Book Reviews

Ethical Imperatives of the Constitution

Earl Warren: A Public Life. By G. Edward White. *New York, Oxford: Oxford University Press*, 1982. Pp. x, 429. $25.00

Max Isenbergh†

Several times in this valiant biography,[1] G. Edward White considers and rejects luck as an explanation for the superlative career of his less than superlatively gifted subject. Professor White does acknowledge that the first important step in Earl Warren's march to the Supreme Court—a march that looks in retrospect like a parlay of lucky turns extended over thirty-five years—was a "fortuitous congruity of Warren's ambition to do trial litigation and the availability of a position in the district attorney's office of Alameda County."[2] He also admits seeing in the middle years, when Warren was District Attorney, Attorney General, and Governor, a "convergence . . . of [Warren's] special character traits [with] the political climate of California."[3] And he reports in detail the burst of interacting coincidences in 1952 and 1953 that pushed Warren toward his nomination as Chief Justice.[4]

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1. G. WHITE, EARL WARREN: A PUBLIC LIFE (1982) [hereinafter cited by page number only].
2. P. 24.
3. *Id.*
4. Chief Justice Vinson died of a heart attack in September 1953, only five days after Warren had announced his intention to retire as Governor of California; Warren had come to his decision to retire partly because President Eisenhower had offered him the post of Solicitor General with a promise that he would be named to fill the first vacancy on the Supreme Court; the President, who did not regard his commitment to Warren as extending to the Chief Justiceship, had first sounded out John Foster Dulles for that position, but Dulles preferred to stay on as Secretary of State; when the President and his advisors finally turned to Warren, they still had vivid memories of Warren's support at the Republican National Convention and in the election of 1952, and, far off the mark, they sized him up as a middle-of-the-road Republican, sympathetic by temperament and conviction to the Eisenhower Administration's policies and programs. Pp. 145–53. White also volunteers that Warren himself later quoted Eisenhower as calling the appointment of Warren to the Court the "biggest damn fool thing I ever did." Pp. 129–30 (quoting E. WARREN, THE MEMOIRS OF CHIEF JUSTICE WARREN

Nevertheless, White insists that what allowed Warren to "raise[] ethics to a high judicial art"[5] and thus become a "major figure[] in twentieth-century American history"[6] was not luck but the unfolding of his own qualities:

> [Among Warren's] most memorable qualities were . . . presence, timing, capacity for growth, persuasiveness, inner conviction, decency, persistence, reasonability . . . . [These allowed him to become] a symbol for a large inarticulate body of the American public [and to] pursue[] Everyman's instinctive ideal of fairness . . . . [H]e was . . . a great man . . . . In a public world of corruptible and self-serving actors, he set a standard of incorruptibility and humanity; in a society fraught with injustices, he sought to use the power of his offices to promote decency and justice.[7]

Some readers will be slow to agree that by and large Warren's pre-Supreme Court career shows virtue inexorably transcending luck. They may give both greater weight than White does to the element of luck and less to the element of virtue. For these doubters, White provides a full and fair *aide-mémoire*—full in the range of episodes it reports and fair in the comments it makes about them.

For example, White recounts in detail the *Point Lobos* murder case, which in 1936 and 1937 made District Attorney Warren a public figure in California and first brought him national attention. Here White reminds his audience of "what has become the most established interpretation of Warren's actions":[8] that "the investigators from Warren's office engaged in 'gross fourth amendment violations'"; that "'confessions were [allegedly] coerced both physically and psychologically'"; and that "'[m]any people . . . thought the defendants . . . were innocent, despite the verdict.'"[9]

White scrupulously discloses several other episodes hard to reconcile with his holding up Warren's public life as a lesson on virtue triumphant. Of these, the episode most out of line with White's thesis is the program, begun a few days after Pearl Harbor, of relocating Japanese Americans from the California coast (and the Oregon and Washington coasts as well) to inland detention centers. Again White tells the reader all he needs to know, from Warren's membership in the Native Sons of the Golden West, a notoriously anti-Japanese lodge, to his statement to a conference of Gov-

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5 (1977)).

5. P. 367.
6. *Id.*
7. P. 369.
8. P. 35.
9. *Id.* (quoting Powe, *Earl Warren: A Partial Dissent*, 56 N. CAL. L. REV. 408, 416 (1978)).

ernors in 1943 that "no one [is] able to tell a saboteur from any other Jap."[10] And in commenting on what such facts say of Warren's ethos as a civil servant, White does not hold back unfavorable judgments. Here, on the contrary, is his summary of Warren's role in the Japanese evacuation and internment: "Warren not only participated in but can be said to have engineered one of the most conspicuously racist and repressive governmental acts in American history."[11]

Yet I believe that, in the end, most of White's audience, including those who start off as doubters, will embrace his position that it was not luck but a high mind, a stout heart, and a good character that shaped Warren's career in California and made him a natural for eventual nomination to the Supreme Court. If White adds to his burden of persuasion each time he discloses adverse facts or pronounces an uncomplimentary judgment on Warren, he also improves his own credibility with those he must persuade. Readers will decide early, with good reason, that they can trust him. And so, when he follows unfavorable disclosures of Warren's actions with explanations, mitigations, and comparisons with the more reprehensible behavior of Warren's peers, readers are likely to find these defenses trustworthy as well.

Consider, as an illustration of this method, some further details of White's treatment of the least ingratiating episode in Warren's public life. "[A]mong Warren's motives for excluding the Japanese from California," he writes—obviously making no effort to favor his subject or his thesis by choosing gentle words—"was a provincial, xenophobic racism."[12] He admits that Warren perceived all Japanese-Americans as "treacherous"[13] to the nation in general, and in particular to the California that Warren regarded as a "nativist paradise"[14] to be preserved from foreign ideologies in time of peace[15] and from sabotage in time of war.[16]

All that and more said, White goes on to put Warren's connection with the exclusion of Japanese-Americans into perspective.[17] He reminds us that California was in shock after Pearl Harbor—blacked out by night, patrolled by civilian watchers by day, and assailed night and day by rumors of spies and saboteurs. Despite censorship, word had gotten out that Japanese submarines had surfaced within signalling distance of fishing boats manned by Californians of Japanese descent, and that a Japanese

10. P. 73 (quoting PROCEEDINGS OF THE GOVERNORS' CONFERENCE 10 (1943)).
11. P. 75.
12. *Id.*
13. *Id.*
14. P. 102.
15. P. 36.
16. P. 56.
17. Pp. 69–70.

submarine had sunk a tanker off San Luis Obispo. Many officials, Warren among them, knew that the Navy had deployed only two destroyers to defend the Pacific coast from Canada to Mexico. When President Roosevelt by executive order authorized the evacuation and internment of Japanese-Americans, Congress overwhelmingly approved, as did nearly all of the nation's best known journalists. In California, not one political leader uttered a word of opposition.

