social programs. Government assumed important responsibilities for rationalizing the market and managing the economy. The new social contract did not challenge capitalism or seriously undermine corporate prerogatives. Instead, it used the expertise of the modern state to coordinate, guide, and supplement the functioning of the capitalist economy. The Court also attempted to manage social conflict by ensuring formal, but limited, representation for "legitimate" affected interests in the administrative agencies of the corporate-administrative state. To the *degree* racial minorities, women, the poor, consumers, and environmentalists transformed themselves into *organized* interests they became incorporated in varying degrees in the new social compact.

The symbol of the new judicial attitude in economic matters was the famous footnote number four of *U.S. v. Carotene Products* of 1938 that established the "double standard" for due process

review. According to this doctrine, the Court would employ different levels of judicial scrutiny to personal or civil rights as opposed to traditional property rights. Legislative regulation of property would be presumed constitutional and subject only to minimal scrutiny to determine if there was a rational basis for the regulation. On the other hand, stricter judicial scrutiny would apply to individual rights under any of three conditions: 1) where fundamental rights were involved; 2) where laws restricted access to the political process; and 3) where governmental action was directed against "discrete and insular" minorities.

To mainstream analysts, the double standard symbolized a Court committed to protecting individual rights and abandoning its historical regard for property rights. However, as Michael McCann makes clear, the "result was nothing less than a significant qualitative transformation in the constitutional status of 'property' itself." Property in a corporate society was no longer perceived as a relatively unfettered domain of freedom or autonomy, but increasingly a set of relationships with the modern administrative state. The Court gradually realized that its dominant purpose was no longer the prevention of unauthorized intrusions on private property, but the assurance of "fair" representation for all organized interests in the corporate-administrative state. The courts adopted an idealized version of democratic elitism. The United States was seen as a pluralistic, liberal society in which all "legitimate" interests were guaranteed representation and the right to pursue their self-interests. The courts' principal functions were protecting individual political liberties to participate in the game of politics and ensuring that the rules of the game were fairly administered.

### **Labor Law and Corporate Capitalism**

Labor law offers a good illustration of the legal role in constructing an ideology and an institutional structure to support corporate capitalism. On the one hand, labor law is class-based and justifies hierarchy and domination in the workplace and the community. For example, the preeminent importance of capital mobility and ease of disinvestment is supported by the law. Communities surrounding a plant have few legally protected interests in decisions a company makes affecting that community. Employees do not have a legally recognized interest in the fruits of their labor or the management of a company, much less a right to a job. Management decision about operations and resource allocations, even unauthorized commands, must be obeyed pending completion of grievance procedures. The workplace, both physically and existentially, belongs to the employer and workers acquire no rights or entitlements there, unless contractually conceded. And even here, companies have maneuverability as evidence by the use of Chapter VI bankruptcy filings to avoid contractual obligations.

On the other hand, labor law reflects the contractions of the modern social contract. It both fosters and constricts worker self-expression. Workers are allowed to organize, and prior to the 1970s, this right was even protected by the National Labor Relations Board (NLRB). But at the same time, labor law tries to guide worker activity into narrow, institutionalized channels in which only "legitimate" conflict is permitted. Forms of worker activity such as wildcat strikes, sit-down strikes, and secondary boycotts are prohibited even under life-threatening conditions. Workers must go through the proper legal procedures to gain recognition as a union or to protest management practices. These administrative requirements moderate social conflict and prevent it from spilling over beyond acceptable boundaries.

Labor law also encourages, yet limits, employee participation in the workplace. Worker participation is facilitated but largely confined to wages and working conditions. The attempts of workers to influence the organization of the work process or decisions about investment, disinvestment, and long-range planning are restricted. The law recognizes a core of managerial prerogatives where decisions are not negotiable. The more important the issue is to employer control the fewer the legal bargaining rights for workers. Finally, labor law enhances the institutional interest of unions at the expense of their own members. In return, unions have accepted a role in preserving industrial peace and performing managerial and disciplinary functions in the workplace.

In sum, labor law reflects the priorities of corporate liberalism. It allows limited opportunities for working people to fight for their rights but increasingly, under this legal model, working people are losing. This legal framework sees conflict as interest-group based, not class-based. It assumes that economic growth is the primary social goal. Permissible conflict by "legitimate" interests is to be directed by the state into acceptable channels and resolved administratively or judicially. Many important societal decisions remain off the public agenda because they are the prerogatives of those who control the corporate-dominated private sphere. The Court has acknowledged this function of labor law in its decision *m First National Maintenance Corporation v. NLRB* of 1981:

A fundamental aim of the National Labor Relations Act is the establishment and maintenance of industrial peace ... Central to the achievement of this purpose is the promotion of collective bargaining as a method of defusing and channeling conflict between labor and management... In view of an employer's need for unencumbered decision making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business.

