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Arthur S. Miller

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ON POLITICS, DEMOCRACY, AND THE FIRST
AMENDMENT: A COMMENTARY ON *FIRST
NATIONAL BANK V. BELLOTTI**

ARTHUR S. MILLER**

The large private corporation fits oddly into democratic theory. Indeed, it does not fit.

—Charles E. Lindblom***

I. Introduction

“The legal machinery,” Morris R. Cohen once observed, “never operates apart from human beings, judges, juries, police officials, etc. The imperfect knowledge or intelligence of these human beings is bound to assert itself. It is therefore vain to expect that the legal machinery will work with a perfection that no other human institution does.”¹ Since Professor Cohen’s observation surely is accurate, we should not expect perfection from the Supreme Court of the United States. Nevertheless, are we not entitled to expect that the Justices be cognizant of the economic and political facts of life, and that they give them full and due consideration? In answering this question, this article will analyze the Supreme Court’s opinion in *First National Bank v. Bellotti*,² cast against an evaluation of the role of the Court in Professor Jesse Choper’s *Judicial Review and the National Political Process*.³ My theme may be simply stated: Neither *Bellotti* nor Choper adequately consider the brute facts of the political economy of American constitutionalism.

Bellotti arguably is the most important first amendment decision in recent memory. In that case, the First National Bank challenged a Massachusetts statute forbidding certain expenditures by banks and business corporations for the purpose of influencing the vote on referenda. Despite the fact that the referendum in question had nothing directly to do with the plaintiff-bank’s business,⁴ the Supreme Court invalidated the

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** Professor Emeritus of Law, The George Washington University; A.B. 1938, Willamette University; LL.B. 1949, Stanford University; J.S.D. 1959, Yale University.

*** C. LINDBLOM, POLITICS AND MARKETS 356 (1977).

¹ Cohen, *Positivism and Idealism in the Law*, 27 COLUM. L. REV. 237, 248 (1927).

² 435 U.S. 765 (1978).

³ J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980) [hereinafter cited as CHOPER].

⁴ The referendum at issue dealt with a proposed constitutional amendment to allow collection of a graduated income tax on individuals. 435 U.S. at 769.

statute.⁵ In an opinion authored by Justice Lewis Powell, the Court reasoned that the corporation is a constitutional person and, accordingly, it is to be treated as any other person (*i.e.*, a natural person) when first amendment issues are raised.⁶ "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."⁷ That is a nice sentiment, and if one accepts the premise that corporations are always to be equated with natural persons under the Constitution,⁸ then the decision inexorably flows as a matter of simple logic. The problem, however, is in the nature of the premise. If it is faulty, as I believe it is, then Powell's conclusion is invalid.⁹ Professor Choper deals with the *Bellotti* decision by ignoring it, as does Professor John Hart Ely in his recent book on the theory and practice of judicial review.¹⁰

The implications of *Bellotti* are abundantly clear. The assets of corporations may be used for all types of political (public) expression, without regard to whether the content of that expression materially affects the firms. And that is so even though some corporate behemoths, such as AT&T or General Motors, have assets that not only dwarf those of any natural person but also are larger than most nation-states of the world. To pretend that a corporation is a person is a person—to paraphrase Gertrude Stein—and then proceed to suggest that AT&T, for example, is the same as a natural person for purposes of the first amendment is to be wilfully blind. Since we must assume that judges do not divest themselves of their preferences and predilections when they put on the black robes of judicial office,¹¹ the myopia of the Court is understandable, although indefensible. For Choper and Ely to ignore the portents of *Bellotti* is more puzzling, particularly since Ely

⁵ *Id.* at 795. The *Bellotti* doctrine was solidified in June, 1980 when the Court held that a public utility could not be prevented from inserting propaganda in its monthly bills. *Consolidated Edison Co. v. Public Service Comm'n*, 100 S. Ct. 2326, 2336-37 (1980). *See also* *Central Hudson Gas & Elec. Co. v. Public Service Comm'n*, 100 S. Ct. 2343, 2354 (1980) (holding unconstitutional order prohibiting electric utility's promotion of electricity use).

⁶ 435 U.S. at 776.

⁷ *Id.* at 777.

⁸ *See* *Santa Clara County v. Southern Pac. Ry.*, 118 U.S. 394, 395-96 (1886); text accompanying notes 24-30.

⁹ *See* Miller, *On the Choice of Major Premises*, in A. MILLER, *THE SUPREME COURT: MYTH AND REALITY* 105-31 (1978) [hereinafter cited as MILLER].

¹⁰ J. ELY, *DEMOCRACY AND DISTRUST* (1980) [hereinafter cited as ELY]; *see also* Miller, *Book Review*, 39 U. FLA. L. REV. 369 (1980) (reviewing ELY).

¹¹ It is vain to contend with judges who have been at the bar the advocates for forty years of railroad companies, and all the forms of associated capital, when they are called upon to decide cases where such interests are in contest. All their training, all their feelings are from the start in favor of those who need no such influence. Statement of Justice Samuel F. Miller, *quoted in* C. FAIRMAN, *MR. JUSTICE MILLER AND THE SUPREME COURT* 374 (1939). *See* Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, in MILLER, *supra* note 9, at 51-87.

For a candid revelation of Justice Powell's pro-business philosophy, uttered just before

advocates a "representation-reinforcing" theory of judicial review,¹² and Choper is most interested in the protection of individual rights.¹³ I do not suggest that the Court or Choper or Ely are not fully aware of the immense disparity in wealth between the disembodied entities called corporations and natural persons. Nor do I say that they are unaware of the disproportionate strength in the electoral and political processes between the two. What they do is blithely to disdain, save in a few conclusory statements in *Bellotti*,¹⁴ discussing the question.

If the first amendment is more than the private preserve of the media—which surely it is¹⁵—then the full significance of *Bellotti* becomes apparent. Those with money, provided they are collectivities called corporations, now have constitutional *carte blanche* to try to manipulate the political process. The hidden underbelly of American politics is now constitutional doctrine. That makes corporations more equal, as Orwell might have said,¹⁶ than natural persons, who by federal statute are limited in their electoral contributions. Although limitations on campaign contributions are valid,¹⁷ *personal* campaign expenditures are limited only by the wealth of the person.¹⁸ Corporations, to be sure, also are limited in what they can contribute to a candidate. After *Bellotti*, however, they are presumably free to espouse the same views of a given candidate, and perhaps even the candidate himself,¹⁹ because they have no direct connection with that candidate. The meaning is clear beyond

he went on the Court, see Powell, *Attack on American Free Enterprise System*, a memorandum dated August 23, 1971 and submitted to the U.S. Chamber of Commerce (available from that organization). Among other things, Powell said: "Business must learn the lesson, long ago learned by labor and other self-interest groups. This is the lesson that political power is necessary; that such power must be assiduously cultivated; and that when necessary, it must be used aggressively and with determination—without embarrassment and without the reluctance which has been so characteristic of American business." That statement, and the entire memorandum, clearly reveals the philosophical predicate for Justice Powell's *Bellotti* opinion. (It is worth at least passing mention that Powell's conception of American economic history is faulty at best. Businessmen have always known that "political power is necessary," and, indeed, the history of government-business relations in the United States can be and has been written around that theme). Given Powell's 1971 views, should anyone be surprised at this 1978 opinion in *Bellotti*?