Against that background of fear, not all of it to be dismissed as delusional, Attorney General Warren stands out, in White's presentation, as "the most visible and effective California public official advocating internment and evacuation of the American Japanese."[18] But he does not stand out as one upon whom it is fair to heap a heavy measure of individual moral blame. On the contrary, White sees to it that readers understand that Warren's connection with the program was as advocate, not inventor, and that in his advocacy Warren simply voiced the sentiments of the people of his state. Also, albeit by blurring distinctions between ethical merit and constitutionality, White puts Warren in good company: "The United States Supreme Court twice sustained constitutional challenges to the relocation program. Among those who defended the program and its constitutionality were Walter Lippmann, Harlan Fiske Stone, Felix Frankfurter, William O. Douglas, and Hugo Black."[19]

White also extends his lines of moral perspective to the background of Warren's youth. And again White reminds readers of the unfairness of holding Warren personally responsible for prejudices that were folkways of his early milieu. In Bakersfield, where Warren grew up, and at Berkeley, where he attended college and law school, an undifferentiating anti-orientalism had long been established as a premise of social life; and, in White's words, "no influential segment of California political life was sympathetic to the Japanese."[20]

When Warren entered politics in 1920, the "provincial, xenophobic racism" noted by White[21] was as endemic as slavery had been in the South a hundred years before. That it did not occur to Warren to fight it then or later in his political career ought not be counted against him any more than, say, John Tyler's stance on slavery when he was running for the Virginia House of Delegates in 1822.

White does more than scale down Warren's personal responsibility by drawing it in the perspective of Pearl Harbor and the "yellow peril" hallucination that had pervaded California for half a century. He shows

18. P. 71.
19. P. 75 (footnotes omitted).
20. P. 68.
21. P. 75.

Warren conspicuously taking a stand for fairness toward the Japanese on several occasions during World War II, when being noncommittal would have been both easy and politically advantageous. He points out, for example, that in February 1942, only a few days before President Roosevelt's executive order on relocation was to come into effect, Attorney General Warren opposed the State Agricultural Department's revocation of licenses held by non-citizen Japanese to handle fruits and vegetables.[22] He also reports that in December 1944, Governor Warren called upon Californians to "join in protecting [the] constitutional rights" of the interned Japanese, then about to be released.[23] Finally, White notes that when the first wave of revulsion toward the internment began to spread in California and loud disavowals of the whole program became a much-used politicians' ploy, Warren, who no doubt could have gotten away with it, refused to allow his public relations minions to put him in a better light than the facts warranted.[24]

If all that on the Japanese relocation is more than readers want to know, this material, along with about as much again on other episodes that have cast shadows on Warren's reputation, is nevertheless White's best service to Warren. For Warren emerges from White's examination of his political career as a man worthy of the moral judgment White pronounces at the end: "In a public world of corruptible and self-serving actors, he set a standard of incorruptibility and humanity; in a society fraught with injustices, he sought to use the power of his offices to promote decency and justice."[25]

White's way with the rest of the book, an appreciation of Warren as Chief Justice, is broadly similar to his treatment of Warren's earlier public service. Again, only after making sure that readers know the worst that has been said of Warren does he start on his affirmative case. And again, here as there, he relies more on a show of overbalancing merits than on a denial of faults.

For two fundamental reasons, however, this part of White's job is harder: responsible criticism of Warren as Chief Justice is more solid and extensive than criticism of Warren as a California functionary, and Warren's successes in Washington are more debatable than his successes in Sacramento. Although White again acknowledges honestly and champions loyally, this time, for all of White's valor, Warren does not come out so well.

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22. P. 74.
23. *Id.* (quoting Los Angeles Times, Dec. 19, 1944).
24. *Id.*
25. P. 369.

A sense of what White had to contend with and how he did it can be drawn from his treatment of Anthony Lewis's essay on Warren as Chief Justice.[26] Lewis's conclusions, liberally quoted by White, are that Warren "made no attempt . . . to propound a consistent theory of how a judge interpreting the Constitution should approach his task," and that his opinions were "bland . . . presentation[s] . . . almost . . . unencumbered by precedents or conflicting theories," and short on "qualities valued in the judicial process [such as] stability, intellectuality, [and] craftsmanship."[27]

White responds to all that by explicitly conceding that Lewis's criticisms are "not inaccurate."[28] Moreover, he volunteers a few comments of his own that are just as condemnatory. He acknowledges that Warren's "reasoning was often technically imperfect, opaque, or assertive,"[29] that Warren was "primarily interested in results,"[30] and that he produced opinions which, "divorce[d] . . . from their ethical premises, . . . evaporate."[31] And, in a variety of formulations, he admits that Warren took his own ethical judgment as a surer guide to decision than the explicit text of the Constitution.[32]

It is not upon a general or specific denial then, but upon a plea in avoidance, that White relies to save Warren's good name as a jurist. To vitiate a confession as damaging as the one we have seen, he needs an avoidance of heroic sweep, and he produces one. First he calls into question the judicial postulates of this century's dominant school of theorists on constitutional adjudication. And then he claims for Warren's judicial performance a merit independent of those postulates, a merit that makes itself clear on its own without help from the classical juridical discourse in which he has conceded Warren to be deficient.

White begins his examination of the orthodox view by defining it in aphorisms that few would dispute. Although the Constitution and statutes come to the Court already made, the Justices nonetheless inevitably make constitutional and statutory law by transforming lifeless texts into working rules that govern actual cases. Once the Court has taken this last step in the enacting of law—which extends to the unmaking of law for nonconformity with the Constitution—no other agency of government has an opportunity to correct its errors or otherwise change its conclusions. There-

26. Lewis, *Earl Warren*, in 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1969, at 2721 (1969).
27. *Id.* at 2722, 2724, 2723.
28. P. 217.
29. P. 365.
30. *Id.*
31. P. 367.
32. *See, e.g.*, Pp. 230, 362.

fore, if the Justices are not to betray both the principle of separation of powers and their oath to decide cases "agreeably to the Constitution and laws of the United States,"[33] they must constantly and pervasively assume an attitude of self-restraint.