### **Free Speech and Property Rights**

First Amendment decisions of the last two decades provide a clear example of how the law poses a set of contradictions for those seeking fundamental change in the United States. The "Free Speech Tradition" embodies valuable, hard-won rights for Americans. Yet recent decisions of the Supreme Court show how the First Amendment can be interpreted to limit the rights supposedly contained within it. For example, the Court has shrunk the scope of the public sphere in decisions involving conflicts between freedom of expression and private property. It has refused to equate shopping centers with public streets or parks and allowed mall owners to restrict access to and expression in "private" spaces. The Court also has limited handbilling on a military base crisscrossed by public roads; permitted a city to allow the use of placard space on public buses for commercial advertising but not for political advertising; and limited press access to jails and pretrial hearings. These decisions suggest that while ownership of or access to property, especially the corporate controlled media, is necessary to effectively exercise one's speech and press rights. The law supports restrictions on such access.

Another series of decisions, dealing with commercial speech, has continued the historical pattern of increasing the constitutional protection of corporations as "persons" with individual rights. Prior to 1975 commercial advertising had not enjoyed full First Amendment protection. However, in *Bigelow v. Virginia* of 1975 the Court decided that commercial speech was protected, finding a public, consumer interest in such speech. A series of other decisions extended these "consumer rights," illustrating the contradictions involved when a liberal, market-based conception of personal liberties is used to interpret the First Amendment. Similar to the way in which the worker's "right to work" was used in the past to legally restrict trade union organizing and enhance corporate power, consumers' "rights to know" have become the basis for the empowerment of corporations and advertising agencies, not consumers. Even more significantly, the Court extended corporations free speech rights and the full protection of the First Amendment in *Consolidated Edison v. Public Service Commission* of 1980. A New York State Public Service Commission regulation prohibiting public utilities from enclosing statements of their views on public issues along with monthly bills was ruled an unconstitutional restriction of a corporation's free speech. Using the same logic, the Court also struck down a ban on utility advertising promoting the use of electricity.

Several related cases further demonstrate the Court's solicitude for expanding speech rights for corporations and the wealthy. In *Miami Herald Publishing Company v. Tornillo* of 1974, Florida's right-of-reply statute, compelling a newspaper to furnish cost-free reply space, was unanimously struck down as an abridgment of the paper's private property rights and its free speech rights to exclude access by third parties. The Court also invalidated a Massachusetts law forbidding corporations from spending corporate funds to influence public referenda (*First National Bank v.*

Belotti of 1978). Finally, the 2000 presidential election illustrates the significance of two Court decisions dealing with campaign finance reform and third party access to the nation's voters through media. In 1976, the Court struck down provisions of the Federal Election Campaign Act that placed limits on the amount of money individuals could spend independently to support political candidates as well as limitations on the amount candidates could spend on their own campaigns (*Buckley v. Valeo*). Spending money was seen by the Justices as a form of protected speech, not just speech-related conduct. In 1998, the Court ruled that a decision by a state-operated television station to deny a third party candidate the right to participate in a televised congressional candidate debate did not violate the candidate's First Amendment rights or the public's rights to freedom of information (*Arkansas Educational Television Commission v. Forbes*). According to John Shockley: "... [T]he Court has in fact used the First Amendment to protect the influence of the wealthy in American politics, reshaping [the First] Amendment... into a means to afford both fundamental and exclusive protection to the wealthy in the political process."

Rather than seeing such decisions as victories for abstract principles of free speech, such as "consumers' rights," we should understand their class dimensions—they benefit the wealthy and corporations over ordinary citizens. These kinds of decisions reveal the structural character of class inequality embedded in U.S. constitutional law. As Michael McCann points out, they parallel "the older judicial activism not only in its substantive and economic character but also in its fundamental, if more subtle, embrace of ideas supporting uniquely capitalist forms of social organization against substantive egalitarian challenge ... The Court still adheres to the established constitutional tradition of limiting concern for systemic socioeconomic inequalities to an individualistic, exchange-oriented logic of public goods allocation."

### **Recent Judicial Trends**

Over the past decade, to the disappointment of many conservative legal scholars and judges, the Supreme Court has not issued any major decision that significantly challenges the constitutional principles on which the corporate-administrative state was established after 1937. After all, deregulation, privatization, and the legal changes needed for globalization have been carried out under that system through the legislative and executive branches without the need of any significant judicial involvement. Corporations have learned that they can use their power in legislatures, administrative agencies, political parties, the media, and the universities to accomplish their goals without having to rely on the kind of constitutional doctrines prevalent before 1937. Therefore, the courts have tinkered at the edges of constitutional property doctrine. Recent decisions in the area of federalism, limiting the national government's powers over the states, whether based on grounds of sovereign immunity or of narrower congressional power under the commerce clause and Fourteenth Amendment, may be indirectly beneficial to corporations, but they do not pose a major challenge to the legal foundations of the corporate-administrative state. Occasionally some Justices have hinted at the possibility of significantly changing the post-1937 system, but that is quite unlikely until the economic foundations of that system significantly change.