¹² ELY, *supra* note 10, at 77-88.

¹³ CHOPER, *supra* note 3, at 60-128. Professor Ely would limit judicial review to those issues that promote representation in government, while Professor Choper would keep the Supreme Court out of federalism and separation of powers questions. Both are interested in developing a viable theory to justify judicial review that promotes the rights of natural persons.

¹⁴ 435 U.S. at 785 n.22, 788-92.

¹⁵ See 435 U.S. at 798-99 (Burger, C.J., concurring).

¹⁶ See G. ORWELL, *ANIMAL FARM* 112 (1946).

¹⁷ Buckley v. Valeo, 424 U.S. 1, 29 (1976) (per curiam).

¹⁸ Limitations on personal campaign expenditures violate the first amendment. *Id.* at 54.

¹⁹ See Democratic Nat'l Comm. v. Independent Comm. for Reagan, ___ F.E.C. ___ (1980) (independent committees may expend money on behalf of candidate so long as no contact exists between candidate and committee).

doubt: In the words of the old frontier maxim, "them as has, gits." As Justice White's *Bellotti* dissent observed, money talks in the political process.²⁰ That, of course, is a hoary social truism, but it has been elevated into constitutional law. Nowhere in Powell's opinion is there recognition of the overwhelming political power of the economic enterprise. Nor does Choper acknowledge it, even though his book is said to be a "functional" analysis. Surely the time has come to recognize corporations for what they are—private governments—and to treat them as such under the Constitution.²¹ Surely, too, Professor Choper, who advocates that the Supreme Court not decide questions of federalism,²² should consider the giant corporations to be units of a system of "functional" federalism that is probably as important—perhaps more important—than the system of "formal" federalism.²³ As such, those firms should be held to constitutional standards—they should have *duties* as well as *rights* under the fundamental law.

II. The Function of the Court

Only by the most transparent fiction can the corporation be called a person. During the first century of our republic, this view was both generally known and widely accepted—even by the Supreme Court.²⁴ In 1886, however, the Court, under Chief Justice Morrison Waite, had a blinding flash of revelation: they concluded through an intuition known only to them that the corporation was a constitutional person. In *Santa Clara County v. Southern Pacific Railway*²⁵ the Court casually, and without even hearing argument on the point, determined that enormously important matter²⁶—thereby neatly "amending" the fourteenth amendment.²⁷

The significance of *Santa Clara County* cannot be over-estimated. By being able to invoke the due process clauses of the Constitution,²⁸ corporations have been able to wax large and strong. Those entities are unique in human history; nothing quite like them has even been seen prior to the last ninety or so years. I do not suggest that *Santa Clara*

²⁰ 435 U.S. at 812 (White, J., dissenting).

²¹ See generally Miller, *A Modest Proposal for Helping to Tame the Corporate Beast*, 8 HOFSTRA L. REV. 79 (1979).

²² CHOPER, *supra* note 3, at 171-259.

²³ See Miller, *The Constitutional Law of the "Security State,"* in A. MILLER, SOCIAL CHANGE AND FUNDAMENTAL LAW: AMERICA'S EVOLVING CONSTITUTION 43-95 (1979).

²⁴ See, e.g., *Munn v. Illinois*, 94 U.S. 113, 134-35 (1877).

²⁵ 118 U.S. 394 (1886).

²⁶ *Id.* at 395-96.

²⁷ It is interesting to note that those who lambaste the Supreme Court for some of its fourteenth amendment decisions, see, e.g., *Baker v. Carr*, 369 U.S. 186 (1962) (legislative apportionment); *Brown v. Board of Education*, 347 U.S. 483 (1954) (school desegregation), are strangely silent about *Santa Clara County*. See, e.g., R. BERGER, GOVERNMENT BY JUDICIARY (1977) [hereinafter cited as BERGER].

²⁸ U.S. CONST. amend. V, § 3; U.S. CONST. amend. XIV, § 2.

County was the principal cause of that development. Surely "technological imperatives" had more to do with it.²⁹ Nonetheless, the favorable legal climate in which corporations operated, in both public and private law,³⁰ permitted those imperatives to influence the creation and growth of the modern giant business corporation. These firms are at once economic entities, sociological communities, and political orders. They are collectivities: to accord them the speech rights of natural persons, as the Supreme Court does, is myopic at best.

Neither political scientists nor economists have as yet produced a satisfactory theory of conscious economic cooperation and its effect on the constitutional order.³¹ Lawyers, with invincible parochialism, still refuse to recognize the corporation for what it is, and that is so even though the giant corporation is, as Arthur Bentley said in 1908, "government through and through."³² It is economic government, exercising sovereignty over large segments of society. Although, as Bentley went on to say, it does not ordinarily use certain "technical methods," such as hanging, "that is a detail."³³ (The State still has a monopoly on the exercise of the *legitimate* use of force.) Corporate governance is a problem for the constitutional lawyer. By allowing corporate free speech in matters that do not materially affect the enterprise, the Supreme Court has accorded the corporation rights without concomitant constitutional duties—thus giving some credence to the view that the Justices have legitimated "economic intervention" and accompanied it with an "illusion of equality, justice and freedom."³⁴ The Court is now, and in fact always has been, the "ultimate guardian of corporate privilege."³⁵

This proposition, I realize, does not concur with the popular wisdom about the modern Supreme Court as guardian of civil rights and liberties. While the Court does have that function, as Professor Choper cogently shows,³⁶ it also has a greater role. My point is to pose this question: Who are the ultimate beneficiaries of those decisions of the Warren and Burger Courts? Are they about the same as those who have always benefited—those with money and property? There can be little doubt that the answer to that question is "yes." To demonstrate the validity of this proposition requires brief discussion of the function of the Court in modern America. Some reference, of course, must be made to history, but principally as a backdrop against which the drama of modern constitutional litigation is played.

²⁹ See J. GALBRAITH, *THE NEW INDUSTRIAL STATE* 11-22 (1967).

³⁰ See A. MILLER, *THE MODERN CORPORATE STATE: PRIVATE GOVERNMENTS AND THE AMERICAN CONSTITUTION* 37-49 (1976) [hereinafter cited as *THE MODERN CORPORATE STATE*].

³¹ See *THE ECONOMY AS A SYSTEM OF POWER* (W. Samuels ed. 1979).