Paraphrasing Holmes's dissent in *Lochner v. New York*,[34] White spells out what he takes judicial self-restraint to mean: that "Constitutional interpretation . . . [is] not a process in which judges articulate[] their social and economic theories";[35] and that the judiciary can substitute its judgments for those of the legislature only when the latter's acts were not "rational."[36] In sum, the judiciary's "proper role [is] . . . to defer to the appropriate lawmaking branch of government."[37]

White makes it clear that Warren did not agree with the role accorded to judges in the Holmesian scheme:

> Warren did not share [all of] . . . the orthodox twentieth-century theory of judicial review. Warren's Progressivism had led him to believe that legislatures were neither "democratic" nor "representative" . . . . He remained . . . a thoroughgoing skeptic about the representativeness or democratic character of the legislative forum.
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> Warren had . . . been inclined, [in] California . . . to prefer his own solutions to social problems over those of legislators . . . .
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> Warren became a champion of activism after the decision in *Brown* . . . . [By the time of] *Cooper v. Aaron*, four years later, he had . . . learned that deference to "democratic" branches of government might perpetuate injustices. He had resumed the familiar stance of Progressive champion of the public interest.[38]

White also makes it clear that he does not deplore such an antidemocratic credo in the Chief Justice of the United States nor even the risk of antidemocratic decisions it creates:

> As a matter of history, and as a theoretical posture, there was nothing indefensible about Warren's stance. He was returning to a scrutinizing role for the courts that was of longer standing in American life than the role that Holmes helped to originate . . . . His activism was based on the premise that justice needed to be done and that one could not expect . . . that ostensibly more "democratic" institutions would do it.[39]

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33. 28 U.S.C. § 453 (1976).
34. 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).
35. P. 352.
36. *Id.*
37. P. 353.
38. Pp. 353-54 (footnotes omitted).
39. P. 354.

The two reasons that White suggests for rejecting Holmes's view do not satisfy. The first—that the more "scrutinizing role" White prefers for the courts is "of longer standing in American life"—is surely not enough, true as it may be as a historical observation. If greater age ever gives greater validity to one of two competing doctrines, it cannot do so here. The doctrine White prefers flourished in an age when statutes were few, when there was no written constitution, and when the courts belonged to a sovereign who professed to derive his political power from God. The eight decades in which the doctrine White opposes has come into its own are a period in which any year's output of federal statutes is many times the volume of Blackstone's *Commentaries*, in which constitutional litigation is commonplace, and in which we have come to understand that the preamble of the Constitution in which We the People assert ourselves as the source of political power is the essential statement of the American Revolution.

White's second reason—that an activist judiciary is necessary to compensate for the injustice inevitably engendered by democratic institutions—is no better. There is nothing in the nature of things to suggest that institutions politically responsive to the people through their representatives should "perpetuate injustice" any more than a judiciary that feels free to define natural law and justice on its own. But even if there were, decent respect for the separation of powers prescribed in the Constitution would seem to call for the judicial self-restraint central to the reigning orthodoxy of this century. In any event, White cannot hope to carry the day on the pleadings. If Holmes's theory, appealing as it is to believers in democracy, is to be supplanted by Warren's, it will take a reasoned demonstration. All White offers is sheer assertion.

Another analytical deficiency in this predominantly well-reasoned book shows itself in the course of White's disquisition against the Holmesian view. He accuses Felix Frankfurter, Holmes's best known disciple and "the arch defender of self-restraint,"[40] of following a course that Warren believed "regularly prevented justice from being done."[41] But despite devoting much of the book to the Warren-Frankfurter relationship—an entire chapter entitled "Reacting to Felix Frankfurter," more references to Frankfurter as Justice than to any other Justice, copious notes on Frankfurter's non-judicial writings, and more—White, for all his high competence as legal historian, searcher of archives, and analyst of Supreme Court opinions, dredges up nothing that corroborates his charge. What he does adduce—a recital of temperamental clashes between the

40. P. 177.
41. P. 187.

two and a catalogue of their doctrinal differences—is not only irrelevant to the justice or lack of it in Frankfurter's juridical positions, but betrays a fall by White from his usual high standard of objectivity.

On Warren's and Frankfurter's personal rift, he seems to forget that it takes two to stage a temperamental clash and that it takes more than sheer assertion by a biographer to establish that his subject was always on the side of the angels. On their disagreement as jurists, White is no less assertive, apparently expecting his summarily declared conclusions, which invariably put Frankfurter in the wrong, to be taken as gospel.

One need not be a partisan of Frankfurter—as, I admit, I am—to be puzzled by White's elaborate aberration from the evenhandedness he maintains toward other adversaries or critics of Warren. My hunch is that the explanation lies in the influence of H.N. Hirsch's much-noticed recent biography of Frankfurter.[42] White not only cites Hirsch's work repeatedly, but at several crucial points in the main text reveals an undiscriminating acceptance of everything bad about Frankfurter that Hirsch has to say. Having spelled out my reasons elsewhere for believing that Hirsch's picture of Frankfurter is an ill-tempered, ill-founded, and irresponsible caricature,[43] I limit myself here to stating my chagrin that it has had a debasing effect on White's high-minded effort.

White does not rest his case for Warren as jurist only upon such negatives as his attacks on Holmes's judicial philosophy and Frankfurter's judicial behavior. He also presents Warren as a vindicator of ethical imperatives "emanating from the ethical structure of the Constitution,"[44] which are therefore more conducive to "good outcomes"[45] than "the principle of fidelity to the constitutional text, the principle of deference to the legislature in close cases, the principle of adherence to precedent, the principle of supplying reasoned professional justifications for results,"[46] or "doctrinal consistency."[47]

After reading that Warren's ideas about the Constitution's ethical imperatives derived in part from "his own code of ethics,"[48] one still wonders how he ascertained what those imperatives are. White does not say, and one cannot deduce them from Warren's best known opinions. In *Miranda v. Arizona*,[49] for example, the four dissenting Justices were unconvinced by Warren's discovery in the words of the Fifth or Fourteenth

42. H. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER (1981).
43. Isenbergh, Book Review, 91 YALE L.J. 1018 (1982) (reviewing H. HIRSCH, *supra* note 42).
44. P. 355.
45. P. 361.
46. P. 360.
47. P. 362.
48. P. 355.
49. 384 U.S. 436 (1966).

Amendment of a requirement "that an individual held for interrogation . . . be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation" and that "this warning [be] an absolute prerequisite to interrogation."[50] Skeptics surely will remain unmoved by Warren's or White's belief that there is a nontextual ethical imperative elsewhere in the Constitution demanding the majority's conclusion. Even of *Brown v. Board of Education*[51] one may doubt that Warren could have rallied a unanimous Court to his opinion by invoking some unwritten corollary of the Constitution instead of relying, as he actually did, on a straightforward reading of the words of the Equal Protection Clause coupled with a factual determination that "[s]eparate educational facilities are inherently unequal."[52]

But I do not write off White's discussion of Warren, Chief Justice, as a price readers pay for access to his magisterial treatment of Warren's pre-Court career. What redeems it is this: If White too frequently takes Warren's judicial inadequacies as virtues and his antidemocratic self-indulgences as judicious responses to moral commandments of the Constitution, he never fails to lay out all the facts we need to judge for ourselves whether inadequacy, virtue, self-indulgence, or judiciousness is the right word for the particular behavior of Warren's that he is examining. And so, no matter how many of White's laudatory conclusions we reject, we must in fairness acknowledge the value and importance of the latter part of the book. Thanks to White's honesty, skill, and diligence, it is a reliable collection of materials providing an opportunity to appraise Warren's judicial performance as a whole, an opportunity that non-specialists rarely have for any member of the Court.