The judiciary also has been involved during the past two decades in reversing or limiting some of the reforms of the 1960s and 1970s in areas such as individual liberties, affirmative action, freedom of choice, and access to the courts. While many of these decisions have class dimensions and have negative implications for democracy, they also do not directly affect the corporate-administrative system of property that was able to survive, and even flourish, during the period when these liberal reforms were more firmly in place.

However, there is one other area—labor relations—in which the judiciary has played a significant role in protecting corporate power, especially since the Reagan administration. A 2000 report of Human Rights Watch concludes that workers in the U.S. lack the rights to organize, bargain, and strike supposedly guaranteed in the First Amendment's provision of freedom of association and expression, and in internationally recognized human rights norms. The report finds that employers are free to fire, harass, and intimidate with impunity workers trying to organize unions; to refuse to bargain with workers who successfully have stepped over the legal hurdles

placed in the way of organizing; and to make the right to strike a travesty by permanently replacing strikers. Furthermore, the report states that millions of workers in the United States are denied coverage of the labor laws that do exist. While some of these principles have been in place since the passage of the Wagner Act in 1935, courts and the National Labor Relations Board have made matters much worse for the labor movement since the Reagan administration. In the process, they have demonstrated the normal, historical tendency of the law to support and facilitate the exercise of corporate power.

## Conclusion

So what role does the law play in making anything really different as opposed to supporting the status quo or the kind of reforms that give us more of the same? First, we should not see the law cynically as merely an instrument of class oppression or ideological co-optation. Neither should we see it idealistically as fundamentally autonomous of economic power, and therefore, a principal means to bring about reform. This law can be, and to a degree has been, both a force for maintaining the status quo and an instrument of reform, even sometimes radical reform. However, those forces with the most political-economic power historically have been the most successful in using the law to promote their interests just as they have been in using the media, education, religion, and political parties. The law is one important arena of struggle we should not dismiss. Neither should we be unrealistic about its possibilities. The real issue is about the role law can play in contesting power—a very difficult proposition indeed, given the tendency of those who have power to hold onto it with all the forces at their disposal.

Second, with this realization, is a major issue of *how* the law can be used to contest power. To the degree that the law can be used within the established political process, judicial strategies for change are less desirable than legislative strategies. The historical record here seems clear. Throughout most of our history, the courts have been one of the most conservative institutions in society. Their patterns of recruitment, socialization, and decision-making all contribute to this. Judges are relatively insulated from public pressures and accountability; are non-representative of the larger population; and are socialized to "know" the law as a non-political, neutral process. Given this, few judges see their role as that of agents of social reform other than through helping adapt the system to necessary economic and political changes.

Too many baby-boomer liberals and legal reformers grew up with an idealized image of the Warren Court as a liberal instrument of change that fostered the Civil Rights movement and tried to bring about other significant changes in U.S. politics until it was frustrated by the Nixon administration. To a minor degree this was true, but it is more mythology than history. The liberal record of the Warren Court contained more blemishes than is often acknowledged; the Warren Court operated within prevailing liberal, individualistic, market-oriented conceptions of society, which largely denied the reality of class or group solutions to social problems; and, to the degree it fostered progressive change, it was facilitating the development of the U.S. post-World War II political economy, just as courts had facilitated capitalist economic development previously. It is more accurate to see the Warren Court as an institution of legitimation and social conflict management than of progressive reform.

Over the last half-century, more reform, even if it was not fundamental, has been brought about through the legislative than the judicial process. For every *Brown v. Board of Education* or *Baker v. Can* there are many more laws such as the National Labor Relations Act, Civil Rights Act of 1964, and Voting Rights Act of 1965. Quite often, even when progressive legislation is passed, the courts are more likely to interpret the legislation to limit, rather than enhance, the reforms instituted, as indicated by the courts' interpretation of civil rights, labor, and campaign finance reform legislation over the last twenty-five years. Therefore, to the degree people use the law as a vehicle for change, it should de-emphasize, judicial-based strategies.

If legislative legal strategies are more likely to be effective, then how do people participate in changing the law? While not completely dismissing the idea of changing the law by changing people's consciousness, I think language-based strategies are limited. Political activity, both inside



and outside established political processes, which leads to laws changing people's material reality, is more important, and in the process is more likely to affect people's consciousness. A law guaranteeing a sustainable income or national health care as a right of citizenship in a modern society can be much more effective in changing people's consciousness than attempts to do so through using language and persuasion to reconstitute their beliefs.

We must remember that a political-economic system dominated by large corporations will tend to have laws reflecting that power and protecting the property interests of those corporations. As Raymond Williams has stated:

. . . Laws are necessarily the instruments of a particular social order. None can survive without them. But then what is at issue, in any conflict about particular law, is the underlying definition of the desired social order ... To challenge that order is to challenge those laws.

Challenging that order necessitates challenging capitalism. Many people today do not want to talk about this. They hope to bring about progressive change by avoiding a discussion of the inherent, exploitative characteristics of capitalism. They seem to be hoping for some form of "friendly capitalism." But we need to move beyond capitalism if we are to create a decent, just, and humane world.