³² A. BENTLEY, *THE PROCESS OF GOVERNMENT* 268 (1908).

³³ *Id.*

³⁴ Roelofs, *The Warren Court and Corporate Capitalism*, *TELOS*, No. 39, at 94 (1979).

³⁵ See *THE MODERN CORPORATE STATE*, *supra* note 30, at 93.

³⁶ See CHOPER, *supra* note 3, *passim*.

Any institution has both a *manifest* and *latent* function.³⁷ My main conclusion in what follows is similar to, but broader than, that of Professor Alan Westin: "In matters directly affecting business, as in labor relations, antitrust and tax issues, the Warren Court [was] simply an enunciator of the social capitalist status quo in American politics."³⁸ This observation, it seems to me, can be expanded to cover all, or at the least most, of the areas of Supreme Court adjudication. When we ask about both the manifest and latent functions of Court decisions, then it may readily be seen that "the social capitalist status quo" is furthered by many decisions which have the manifest function of protecting individual rights and liberties.

"The fundamental function of the law," McGeorge Bundy once asserted, "is to prevent the natural unfairness of society from becoming intolerable."³⁹ Evidence for that observation may be found in the series of Supreme Court decisions rendered during the past forty years that outwardly (and actually) protect human rights, but which also serve as symbolic victories to certain segments of society.⁴⁰ Those decisions are a means of stifling social discontent by permitting liberties which the State considers relatively unimportant to flourish in what appears to be, but often actually is not, a permissive society.⁴¹ The basic question that must be asked and answered is: *Cui bono?* Who in fact benefits from the Court's civil rights/civil liberties decisions? To answer that question requires, first of all, a recognition that the Court's decisions are a part of a continuum of governmental actions taken during the past several decades to ameliorate the brutalities of industrialism. In the main, these involve social services—in brief, the "Welfare State"—which, as C.B. MacPherson has said, came because of "the sheer need of governments to allay working-class discontents that were dangerous to the stability of the state. It was Bismarck, the conservative Chancellor of Imperial Germany, and no great democrat, who pioneered the welfare state in the 1880s, for just this purpose."⁴² And it is the Supreme Court made up of lawyer-judges who come from a conservative profession which has helped to allay some popular discontents in America.

Analysis of the beneficiaries of these decisions must proceed on two levels. First is the *ostensible* beneficiary, who often as a person is the *actual* beneficiary. But second, and of greater long-range significance, are the *hidden* winners—those who profit most from the stability of the constitutional order. During the 1930s and '40s, the Supreme Court revolutionized constitutional jurisprudence by legitimizing the growing

³⁷ See R. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 115-122 (rev. ed. 1968).

³⁸ A. WESTIN, THE SUPREME COURT UNDER EARL WARREN 56 (1972).

³⁹ Statement of McGeorge Bundy, quoted in M. MAYER, THE LAWYERS 516 (1967).

⁴⁰ See, e.g., Baker v. Carr, 369 U.S. 186 (1962) (urban voters); Brown v. Board of Education, 347 U.S. 483 (1954) (black Americans).

⁴¹ Compare C. LASCH, THE CULTURE OF NARCISSISM (1978) with F. DONNER, THE AGE OF SURVEILLANCE (1980).

⁴² C. MACPHERSON, THE REAL WORLD OF DEMOCRACY 11 (1966).

benevolent role of government in the lives of its citizens (*i.e.*, the Positive State). In the process of that reorientation, the Justices changed their principal role from being "the first authoritative faculty of political economy in the world's history"⁴³ to guardian of human rights and liberties. Those actions, particularly the validation of the Positive State,⁴⁴ were taken in conjunction with the political branches of government. The Court cooperated with Congress and the President in the establishment and furtherance of welfare programs. Cooperation, indeed, is the forgotten part of separation of powers, as Woodrow Wilson observed in 1908.⁴⁵ It would be odd if the Justices were so ambivalent as, on the one hand, to cooperate fully with the politicians, both federal and state, in socio-economic matters, and, on the other hand, to refuse cooperation when civil rights or liberties are involved. Cooperation took place there as well, but on the submerged or latent level. As Professor J. A. G. Griffith concluded in *The Politics of the Judiciary*,⁴⁶ "The judiciary in any modern industrial society, under whatever economic system, is an essential part of the system of government and . . . its function may be described as underpinning the stability of that system and as protecting that system from attack by resisting attempts to change it."⁴⁷

The past forty to fifty years are unique in American history. For the first time, and then only slowly at first, the rights of "discrete and insular minorities"⁴⁸ began to receive at least some protection from the High Bench. Ethnic groups and others have begun to get at least the appearance of rights purportedly guaranteed since the beginnings of the republic. Two important questions are posed by this development, which by no means is over even though recent "conservative" appointments have slowed it in some areas.⁴⁹ The questions are: Why did the development come so late in American history?; and, What is the sociological function of increased protection of personal liberties? While each question merits attention, our main focus will be on the latter.

The Bill of Rights has been a part of the Constitution since 1791 and the fourteenth amendment since 1868. Yet it is accurate to say that the rights protected by the first eight amendments were submerged until

⁴³ J. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* 7 (1924).

⁴⁴ For a discussion of the concept of the Positive State, see *THE MODERN CORPORATE STATE*, *supra* note 30, at 86-87; A. MILLER, *THE SUPREME COURT AND AMERICAN CAPITALISM* 72-132 (1968).

⁴⁵ W. WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 166 (1908) [hereinafter cited as *WILSON*].

⁴⁶ J. GRIFFITH, *THE POLITICS OF THE JUDICIARY* (1977).

⁴⁷ *Id.* at 213. Professor Griffith's conclusion is the basis for my theme in this essay.

⁴⁸ The phrase, "discrete and insular minorities," is taken from the famous footnote in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Full discussion of the implications of that footnote may be found in *ELY*, *supra* note 10, at 145-70.

⁴⁹ The "conservative" appointees are Chief Justice Burger and Justices Powell, Rehnquist, and Blackmun. For an early discussion of these appointees, see L. LEVY, *AGAINST THE LAW* 12-54 (1974).

well into the twentieth century.⁵⁰ Why? Additionally, why are those amendments now fully enforced, insofar as courts can? The same may be said for the fourteenth amendment: only in very recent years has the equal protection clause been fully—at least, almost fully—enforced. Again, why now?