If White, though trying to do better by Warren, exposes him as a supporter of his own predilections rather than high juridical principle, White may, paradoxically, have improved Warren's rating with many of White's readers. For it may be that Charles Evans Hughes, one of Warren's most admired predecessors as Chief Justice, was right when he said, as Justice Douglas reports it, that "[a]t the constitutional level . . . ninety percent of any decision is emotional. The rational part of us supplies the reasons for supporting our predilections."[53] And whether or not Hughes was right, a goodly part of the audience for books like White's will believe that he was. They also believe—and how could they believe otherwise—that the predilections White attributes to Warren, to wit, "fairness, decency, . . .

50. *Id.* at 471.
51. 347 U.S. 483 (1954).
52. *Id.* at 495.
53. W. DOUGLAS, THE COURT YEARS, 1939-1975, at 8 (1980).

individuality, dignity, . . . humanity, and integrity,"[54] are likely to generate more desirable results than the often unexpressed, sometimes parochial, and occasionally subliminal predilections of most other Justices. White's failed effort to transmute Warren's personal ethical code into a constitutional command also has value, although of a different sort, for those who repudiate Hughes—believing with Holmes that the paramount purpose of judicial self-restraint is to keep the Justices' predilections from outweighing the Constitution itself and that hope of achieving that purpose is not quixotic.

Those Holmesians—I should say "we," because I belong to their company—must realize that the Justices who preach that faith do not always practice it. How else are decisions like these to be explained: that a state legislature cannot make a crime of abortion procured or attempted during the first trimester of pregnancy for any purpose other than saving the life of the mother;[55] that a *state court's* decision applying a century-old common law rule accepting negligent misstatement as grounds for termination of the privilege to defame a public official violates the command of the First Amendment that "*Congress* shall make no law . . . abridging the freedom . . . of the press;"[56] or that citizens of the United States have a privilege not only to travel from one state to another, but also, if they are needy, to force a state to waive its one-year residence requirement for welfare benefits?[57]

If we consider ourselves Holmesians and yet approve the above and similar decisions, it must be because our own predilections have caused us to accept some extrapolation of the Constitution or metaphoric catchwords about it as more authoritative than its literal text. Although not likely to perceive such self-deception in ourselves, as soon as White lets out that Warren's personal ethical beliefs coincided with "the ethical structure of the Constitution,"[58] we see that Warren's extrapolation was spurious and his metaphor false. Still, White's failure to establish Warren's theory of judging as an acceptable alternative to the generally acclaimed but widely violated judicial orthodoxy of this century may be as valuable as his most manifest successes in this book. For it may help us guard against the intellectually subversive influence of predilections, however nobly conceived, upon the Court as well as ourselves.

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54. P. 365.
55. Roe v. Wade, 410 U.S. 113 (1973) (Blackmun, J.).
56. U.S. CONST. amend. I (emphasis added). The case is New York Times v. Sullivan, 376 U.S. 254 (1964) (Brennan, J.).
57. Shapiro v. Thompson, 394 U.S. 618 (1969) (Brennan, J.).
58. P. 359.

Corporate Law as the Ideology of Capitalism

The Politics of Law: A Progressive Critique, edited by David Kairys. *New York: Pantheon Books*, 1982. Pp. ix, 321. $22.50.*

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[The Politics of Law *is a collection of essays from the Critical Legal Studies movement. The essential tenets of this movement include: (1) a rejection of the idea that a distinctly legal mode of reasoning exists; (2) a belief that democratic processes lend a false legitimacy to existing social and economic relations; (3) the assertion that law and the state embody values that prevent their neutrality; and (4) the view that law is an important tool in legitimizing the existing social system. In this review, Professor Deutsch offers a "critical" analysis of the ideological role of law in American society as an alternative to the essays in* The Politics of Law.—Ed.]

I.

The United States is a nation forged by revolution. It is also a society whose economic system is denominated "capitalism." In Marxist terminology, revolution is a political event associated with the termination as well as the birth of capitalist values, and ideology is doctrine utilized to produce change.

For political scientists in the United States, the question "Is ideology dead?" seems more important than the question of the nature of American ideology. This emphasis is unfortunate because ideological factors are basic determinants of political action. Indeed, with the exception of personal friendship or economic and political corruption, it is ideological affinity that arguably provides the primary basis for political allegiance. Consequently, the inability of American political science to deal with a political concept of such fundamental importance suggests that ideology must operate within our society in unique and mysterious ways.

Ideology comprises the set of beliefs by which a society expresses acceptance of itself. Ideology is what transforms a group, of whatever size or

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* For a review more closely tied to *The Politics of Law*, see Forbath, Book Review, 92 YALE L.J. (1983).

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status, into a social entity. For Marxists, ideology consists of revolutionary action. Yet because revolution may not actually occur at any given time, ideology can also legitimate the status quo.

Historically, religion served to legitimate the status quo, and it is presumably to accommodate this fact that Marxist doctrine denominates religion an opiate. Religion functions as an opiate, however, only when it erects an impregnable wall between the realms of Caesar and of God. It is at that point, when neither the secular nor religious world defines aspirations or limits in the other realm, that religion serves simply to maintain a given state of affairs. But at that point, because it is simply promoting its version of supernatural reality rather than attempting to interact with the circumstances of secular existence, religion as opiate is rendered ineffective as ideology: It becomes ideas incapable of moving people to action. To be effective, ideology must be in the world and of it, for ideology must move large numbers of people to change or preserve the social structure that surrounds them.

Common law is law defined by cases. Since corporate lawyers are paid largely to keep their clients out of court, corporate law is characterized by a relative paucity of precedents. Moreover, abstract propositions derivable from those decisions are not themselves authoritative. Only the holdings arrived at in the process of applying those propositions to the concrete complexities of an actual dispute are properly called law.

It is this process of application that constitutes the constant interaction of law with reality, and thus it is this process that permits law to operate as ideology. Americans have long accepted the proposition that the words of the Bill of Rights impose limits on the power exercised by political authorities. Until the years following World War II, the rights secured by those words had not been seen as granting individuals social and economic, as well as political, entitlements. Only after the Depression forced the New Deal's acknowledgment of the need for governmental intervention in the economy did constitutional law have to take into account the reality of social and economic stratification. Nonetheless, the judiciary, the branch of government most intimately connected with the application of law to reality, is still entrusted with the ideological task of giving reality to the Bill of Rights' promise of according individuals the same respect as the state.