The questions ask much. Only summary treatment can be given here. For most of our country's history, the Supreme Court read the Bill of Rights literally, not applying them to the states.⁵¹ Only in 1925 did the first breakthrough come.⁵² Equally significant is the fact that the first important freedom of expression case was not decided until 1919,⁵³ and then the State prevailed. Even the notorious Alien and Sedition Act of 1798⁵⁴ never got to the Supreme Court, despite harshly repressive measures. The nineteenth century, the myth to the contrary notwithstanding, was not one of widespread freedom for the mass of the people. Those who invoked the Constitution were, speaking very generally, the businessmen who wished to fend off adverse state or federal regulation. They usually prevailed, either on interstate commerce or obligation of contracts grounds before the Civil War⁵⁵ or through the Court's invention of substantive due process after that conflict.⁵⁶

Government in this century is not more repressive than in the past. If anything, it is less so for the people in general. Life for most people during most of American history was, as Thoreau said, one of "quiet desperation." People in the nineteenth century did not think in terms of rights—most people, that is—but in how to wrest a living from a continent which, although fabulously wealthy in natural resources, daunted all but the most courageous and tenacious. One has only to read the social histories of America,⁵⁷ as well as novels by Sinclair Lewis, Upton Sinclair, Theodore Dreiser, Hamlin Garland, and others, to realize that until well into the twentieth century life for many Americans was not only desperate but, in the well-known words of Thomas Hobbes, "poor, nasty, brutish and short." In this century, however, the productivity of labor vastly increased. Mass production was born and suddenly the

⁵⁰ See generally P. MURPHY, *WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES* (1979).

⁵¹ See, e.g., *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250-51 (1833) (fifth amendment intended solely as limitation on federal government and does not limit power of state governments).

⁵² See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (freedom of speech and press are among fundamental liberties protected by due process clause of fourteenth amendment).

⁵³ See *Schenck v. United States*, 249 U.S. 47 (1919).

⁵⁴ 1 Stat. 596 (1789). See generally L. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (1960); J. SMITH, *FREEDOM'S FETTERS—THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* (1956). Not until 1964 did the Court squarely address the Act, and then only in dicta. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 273-76' (1964).

⁵⁵ See, e.g., *Gibbons v. Ogden*, 22 U.S. (5 Wheat) 1, 239-40 (1824).

⁵⁶ See, e.g., *New State Ice Co. v. Liebman*, 285 U.S. 262, 278 (1932).

⁵⁷ See, e.g., P. CARROLL & D. NOBLE, *THE FREE AND THE UNFREE* (1977); but see R. NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY* (1932).

economy produced goods in plenty. Since necessitous men cannot be free men, the ability of more and more people to sup at the groaning tables of opulence meant that they were—at long last—able to demand and enjoy more freedom. I am aware, of course, of the characterization of Americans as a “people of plenty”⁵⁸ and the role that seemingly unlimited “free” land had to play in shaping the American experience. Nevertheless, it is only with the marriage of technology to entrepreneurship that the cornucopia of consumer goods became so large.

Surely the coming of an economy of abundance is one of the reasons for the civil rights/civil liberties explosion in constitutional law. The two phenomena—one economic and the other legal—came at roughly the same time in history. That burst of judicial activism coincided, as previously noted,⁵⁹ with political activism aimed at helping some of the disadvantaged in society—some of those left behind in the struggle for greater wealth and status. It would be quite wrong to attribute the explosion to a newly-discovered altruism in American elites, or to a special prescience of Supreme Court Justices. Principally, this change in judicial thinking was the result of an industrial economy in which brutal necessity no longer stared people down. Business required customers as well as workers. In sum, recognition of long-submerged constitutional rights coincided in time with the Golden Age in the United States—the period of roughly 1945 to 1970 when all seemed possible. The dollar was king, American military might was supreme, and for the first time both bread *and* freedom became possible.⁶⁰

Another reason exists for the latter-day recognition of personal rights. Groups previously deeply submerged in society began to surface and demand more. The trade union movement flowered, receiving constitutional protection in 1937.⁶¹ Black Americans, long under the thumb of a rigid caste system, became more insistent that they, too, were persons under the Constitution and entitled to its protections. Add the expansion of the franchise, coupled with incessant propaganda⁶² about democracy, and another factor may be seen. Then, too, the United States fought World War II with conscripts, many—perhaps most—of whom came from the working class. A tacit perception that those who fought and won a war would not remain quiescent in the face of either economic deprivation or denial of democratic rights may, as in Great Britain, have

⁵⁸ The term, “people of plenty,” comes from D. POTTER, *PEOPLE OF PLENTY: ECONOMIC ABUNDANCE AND THE AMERICAN CHARACTER* (1954).

⁵⁹ See text accompanying notes 39-47 *supra*.

⁶⁰ That the post-1970 period portends a reversion of the status quo ante seems obvious. In the coming “age of frugality,” which is hard upon us, the necessity of gathering sufficient supplies to live will again outweigh freedom and the enjoyment of it. See generally A. MILLER, *DEMOCRATIC DICTATORSHIP: THE EMERGENT CONSTITUTION OF CONTROL* (to be published in 1981).

⁶¹ See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) (upholding National Labor Relations Act).

⁶² For an insightful discussion of propaganda as a tool of all governments, see generally J. ELLUL, *PROPAGANDA* (1965) [hereinafter cited as ELLUL].

been significant in the enhancement of personal rights. These rights and the government's response to them were economic, as addressed by the Employment Act of 1946,⁶³ and human, as reflected in the series of decisions that furthered the cause of human decency for black Americans.

I do not suggest that these reasons, which overlap and coincide, exhaust all possible explanations of a major historical phenomenon. There is, Ernest Nagel has told us, no simple and at the same time complete explanation of any social phenomenon.⁶⁴ But I do suggest that the reasons outlined above did play a considerable part in what became Supreme Court decisions, presidential actions, and congressional statutes. The *zeitgeist* has changed. Today Americans enjoy more freedom than ever before in their history. The "why" is important; but so, too, is the social function that is served.

All political or social phenomena have functions. In *The Pathology of Politics*,⁶⁵ Professor Carl J. Friedrich argued that such disfunctional—some would say aberrational—matters as violence, betrayal, corruption, secrecy, and propaganda all serve definite, identifiable functions, "notably that of facilitating the adaptation of a system or regime to changing conditions occurring either in the system or in the social structure, or in the outside environment."⁶⁶ The point is not argued here, except to say that if such socially objectionable behavior can be functional, then surely a series of Supreme Court decisions can be similarly analyzed.

Judicial decisions are political epiphenomena,⁶⁷ and the Supreme Court is an instrument of politics, both in its lawmaking proclivities and in the fact that it is a target of interest groups.⁶⁸ The Court's function is to produce decisions that are not only system-maintaining but also system-developing. "A political function," says Friedrich, "is the correspondence between a political process or institution and the needs or requirements of a political order."⁶⁹ Any political order requires not only stability but also a process of orderly change. The great and continuing task of the Justices is to facilitate both elements. Through their decisions they buttress the constitutional order—the "system"—and by progressive interpretations they enable change to occur within rather severely constricted boundaries. The need is for a constantly shifting equilibrium.

As previously suggested, one must distinguish between *manifest* and *latent* functions of societal institutions.⁷⁰ Simply put, manifest func-

⁶³ 15 U.S.C. §§ 1021-1025 (1976 & Supp. I 1979).

⁶⁴ E. NAGEL, *THE STRUCTURE OF SCIENCE* 447-546 (1961).

⁶⁵ C. FRIEDRICH, *THE PATHOLOGY OF POLITICS* (1972) [hereinafter cited as FRIEDRICH].

⁶⁶ *Id.* at 224.

⁶⁷ See generally M. SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* (1964); A. MILLER, *ORACLE IN THE MARBLE PALACE: POLITICS AND THE SUPREME COURT* (in process).

⁶⁸ For a discussion of how the Supreme Court was the target of the NAACP in the cases that culminated in *Brown v. Board of Education*, 347 U.S. 483 (1954), see generally R. KLUGER, *SIMPLE JUSTICE* (1976).

⁶⁹ FRIEDRICH, *supra* note 65, at 5.

⁷⁰ See text accompanying notes 37 & 38 *supra*.

tions are the outward or obvious ones. They are important in themselves but must be considered in conjunction with latent functions—those that do not immediately meet the eye, but which may be of far greater significance. Using that distinction, what may be said about the Supreme Court and its egalitarian decisions of the past few decades? The manifest function, quite obviously, is to bring discrete and insular minorities (and the other disadvantaged) into the mainstream of American life, to protect the individual in his personhood against arbitrary governmental acts. These goals are reflected in the range of decisions involving the status of blacks,⁷¹ women,⁷² urban voters,⁷³ workers,⁷⁴ and consumers.⁷⁵

The latent function is to protect the system of those who profit most from it. Hydraulic pressures of social discontent are siphoned off in judicial decisions that protect some individuals and appear to protect many more. Ultimately, however, the beneficiaries are those who have throughout American history profited from the workings of the constitutional order—the moneyed and propertied, “the social capitalist” class. Social change is facilitated by Supreme Court rulings, at the least possible cost to those who control and rule.⁷⁶ The Justices know that in a period of extraordinarily rapid social change⁷⁷ it is more important to accommodate new demands without excessive social cost than to preserve the status quo.

I do not contend that the latent function of the Court, as I have described it, is the result of a dark and conspiratorial maneuver by a hidden power elite. The process is much more subtle than that. But I do say that human liberties receive constitutional protection only to the extent that the vital interests of the State are not jeopardized—which means the vital interests of those who profit most from the State.⁷⁸ The system, latent though it is, simply exists. It has a major prophet in Professor B. F. Skinner and a patron saint in Pavlov, the Russian scientist who discovered the conditioned reflex.

⁷¹ See, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954).

⁷² See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971).

⁷³ See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962).

⁷⁴ See, e.g., *NLRB v. Jones & Laughlin Steel Corp.* 301 U.S. 1 (1937).

⁷⁵ See, e.g., *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

⁷⁶ For a discussion of the “ruling class” in the United States, see G. DOMHOFF, *THE HIGHER CIRCLES: THE GOVERNING CLASS IN AMERICA* (1970); see also Miller, *Reason of State and the Emergent Constitution of Control*, 64 MINN. L. REV. 585, 589 (1980) [hereinafter cited as *Reason of State*] (discussing Principle of Economy of Means).

⁷⁷ It is truistic to note the rapid pace of social change in the twentieth century, the greatest in human history. For discussion of one aspect of this change, see Branscomb, *Information: The Ultimate Frontier*, 203 SCIENCE 143 (1979) (forecast of technological trends over next 100 years). The law must be stable, yet it cannot stand still. Legal theorists, however, have not yet been able to reconcile the notion of law (which connotes a static system) with rapid social change. Perhaps this is attributable to the fact that our legal institutions grew out of feudalism, which is a static order, and have, as Woodrow Wilson said, a Newtonian cosmology behind them. See WILSON, *supra* note 45, at 54-56.

⁷⁸ See note 76 *supra*.

In *Beyond Freedom and Dignity*⁷⁹ Professor Skinner stated that "[w]hat is being abolished is autonomous man—the inner man, the homunculus, the possessing demon, the man defended by the literatures of freedom and dignity. His abolition is long overdue. . . . A scientific view of man offers exciting possibilities. We have not yet seen what man can make of man."⁸⁰ Skinner is neither joking nor speaking in hyperbole. As an individual, he may be harmless, and no doubt he thinks that his work is beneficently furthering the cause of humankind. Others, however, can and will seize his ideas and apply them. "Gobineau was a harmless intellectual crank, but out of his harmless theory of the intellectual superiority of the Aryan race came National Socialism. As Keynes noted: 'The political fanatic who is hearing voices in the air has distilled his frenzy from the work of some academic scribbler of a few years back.'⁸¹ The need perceived today is for mind manipulation and, through it, control over the human being. Aldous Huxley recognized this, stating:

We have had religious revolutions, we have had political, industrial, economic, and nationalistic revolutions. All of them, as our descendants will discover, were but ripples in an ocean of conservatism—trivial by comparison with the psychological revolution toward which we are so rapidly moving. *That* will really be a revolution. When it is over, the human race will give no more trouble.⁸²

Huxley's revolution has already begun. Man is increasingly seen as an object, and manipulable as such. Mass communications provide the technological means of accomplishing that end. National advertising promotes it. A pervasive system of propaganda—propaganda, as Jacques Ellul has said,⁸³ being characteristic of all governments—helps it along. During the twentieth century, the rise of the State of preeminence means that an increasing number of controls are placed upon human activity—by both public and private government, for the two interact into one overarching whole.⁸⁴ At the same time, a subtle "trade-off" accompanies the rise in social controls and mass manipulation. It is in this area that the Supreme Court has had and continues to have an important role to play. Sometimes, the Court's participation in this process is conscious, as it was in *Brown v. Board of Education*,⁸⁵ when surely the Justices knew that rising discontent among black Americans would sooner or later boil over in racial turmoil.⁸⁶

⁷⁹ B. SKINNER, *BEYOND FREEDOM AND DIGNITY* (1971).

⁸⁰ *Id.* at 200, 215.

⁸¹ W. THOMPSON, *EVIL AND WORLD ORDER* 24 (1976).

⁸² Statement of Aldous Huxley, *quoted in* A. SCHEFLIN & E. OPTON, *THE MIND MANIPULATORS* 10 (1978).

⁸³ See ELLUL, *supra* note 62, at ix, x.

⁸⁴ See *THE MODERN CORPORATE STATE*, *supra* note 30, *passim*.

⁸⁵ 347 U.S. 483 (1954).