Perhaps law can serve an ideological function only in connection with political rights; perhaps no ideology can legitimate a society that refuses to accept social class as limiting what an individual can do. So long as one believes instead that individual free will can surmount limitations imposed by class designation, however, one can believe that corporate law, viewed as a social mechanism, functions in the economic realm as constitutional

law does in the political—that the ideals of corporate law define, in connection with economic institutions, the image to which our society aspires.

II.

Henry Ford symbolizes many things in the history of the United States. Developer of the automobile, promoter of an end to international conflict, family patriarch, opponent of labor unions, he represents an individualism that manifested itself in a variety of political and economic forms during the Nineteenth Century. The political manifestation of this individualism was the Progressive movement of the late Nineteenth Century, which advocated "direct" democracy at home (symbolized by such reforms as the initiative, the referendum, and election of judges) and which attempted to restrict involvement in international affairs to "principled" uses of national power (like the convening of conferences and the formulation of agreements in pursuit of ends such as the renunciation by nations of the right to resort to arms).[1]

Progressives believed that the accumulation of capital made possible by the corporate structure permitted persons in control of such entities to wield inordinately large amounts of economic power, a view that sometimes triumphed over even the desire to allow persons to dispose of the fruits of their enterprise. It was this perception that led the Michigan Supreme Court in *Dodge v. Ford Motor Co.*[2] to respond to Henry Ford's plan to expand his production facilities while reducing the selling price of his cars (and keeping to a minimum the dividends paid to shareholders) by warning that:

> The difference between an incidental humanitarian expenditure of corporate funds for the benefit of the employees, like the building of a hospital for their use and the employment of agencies for the betterment of their condition, and a general purpose and plan to benefit mankind at the expense of others, is obvious. There should be no confusion (of which there is evidence) of the duties which Mr. Ford conceives that he and the stockholders owe to the general public and the duties which in law he and his codirectors owe to protesting, minority stockholders.[3]

The argument made by the Michigan Supreme Court rests on the proposition that only competition, as manifested in the profit motive, puts sufficient pressure on those in control of corporate wealth to prevent abuse

1. For one view of the Progressive movement, see R. HOFSTADER, THE AGE OF REFORM (1955).
2. 204 Mich. 459, 170 N.W. 668 (1919).
3. *Id.* at 506-07, 170 N.W. at 684.

of their power.[4] Analogous arguments—that certain competitive practices confer unfair advantages and that the size of certain organizations gives them an unfair competitive advantage—underlie the antitrust legislation limiting the exercise of corporate power.

The dilemma faced by a society characterized by this faith in the competitive ideal is how to justify a system that may injure those who fall short in the contest. The American answer has pointed to success, to a standard of living that far exceeds that of other societies. These economic achievements were accompanied by the growth of corporate entities, a fact that made it difficult to regard size itself as a social evil quite apart from the theoretical argument that only entities as large as the largest factor in any given market could compete on even terms with the leader.[5]

The *Dodge v. Ford* court, while it forced the payment of dividends which Ford had attempted to discontinue, refused to enjoin the building of a Ford-owned steel plant at River Rouge, which was opposed precisely because it represented too large an agglomeration of economic power.[6] What is most striking is the fact that the Michigan Supreme Court refused to act in the face of claims that Ford, over shareholder objections, was charging less than the market price for his product. "In view of the fact that the selling price of products may be increased at any time," the court held, "the ultimate results of the larger business cannot be certainly estimated. The judges are not business experts."[7]

The rhetoric of *Dodge v. Ford* rests on the importance of the profit motive in disciplining corporate activity. In operational terms, however, the decision permits invocation of the business judgment rubric to shield corporate activity from judicial control. In terms of applying the competitive ideal to ongoing economic activity, in other words, only enactment of the antitrust laws has subjected business entities in the United States to more severe constraints than those imposed by other nations.[8] A satisfactory answer to the question of why we continue to accept the costs of such constraints would encapsulate a great deal of United States history. Such

4. "A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end." *Id.* at 507, 170 N.W. at 684.

5. Indeed, the court rejected the Dodges' contention that a Michigan statute limited the size of an existing corporation on the basis that the statute's history indicated encouragement of the large corporation. *Id.* at 493-96, 170 N.W. at 679-80.

6. The minority stockholders' complaint involved the proper distribution of dividends, but part of the relief they sought was an injunction against construction of the smelting plant. *Id.* at 497, 170 N.W. at 681.

7. *Id.* at 508, 170 N.W. at 684. The results up to the date of the opinion were that the Ford Motor Company had grown in fourteen years from a company with a capital stock of $150,000 to one with total assets of over $132 million, while the price of its cars dropped from $900 to $360.

8. In *Dodge v. Ford*, however, the court specifically stated that Ford's proposed expansion did not violate the antitrust laws. *Id.* at 499, 170 N.W. at 681. For a discussion of allowable monopolies, see United States v. Aluminum Co. of Am., 148 F.2d 416, 429-30 (2d Cir. 1945) (L. Hand, J.).

an answer—a persuasive description of the power of the competitive ideal—would canvass those historical factors that make possible an underestimation of the significance of limits on individual achievement, those factors that made the New Frontier an effective political slogan during the Kennedy years.

Such factors include a wealth of natural resources. They include as well the United States' freedom from feudalism and thus from the class structures derived from the networks of personal loyalties that provided stability in feudal society. These factors produce the frontier—a social safety valve and a source of relatively costless economic expansion that allows the shifts in distribution accompanying changes in production to be perceived as making more available for all. Though the frontier existed within the territorial United States, nineteenth-century Americans failed to restrict its significance to the domestic arena. This fact permitted Progressives to believe that what worked in the United States could work anywhere—to insist on limiting participation in foreign affairs to "principled" uses of power—and thus to combine support for competition at home with a refusal to accept war as an activity made necessary by the frontier's disappearance.

Viewed from the outside, the frontier produced an innocent certainty about the rightness of what one was doing that easily turned into arrogance when one dealt with those not members of the frontier community. The antitrust precedent that illustrates this proposition is *United States v. Aluminum Co. of America*,[9] in which Alcoa was charged with attempting to acquire a monopoly in the United States. Foreign manufacturers of aluminum had agreed, through a contract made in Switzerland, to set up a system of export quotas, and evidence was introduced tending to prove that this agreement affected potential imports into the United States.[10] Though Alcoa's presence in the case was crucial to allow service of process, Alcoa had no direct connection with this quota system, participating only through a Canadian corporation established to hold Alcoa's foreign properties.

Judge Learned Hand, speaking for the Second Circuit,[11] held that in such circumstances proof of effects on commerce alone was an insufficient basis for liability; proof of intent to control the foreign commerce of the

9. 148 F.2d 416 (2d Cir. 1945).

10. *Id.* at 444–45. *See* Note, *Application of the Anti-Trust Laws to Extraterritorial Conspiracies*, 49 YALE L. J. 1312, 1314, 1318 (1940) (discussing evidence submitted to district court). The district court concluded, however, that effects had not been proven. United States v. Aluminum Co. of Am., 44 F. Supp. 97 (S.D.N.Y. 1941).

11. The Second Circuit in *Alcoa* was sitting as a court of last appeal pursuant to a certificate from the Supreme Court. 148 F.2d at 421.

United States was also required.[12] Although there was no evidence on this question,[13] the Second Circuit found the requisite intent by relying upon the rule that antitrust defendants are presumed to intend the natural consequences of their acts.[14] Since the evidence in *Alcoa* seemed to reveal effects on United States imports,[15] application of the rule provided a presumption of intent. In cases decided after *Alcoa*, however, pleas of good intent or lack of intent, apparently even when proved,[16] have failed to prevent the imposition of liability.[17] *Alcoa* is troubling, in other words, not only because it imposes United States policy upon foreign entities, but also because it is not above-board about why it is doing so.

III.

F.D.R.'s political success in mitigating the social impact of the Great Depression is undeniable. He successfully deployed a series of experimental and often contradictory policies so that the public responded with hope rather than exasperation. Only as F.D.R.'s second term drew to an end did it become clear that his economic measures had not produced a sustained recovery. True recovery occurred with World War II, but by then the Great Depression had unraveled the simple correlation between corporate size and economic success that characterized the period of economic growth following the Civil War.

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12. *Id.* at 443-44. This view seems to have been accepted by commentators. *See, e.g.*, DEP'T OF JUSTICE, ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 76 (1955); Barron, *Foreign Trade-Mark Licensing and American Anti-Trust Laws: Some Observations on the* Timken *Case*, 9 CATH. U.L. REV. 25 (1960).

13. *See* Note, *supra* note 10, at 1318.

14. *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 243 (1899).

15. The appellate court stated:

> The [district] judge also found that the 1936 agreement did not "materially affect the . . . foreign trade or commerce of the United States"; apparently because the imported ingot was greater in 1936 and 1937 than in earlier years. We cannot accept this finding . . . . It by no means follows from such an increase that the agreement did not restrict imports; and incidentally it so happens that in those years such inference as is possible at all, leads to the opposite conclusion . . . . [T]he proportion of imports to domestic ingot was about 15.6 per cent for the first period and about 12.6 per cent for the second. We do not mean to infer from this that the quota system of 1936 did in fact restrain imports, as these figures might suggest; but we do mean that nothing is to be inferred from the gross increase of imports.

Alcoa, 148 F.2d. at 444.

16. *See* United States v. National Lead Co., 63 F. Supp. 513, 523, 527 (S.D.N.Y. 1945) (although National Lead was unaware of antitrust consequences of its action, it was found liable together with DuPont, which had sought extensive legal advice on antitrust consequences of its actions), *aff'd*, 322 U.S. 319 (1947).

17. *E.g.*, United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947, 958 (D. Mass. 1950) (defense of lack of motive not considered); United States v. Timken Roller Bearing Co., 83 F. Supp. 284, 310 (N.D. Ohio 1949) (good intent no defense), *aff'd*, 341 U.S. 593 (1951); United States v. General Elec. Co., 82 F. Supp. 753, 890-91 (D.N.J. 1949) (although Phillips proved to have knowledge of antitrust laws, question of intent was not considered). Nor was good intent a defense in pre-*Alcoa* cases involving conduct within the United States. *See* Thomsen v. Cayser, 243 U.S. 66, 86 (1917); Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 49 (1912).

The Depression shifted perceptions of economic power, a shift symbolized by a photograph taken in the United States Senate Caucus Room on June 1, 1933. Newspapers ran the picture of an avuncular sixty-two-year-old in a leather-upholstered armchair with a female midget on his lap. The man in the photograph was J.P. Morgan, the banker who organized the holding companies that dominated various sectors of the American economy. Morgan was waiting to testify before a Senate committee about to condemn the practices of his bank, and the midget (who had been placed on his lap by a press agent) was a member of the Ringling Brothers and Barnum & Bailey Circus troupe.[18]

Seven years later, *Litwin v. Allen*,[19] a shareholders' derivative suit against various banks and members of J. P. Morgan & Co., held that a transaction involving the sale by Allegheny Corporation of certain railroad bonds violated fiduciary principles because it was combined with an option to repurchase. The Van Sweringens, who controlled Allegheny, were one of the group of entrepreneurs identified with the Great Depression, and Allegheny had been organized as a holding company to provide them with funds for investment in railroad securities. The option in question, whose terms were extremely favorable to the Van Sweringens,[20] resulted from borrowing limitations in Allegheny's charter.[21] Moreover, because the bonds were convertible, the Van Sweringens insisted on the right of repurchase to avoid the possibility of losing control of the railroad.[22]

As the court noted, "There [was] no case directly in point."[23] The fact that this absence of precedent did not prevent the court from invalidating the transaction underlines the shift in attitude that separates *Dodge v. Ford* from *Litwin v. Allen*: Law made by courts had become a process that functioned not simply to impose limits on the growth of corporations, but also to supervise their business activities. The procedural device which implements this function is the shareholders' derivative suit, and cases on the frontier of corporate law today are delineating the standards of reviewing a corporation's decision not to pursue such a suit.

In *Zapata Corp. v. Maldonado*,[24] the Supreme Court of Delaware—recognized as "eminent" as the result of its "unique experience in

18. G. THOMAS & M. MORGAN-WITTS, THE DAY THE BUBBLE BURST: A SOCIAL HISTORY OF THE WALL STREET CRASH OF 1929, at 417-18 (1979).

19. 25 N.Y.S.2d 667 (N.Y. Sup. Ct. 1940).

20. The option was for a repurchase at the original sale price. The Van Sweringens therefore bore none of the risk of a drop in the price of the bonds. *Id.* at 698. It was this uneven distribution of risk which led the court to hold the defendants liable. *Id.* at 697-99.

21. *Id.* at 691-92.

22. *Id.* at 692.

23. *Id.* at 696.