⁸⁶ Possible racial turmoil is precisely where the United States stands today. The pro-

The Supreme Court has sought to lance the boil of social discontent by constitutionalizing better conditions for the disadvantaged and a permissive society generally. In this endeavor, the Court, of course, does not act alone.⁸⁷ The Court, as an essential part of the system of government, cooperates with the other branches. The net result, not all of which is attributable to the Court, is that life styles are changing; marijuana and other drugs are widely used; alcohol consumption is escalating; abortion has been legalized; tranquilizers are a way of life for millions of Americans; the press and motion pictures have been freed from restrictions on even blatant obscenity and pornography; there is more freedom of speech and of the press today than ever before; and rights long denied to blacks and women receive at least some protection. All these, and more, have the latent function of keeping the population relatively quiescent, particularly when they are coupled with social welfare (income distribution) programs. Innocuous activities are encouraged, at times not subtly, by the mass media (e.g., spectator sports). A price for increasing controls by the State is permissiveness in noneconomic areas. Aldous Huxley brilliantly forecast this development in *Brave New World*, although he thought it would be 500 years away.⁸⁸ His timing was off, as he later admitted.⁸⁹

The Justices have been active participants in this development. Their decisions in racial segregation cases helped stifle discontent by giving blacks the hope, at least for a time, of becoming part of the mainstream of American life. That is perhaps the most obvious of the decisional areas. Other areas may be discerned as well: decisions permitting printing and showing of material that only a few years ago would have been considered obscene and punishable;⁹⁰ occasional recognitions that women have been treated unfairly and are also entitled to equal protection of the laws;⁹¹ permitting a young man to go unpunished even though he paraded through a public building with a slogan "Fuck the Draft" emblazoned on his leather jacket;⁹² and recognizing that the "rotton boroughs" of the nation violated the equal protection clause.⁹³ In these areas—no doubt there are others—the Court helped build the permissive society, the "culture of narcissism," the "Me Generation."⁹⁴ The

mise of *Brown* has not been fulfilled, and the dashed expectations of millions of blacks can easily erupt into violence. See G. GILL, *MEANNESS MANIA: THE CHANGED MOOD* (1980) [hereinafter cited as GILL].

⁸⁷ See, e.g., *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979) (upholding voluntary affirmative action plan).

⁸⁸ A. HUXLEY, *BRAVE NEW WORLD* (1932).

⁸⁹ A. HUXLEY, *BRAVE NEW WORLD REVISITED* 4 (1958).

⁹⁰ See, e.g., *Roth v. United States*, 354 U.S. 476 (1957).

⁹¹ See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971). It is worth noting that the Court could have "enacted" the Equal Rights Amendment into constitutional law in the *Reed* case, but chose not to do so.

⁹² *Cohen v. California*, 403 U.S. 15 (1971).

⁹³ *Baker v. Carr*, 369 U.S. 186 (1962).

⁹⁴ See C. LASCH, *THE CULTURE OF NARCISSISM* (1979).

pattern is not uniform, of course, for when it was perceived that the vital interests of the State were at stake the Justices upheld the power of government.⁹⁵

Of course, the Justices are not alone in furthering the subtle controls being placed on individuals. Other government agencies participate, as do the major social groups of the nation. Furthermore, they do not outwardly assert that they are interested in fulfilling Huxley's prediction. On occasion the Court does overtly state that its decision effects a connection with the fundamental needs of "society."⁹⁶ The net result of this process has been graphically described by Solzhenitsyn:

"[A]s every man goes through life he fills in a number of forms for the record. . . . There are hundreds of little threads radiating from every man, millions of threads in all. If all these threads were suddenly to become visible the whole sky would look like a spider's web and if they materialized as rubber bands, buses, trams and people would lose the ability to move."⁹⁷

With the tremendous improvements in computer technology and the coming of micro-processing, the technology is now available and in place for manipulation of those threads. To Solzhenitsyn, the cobweb symbolizes strangulation and suffocation by bureaucracy in an authoritarian society. There can be no question that the United States has become "the bureaucratic state"⁹⁸ with the bureaucracies being both public and private and cooperating with each other.⁹⁹

In summary, the Supreme Court's work prior to 1937 dealt largely with the rise of finance capitalism. Since then, however, civil rights and liberties received judicial protection for the first time in American history. While some individuals have benefited from these judicial decisions, the ultimate—the latent—beneficiary is "the ruling class"—those with money and property who have always been in control.

That conclusion makes nonsense out of the neo-conservatives' splenetic complaints that the Court acted unconstitutionally in some of its more liberal decisions.¹⁰⁰ The very decisions most criticized—those

⁹⁵ See, e.g., *Wyman v. James*, 400 U.S. 309 (1971) (home visitation by welfare workers without warrant does not violate fourth amendment); *United States v. O'Brien*, 391 U.S. 367 (1968) (statute proscribing knowing destruction of draft card does not violate first amendment).

⁹⁶ See, e.g., *Barenblatt v. United States*, 360 U.S. 109, 128 (1959) (questioning by House Committee on UnAmerican Activities necessary to ensure "national security"); *Dennis v. United States*, 341 U.S. 494, 501-02 (1951) (Smith Act prohibition against advocacy of violent overthrow of government does not violate first amendment because of "national security"). Both decisions are a form of "thought control." See *Reason of State*, *supra* note 76, 605-07.

⁹⁷ A. SOLZHENITSYN, *CANCER WARD* (1968).

⁹⁸ See generally Wilson, *The Rise of the Bureaucratic State*, 41 PUB. INT. 77 (1975).

⁹⁹ Galbraith describes the cooperative relationship between public and private bureaucracies as "bureaucratic symbiosis." J. GALBRAITH, *ECONOMICS AND THE PUBLIC PURPOSE* 143 (1973) [hereinafter cited as GALBRAITH].

¹⁰⁰ See, e.g., BERGER, *supra* note 27.

dealing with racial segregation, abortion, and legislative apportionment—have the actual function of damping the fires of social discontent and of helping to achieve stability through peaceful change—the very values that neo-conservatives cherish. Were they to see beneath the surface, those critics would applaud rather than complain. Of course, the judicial decisions are mere stop-gaps, and since the Supreme Court has no enforcement power of its own, the Justices must depend upon the good will and good sense of officers in the political branches of government for compliance. Although the record on that score is spotty at best, the decisions do give the politicians time to grapple with some of the pent-up demands of long-submerged groups.