24. 430 A.2d 779 (Del. 1981).

the area" of derivative suits[25]—required the trial court to override a corporate decision to discontinue a derivative suit whenever "the Court determines . . . that the [corporation has not demonstrated that the decisionmaking body] is . . . independent [and] has . . . shown reasonable bases for its conclusions, or, if the Court is not satisfied for other reasons relating to the process, including but not limited to the good faith of the [decisionmaking body]."[26] Moreover, even if a corporation meets this test, the trial court may, "in its discretion," apply "its own independent business judgment . . . [and] when appropriate, give special consideration to matters of law and public policy in addition to the corporation's best interests."[27] The *Zapata* court justified this extraordinary degree of judical review earlier in the opinion:

> [N]otwithstanding our conviction that Delaware law entrusts the corporate power to a properly authorized committee, we must be mindful that directors are passing judgment on fellow directors in the same corporation and fellow directors, in this instance, who designated them to serve both as directors and [independent litigation] committee members [charged with deciding whether or not to continue the derivative litigation]. The question naturally arises whether a "there but for the grace of God go I" empathy might not play a role. And the further question arises whether inquiry as to independence, good faith and reasonable investigation is sufficient safeguard against abuse, perhaps subconscious abuse.[28]

The problem posed by *Zapata* centers on the nature of the judicial task this test requires. The difficulties involved in the probing of "perhaps subconscious" motives are apparent in *Globe Woolen Co. v. Utica Gas & Electric Co.*,[29] in which Judge Cardozo upheld a trial court decision voiding a contract between two corporations that shared a common director. It is unclear whether the *Globe* opinion was based upon the substantive terms of the contract, the fact that negotiations on behalf of one of the corporations had been conducted by a subordinate, or the fact that the director who had conducted the negotiations on behalf of the other corporation held the same position in each of the parties to the contract. What is striking is the presentation of the facts on the basis of which Cardozo held the contract void: "At least, a finding that there was [a relation of trust reposed, of influence exerted, of superior knowledge on the one side

25. Joy v. North, 692 F.2d 880, 891 (2d Cir. 1982), *cert. denied sub nom.* Citytrust v. Joy, 103 S. Ct. 1498 (1983).
26. *Zapata*, 430 A.2d at 789.
27. *Id.*
28. *Id.* at 787.
29. 224 N.Y. 483, 121 N.E. 378 (1918).

and legitimate dependence on the other] has evidence to sustain it";[30] "[t]hese elements of unfairness [the common director] must have known, if indeed his knowledge be material";[31] "[t]he inference that [the common director foresaw the precise evils that developed] might not be unsupported by the evidence."[32]

In short, the facts are rarely clear, and because it is so difficult to determine whether or not a potential conflict of interest has in fact had an impact on a given transaction, decisions like *Globe* produced statutes defining in precise terms when a conflict of interest will void contracts or transactions. Such laws have transformed judges making law about conflict of interest into interpreters of statutes. This shift of the judicial role is illustrated by *Joy v. North*,[33] in which the Second Circuit held that the test enunciated by the Delaware Supreme Court in *Zapata* was law in the State of Connecticut.

Agreeing that Connecticut cases do not resolve the question whether Connecticut's law is the same as Delaware's, the majority and dissent arrived at conflicting positions by treating as relevant different statutory material. The majority focused on the fact that Connecticut's indemnification statute "adopts the middle ground between no indemnification and permissible indemnification without regard to outcome and thus does not bespeak a negative attitude toward enforcement of fiduciary obligations through meritorious derivative litigation."[34] While the majority left unclear how the content of the common law governing conflict of interests is defined by statutory provisions regarding rights to indemnification, the dissent fared no better in demonstrating the relevance of *its* statute. It relied on the opinion of the United States Supreme Court in *Burks v. Lasker*, which held (in a footnote) that "[w]hile lack of impartiality [of disinterested directors] may or may not be true as a matter of fact in individual cases, it is not a conclusion of law required by the Investment Company Act."[35] But the statutory provisions interpreted in *Burks v. Lasker*, while they do deal directly with conflicts of interest, not only are restricted to investment companies but are also a matter of federal rather than state law.

The *Joy v. North* opinions must cite either judicial precedent or statutory authority for the result they reach because of the business judgment rule, which requires judges to rely on something more than the certainty

30. *Id.* at 490, 121 N.E. at 380.
31. *Id.* at 491, 121 N.E. at 380.
32. *Id.* at 492, 121 N.E. at 381.
33. 692 F.2d 880 (2d Cir. 1982), *cert. denied sub nom* Citytrust v. Joy, 103 S. Ct. 1498 (1983).
34. *Id.* at 889.
35. 441 U.S. 471, 485 n.15 (1979). The dissent in *Joy v. North* cites *Burks* in 692 F.2d at 900 (Cardamone, J., concurring in part, dissenting in part).

of hindsight when overturning a business decision as unreasonable. The business decision examined in *Joy v. North* is whether it was reasonable for a bank continually to extend further credit to a builder (presumably in hopes of recapturing some of the moneys already advanced). What the majority eventually rested on was the fact that the builder's

> venture . . . is so similar to the classic case of *Litwin v. Allen, supra* (bank purchase of bonds with an option in the seller to repurchase at the original price, the bank thus bearing the entire risk of a drop in price with no hope of gain beyond the stipulated interest) that we cannot agree with the [Special Litigation Committee of independent directors which recommended dismissal of the suit on the basis of the] conclusion that only a "possibility of a finding of negligence" exists.[36]

To ask whether *Joy v. North* was correctly decided is to assess the precedential significance of *Litwin* and to attempt to determine whether the *Litwin* opinion compelled the decision arrived at by the majority in *Joy v. North*. These tasks require us to ask why the *Litwin* court reached the result it did. The *Litwin* opinion recognizes precisely why it was so difficult for a judge to arrive at a just result in that case:

> [T]he main transactions attacked in this case, those dealing with the purchase of the Missouri Pacific bonds with the option of repurchase to Allegheny Corporation . . . took place in October, 1930. There had been a crash in the stock market in October, 1929. In April, 1930, there was an upswing in the market. Shortly thereafter there began a slow but steady decline until October, 1930, when there was another severe break. The real significance of what was taking place was, generally speaking, missed at the time, but is plain in the retrospect. Forces were at work which for the most part were unforseeable. Men who were judging conditions in October, 1930, by what had been the course and the experience of past panics thought that the bottom had been reached and that the worst of the depression was over; that any change would be for the better and that recovery might reasonably be envisaged for the near future. Experience turned out to be fallacious and judgment proved to be erroneous; but that did not become apparent until some time in 1931. In order to judge the transactions complained of, therefore, we must not only hold an inquest on the past but, what is much more difficult, we must attempt to take ourselves back to the time when the events here questioned occurred and try to put ourselves in the position of those who engaged in them.[37]

36. Joy v. North, 692 F.2d at 896.
37. Litwin v. Allen, 25 N.Y.S.2d at 677 (1940).

Given that retrospective awareness, what seems to me crucial is that the Van Sweringens were valued Morgan customers. Why then was the stipulated interest for the loan/option considered an insufficient basis on which to justify J.P. Morgan's giving of the option? My answer rests on the *Litwin* court's recognition that "the only [one of the four] transaction[s] [involved in the case] in which it is claimed that a profit was made by directors sought to be held liable is that involving [a private purchase at prices below the market] of Allegheny Corporation common stock from J. P. Morgan & Co. in January, 1929."[38] Of this transaction, the court said "[t]he interest of the individuals who bought privately was speculative,"[39] which it interpreted to mean that "[t]here is nothing substantial to the contention that the Allegheny stock transaction operated on the minds of the directors as a 'favor'."[40] What *Litwin* held in evaluating the private offer of Allegheny common stock, in other words, is that the fact that a market risk was being taken by those to whom J. P. Morgan sold stock outweighed the fact that the price he charged was below the market; that even a favorable speculative opportunity did not compromise a director's fiduciary duty of acting with undivided loyalty on behalf of the corporation on whose board he sits.

One of J. P. Morgan & Co.'s business practices, branded an abuse of power by the Senate Committee on Banking and Currency, was the use of "preferred lists" of persons who received holding company stock prior to the time trading was begun.[41] The *Litwin* judgment is thus less categorical than that arrived at by the Senate Committee, in that it condemns only the single option transaction in connection with the Allegheny bonds rather than an established "preferred list" practice. Whether this distinction is sufficient to make application of the *Litwin* holding a justifiable basis for the decision in *Joy v. North* is a question that probes the validity of our societal insistence that legislative rules can validly apply to individuals only with the approval of the judiciary. The essence of this belief is that the opportunities for abuse of power afforded a judge in the process of making law are qualitatively different, not only from the opportunities for abuse of power made possible by the legislative process, but also from those afforded the corporate decisionmaker by the process of meeting real and imagined competitive threats. The question raised, in other words, is the legitimacy of that portion of the *Zapata* test that permits a court to apply "its own independent business judgment."

38. *Id.* at 676.
39. *Id.* at 690.
40. *Id.* at 691.
41. F. PECORA, WALL STREET UNDER OATH 27 (1939).

IV.

I shall examine the legitimacy of *Zapata* by focusing on a concrete example. To avoid the ambiguities of the distinction between the promulgation of legal standards and the finding of determinative facts (a distinction that defines both the responsibility and the limitation placed on the work of an appellate judge), I choose the decision in *Dodge v. Ford.* The question I pose is whether the actions of Henry Ford were sufficiently "disinterested" to avoid the possibility that they represented the perhaps subconscious abuse of power mentioned in *Zapata.*

If we look simply at what the Michigan Supreme Court did in *Dodge v. Ford,* we must conclude that it judged the building of River Rouge as sufficiently disinterested, but reached the opposite conclusion about the withholding of dividends. In terms of our question—whether what Ford is doing is an abuse of power—the Court's distinction is at best a purely formal one. The question thus becomes one of the legitimacy of the power of the appellate judge—why the jurist should have the relatively uncontrolled power to determine whether a given business decision was justifiable. What makes the problem of the responsibility of the appellate judge so intractable, moreover, is that the decision of the court does not make the law; the law is precedent, and precedent is the way the decision arrived at by the trial or appellate tribunal is treated in later opinions. Thus, for instance, *Alcoa* becomes a troubling decision only when later cases make clear that intent has nothing to do with courts assuming jurisdiction over foreign transactions.[42]

The problem in *Dodge v. Ford* was created by the fact that Henry Ford's declarations of his intention to put all the company's future earnings back into the business was published throughout the United States in "substantially the following language":

> "My ambition," declared Mr. Ford, "is to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes. To do this, we are putting the greatest share of our profits back into the business."[43]

The problem was that instead of defining his goals in terms of the process of profit maximization, Henry Ford insisted on extolling the benefits of increased economic activity. It was his statement of the ideals motivating

42. *See supra* note 17.
43. 204 Mich. at 468, 170 N.W. at 671.

his behavior that permitted the court to question the extent to which that behavior was sufficently "disinterested."[44]

Focusing on the particular controversy being adjudicated, however, is not enough. So long as judicial rules are being developed, so long as the process of their application continues to interact with the social reality that law attempts to govern, the court's description of the reality contained in the precedents cited to justify its decision must be sufficiently compelling to serve as a standard for judging future behavior. If it is to remain effective, moreover, the doctrine being promulgated can never become so clearly defined as to be impervious to further change. Thus, the clearer a rule is, the more subject it is to manipulation justified by compliance with its explicit formulation. In systemic terms, in other words, any sufficiently uniform standard of behavior will at some point be exploited through development of an application not derivable from the regularities by which the standard was defined.

The rules that govern acceptance of such innovation (the law that governs the marketplace) both determine individual success and define the behavior of the group of which the individual is a member. This duality permits law to serve simultaneously as a constraint which the skillful can successfully manipulate to their individual advantage and as a norm whose existence everyone must respect. It is also as a result of this duality that the law fulfills an ideological function, i.e., it is acceptance of the competitive ideal of corporate law that transforms individual capitalists into elements of a functioning social structure.

V.

Whether the ideology of corporate law is functioning to justify revolution or to legitimate the status quo, however, is an unanswerable question. Revolution, signifying the loss of legitimacy, occurs whenever enough individuals are sufficiently dissatisfied that their desire to replace the choices embodied in the present system outweighs their concern over the potentially unsatisfactory consequences of new choices.

For individuals, revolutions involve shifts in the criteria by which they identify themselves as political actors; a successful revolution prompts a sufficient number of individual shifts to produce a change in the political values held by the society. Individual social and political identifications are ordinarily matters governed by habit, by the experience of the past. Revolution can thus be defined (in terms of the individual) as the replace-

44. Indeed, the *Dodge v. Ford* court described Mr. Ford as intending "to continue the corporation henceforth as a semi-eleemosynary institution and not as a business institution." *Id.* at 504, 170 N.W. at 683. Mr. Ford's views are discussed at greater length in *id.* at 505–506, 170 N.W. at 683–84.

ment of habitual by spontaneous political behavior. Such behavior is ordinarily perceived as a free and disinterested act, although it can, of course, be characterized as the individual's rationalization of the need to accept new social categories. If the revolution succeeds, however, and a shift in social values occurs, new terms that define individuals as political beings come into existence, and the shifts in individual identifications are rationalizations only if there is no such thing as a free act.

In Marxist terms, revolution is defined as the social response to the alienation caused by the division of labor. The division of labor, however, results in the provision of more material goods. To the extent that such goods are perceived as valuable, individual alienation may be a social necessity, an obligation that must be assumed by those who wish to be perceived as behaving in a "disinterested" manner.

The alienation felt by individuals working within a corporation places upon that organization the burden of making activities undertaken for its benefit appear meaningful, even when this means structuring work in ways that are not economically efficient. The last stage of capitalism, in other words, may be a shift from competitive economic entities to a self-sustaining bureaucracy. Whether that stage will in fact occur or, if achieved, will eventually result in revolution depends upon whether the ideal of competition—the ideal that makes corporate law an effective ideology—continues to be attractive, and whether the organization of American society permits rewarding behavior motivated by that ideal.