The changes wrought by the Court in recent decades are, despite the widespread publicity, minuscule. Some groups have made largely symbolic gains—for example, urban voters. Even for black Americans, the gains have been more apparent than real.¹⁰¹ The system of corporate capitalism remains and flourishes, and no doubt will continue to do so if the *Bellotti* decision is any indication. The Progressive movement of the early twentieth century, the New Deal, and the constitutional revolution of the 1930s and '40s were, in final analysis, a means to perpetuate a working partnership between business and government. In the post-1937 period when the Court read Keynesian economics into the Constitution and overtly abandoned laissez-faire, it did not cease to serve the interests of the business class. The Justices merely took a more sophisticated viewpoint, in accord with the long-range interests of the dominant corporate interests. Socialism for the poor (but not for the rich) was staved off, in part by the Supreme Court's giving legal expression to some of the sources of discontent. Professor Griffith is correct: the judiciary, as an essential part of the government, protects the stability of the system of corporate capitalism and resists attempts to change it.¹⁰²

III. The Significance of *Bellotti*

Bellotti, in essence, is an anti-democratic decision, part of a backlash against the spread of the franchise and other aspects of mass democracy. Professor Samuel P. Huntington, in a well-known essay,¹⁰³ complains about the "democratic distemper" and the "decline in the governability of democracy"—simply, it seems, because "democracy" has been successful. Democracy is vulnerable, says Huntington, because of "the internal dynamics of democracy itself in a highly educated, mobilized, and participant society."¹⁰⁴ That viewpoint must be taken seriously, for Huntington spoke for a highly influential group.¹⁰⁵

¹⁰¹ See GILL, *supra* note 86; Miller, *Brown's 25th: A Silver Lining Tarnished With Time*, 3 DISTRICT LAWYER 22 (1979).

¹⁰² See text accompanying notes 46 & 47 *supra*.

¹⁰³ Huntington, *The United States*, in M. CROZIER, S. HUNTINGTON & J. WATANUKI, *THE CRISIS OF DEMOCRACY* 59 (1975).

¹⁰⁴ *Id.* at 115.

¹⁰⁵ Huntington spoke for the Trilateral Commission, a small group of well-placed

The *Bellotti* decision, then, should be seen as part of a Burkean¹⁰⁶ counter-revolution against what are considered to be the excesses of democracy. By glossing over the enormous disparities in wealth (and thus in political power) between natural persons and corporations, Justice Powell's opinion served the interests of the dominant economic form in America—the giant corporations—by helping them to stave off the “excesses” of “a highly educated, mobilized, and participant society.” Since corporate assets may now be used to further the interests of corporations by allowing them to “speak” even if the issues do not materially affect their businesses, the corporate enterprise as a political actor will, simply because of its vastly superior assets, dominate the “democratic” process of elections and direct voting by referenda or initiatives. We have come a long, long way since Chief Justice Marshall opined in 1819 that a corporation, as a mere creature of the law, possesses “only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.”¹⁰⁷ A disembodied economic entity now can speak.

The incongruity of such a conclusion suggests that the myopia of the *Bellotti* majority was willful, not accidental, and that the decision was reached with full cognizance of its portents. It was deliberately aimed at enhancing corporate power, and with the obvious secondary consequence of diminishing the power of the individual *qua* natural person. This result is achieved, even though the corporation is “a *persona ficta*, a ‘legal fiction’ with no pants to kick or soul to damn. What is meant is that while we can point to the corporation’s steel and glass factory, or its tangible chairman of the board, or to its offices in Rockefeller Plaza, there is no physical entity *the corporation* that we can point to — or that can, of itself, adulterate foods or pollute rivers. The corporation *itself*, it is said ‘does no act, speaks no word, thinks no thoughts.’”¹⁰⁸ It is obvious that by giving freedom of expression beyond its material needs to *the* corporation, the Court was in fact permitting those who *control*, but do not necessarily *own*, the firm to have more than a running start in the political arena. To paraphrase Chief Justice Taft in a far different decision: “All others can see and understand this. How can [the *Bellotti* majority] properly shut [their] minds to it?”¹⁰⁹

businessmen, lawyers, and government officials in the United States, Western Europe, and Japan. See generally TRILATERALISM (H. Sklar ed. 1980).

¹⁰⁶ The reference is to Edmund Burke. The late Alexander Bickel was an avowed Burkean. See A. BICKEL, *THE MORALITY OF CONSENT* (1975). For a discussion of Burke, see F. O’GORMAN, *EDMUND BURKE: HIS POLITICAL PHILOSOPHY* (1973). Burke, of course, was *the* defender of the *ancien regime* after the French Revolution. See generally E. BURKE, *REFLECTIONS ON THE REVOLUTION* (1790); E. BURKE, *APPEAL FROM THE NEW TO THE OLD WHIGS* (1791), reprinted in *EDMUND BURKE: ON GOVERNMENT, POLITICS AND SOCIETY* (B. Hill ed.) (1976).

¹⁰⁷ *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

¹⁰⁸ C. STONE, *WHERE THE LAW ENDS* 3 (1975) (emphasis added).

¹⁰⁹ *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37 (1922).

Indeed, how can they? And, indeed, how can such a sagacious commentator as Professor Choper fail to perceive that the *Bellotti* decision will have immense long-range effects on the political order—and thus on the constitutional order? Choper maintains that he is most interested in judicial review as a means of furthering *individual* rights—an orientation precisely 180 degrees away from Powell's opinion. If man is a machine, and manipulable as such, as Skinner and others maintain,¹¹⁰ then the use of corporate assets to dominate the entire political process is sure to eventuate. Corporations and other groups in our corporate society are currently able, through being parts of the "subgovernments" or "iron triangles" of American government,¹¹¹ to pursue narrow goals and to influence greatly, and probably actually control, narrow segments of the decision-making processes within much of the national government. *Bellotti* gives them a leg up on direct "democracy," including referenda and initiatives as well as elections to public office.

Of course, corporations *as such* cannot speak. Identifiable human beings, and only those beings, can. They are the corporate officers, those who control but, except in family-held firms, do not own. When they speak, their voices are not merely the voices of disparate individuals, but the stentorian utterances of the wellnigh bottomless barrels of corporate assets. Those assets give those officers an advantage no other natural person can hope to have. It is not, as Justice Powell suggested, merely a matter of giving an even break to the business enterprise (or of looking at the communication only). The *Bellotti* Court loaded the political dice in favor of corporations, by relying on the argument that the primary function of the first amendment is to inform the public, and that the people are capable of assessing the relative merits of communications received. True, informing the public is basic to the first amendment, but the informing function is based on the assumption that those who speak or would speak are roughly equal in lung power. That assumption is, as Professor Jerome Barron has shown, wholly inaccurate.¹¹²

The editors of the *Harvard Law Review* have advanced the odd argument that there is an even stronger rationale for the decision in *Bellotti*: "Corporate political expression should be protected as the speech and associational activity of the individual owners."¹¹³ That astonishing position completely ignores the facts of business life in large,

¹¹⁰ Many humanists share Skinner's view that man is a manipulable machine. *But see* D. EHRENFELD, *THE ARROGANCE OF HUMANISM* 236-49 (1978).

¹¹¹ For a discussion of subgovernments see D. CATER, *POWER IN WASHINGTON* (1964). For an analysis of iron triangles, see Hecló, *Issue Networks and the Executive Establishment*, in *THE NEW AMERICAN POLITICAL SYSTEM* 87 (A. King ed. 1978). The terms refer to informal but enduring accommodations linking executive bureaus, Congressional committees, and interest groups with a stake in particular programs. *See* G. MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY passim* (1966).

¹¹² *See* J. BARRON, *FREEDOM OF THE PRESS FOR WHOM?* 3-7 (1973) (access to modern media is subject to approval of media managers).

¹¹³ *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 1, 165 (1978).

publicly-held firms. For those editors to maintain that “[c]orporate political expression is simply shareholder speech or the product of shareholder associational activity” is to confuse the entity with its shareholders—a relationship which simply does not exist. While a family-held corporation, such as Cargill or even the Washington Post Company does reflect its shareholders,¹¹⁴ General Motors or AT&T do not.¹¹⁵

If the Supreme Court’s basic theory of the first amendment—that there should be robust debate in a marketplace of ideas—is valid, then an unfair advantage, which in time will amount to domination of the process, will be the result of *Bellotti*. It is no answer to say, as did Chief Justice Burger in his concurring opinion, that a “disquieting aspect of Massachusetts’ position is that it may carry the risk of impinging on the First Amendment rights of those who employ the corporate form . . . to carry on the business of mass communications. . . .”¹¹⁶ To maintain that a state may regulate the non-business related expression of a corporation by no means suggests that the state could similarly regulate, say, the *New York Times*; for after all, expression is the *raison d’être* of the *Times*. Chief Justice Burger should decide that wholly fanciful hypothetical case when it arises, not in a gratuitous dictum uttered in a dissimilar case. The answer to Burger is the same as Holmes gave to John Marshall’s assertion in *McCulloch v. Maryland*¹¹⁷ that the power to tax involves the power to destroy: “Not,” Holmes said, “while this Court sits.”

IV. Conclusion

This essay has been directed toward pointing out some of the implications of Justice Powell’s majority opinion in *First National Bank v. Bellotti*. When coupled with the decisions in *Buckley v. Valeo*¹¹⁸ and *Consolidated Edison Co. v. Public Service Commission*,¹¹⁹ the conclusion is inescapable: a majority of the Justices perceive much of their job to be that of protecting the class from whence they came—its property, its status, its position of political power. They have no apparent interest in

¹¹⁴ Cargill is a family-held corporation, see D. MORGAN, *THE MERCHANTS OF GRAIN* 183 (1979). Even though the Washington Post is now a publicly-held firm, the Graham family owns more than 50% of the voting stock.

¹¹⁵ See GALBRAITH, *supra* note 99, at 218.

¹¹⁶ 435 U.S. at 796 (Burger, C.J., concurring).

¹¹⁷ 17 U.S. (4 Wheat.) 316 (1819).

¹¹⁸ 424 U.S. 1 (1976).

¹¹⁹ 100 S. Ct. 2326 (1980). In *Consolidated Edison*, Justice Powell held that the first amendment protected the utility’s placement of written material advocating nuclear power in its billing envelopes. *Id.* at 2311. On the same day, Powell delivered the opinion in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 100 S. Ct. 2343 (1980), which struck down a ban on an electric utility’s promotion of the use of electricity. *Id.* at 2354. *Central Hudson*, however, deals with “commercial speech” rather than the non-business related speech involved in *Bellotti*. *Id.* at 2351-52. For a discussion of commercial speech, see J. BARRON & C. DIENES, *HANDBOOK OF FREE SPEECH AND FREE PRESS* §§ 4.1-4.10 (1979).

approving any type of wealth distribution scheme, such as was involved in *San Antonio Independent School District v. Rodriguez*.¹²⁰ That, to be sure, was an equal protection decision, but the Court's opinion (written by Justice Powell) permitted the rich, in Professor Laurence Tribe's words, "to create their own secure haven of privilege and exclusion."¹²¹ Justice Powell also authored the Court's opinion in *Bakke*,¹²² which might be thought to strike a different note. It does not, for the dispute there was between "have-nots," not a "have-not" against the "haves"—as in *Rodriguez*.

The United States has travelled a long road since the constitutional convention of 1787 produced the sacred document which is the main object of worship in our secular religion of Americanism (or nationalism or patriotism).¹²³ Of major, perhaps greatest, importance in that journey has been the expansion of the franchise to metes far beyond those of 1789, when the Constitution went into effect. Then only those with money and property could vote. Today all but a minute number of wealth limitations have been eliminated,¹²⁴ women can vote, the voting age has been lowered to eighteen and even those who cannot speak or read English can vote.¹²⁵ That has created a new situation—mass "democracy"—

¹²⁰ 411 U.S. 1 (1973). In *Rodriguez*, the Supreme Court upheld a system of local property taxes imposed to supplement school budgets. *Id.* at 55. The plaintiffs in *Rodriguez* unsuccessfully contended that an educational system that depends on local property taxes is unconstitutional because it operates to the disadvantage of the poor; some school districts received more funds than others.

¹²¹ L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-56, at 1133 (1978).

¹²² 438 U.S. 265 (1978). See LaRue, *The Rhetoric of Powell's Bakke*, 38 WASH. & LEE L. REV. 43 (1981). Professor LaRue states that Justice Powell's argument "seems to be that corrective justice is permissible, but distributive justice is not," and finds that to be "an astonishing proposition." *Id.* at 52. If I understand the terms, "corrective" and "distributive" justice, correctly, I do not find Powell's position (as defined by Professor LaRue) at all astonishing. As I have tried to show in this comment, Powell, like other members of the Court, has no interest in distributive justice as such. Insightful analysis of the problems of distributive justice may be found in L. THURLOW, *THE ZERO-SUM SOCIETY* (1980).

¹²³ Brest, *The Misconceived Quest for the Original Understanding*, 60 B. U. L. REV. 204, 234 (1980); see generally Levinson, "The Constitution" in *American Civil Religion*, 1979 SUP. CT. REV. 123; Lerner, *Constitution and Court as Symbols*, 46 YALE L. J. 1290 (1937). It is worth mentioning that although there is a constitutional separation of church and State in the United States pursuant to the first amendment, by no means are religion and the State separated. See *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being"). For discussion of the two moralities in American public policy—the pagan and the Judeo-Christian—see *Reason of State*, *supra* note 76, at 588-613. For further discussion of civil or secular religion in the United States, see M. NOVAK, *CHOOSING OUR KING* (1974).

¹²⁴ One wealth limitation on voting that remains is restriction of eligibility to vote for the board of directors of water districts to landowners. See *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 730 (1973). *Salyer*, however, may be an aberration. The Court is usually hostile to any type of overt voting restriction. See, e.g., *Hill v. Stone*, 421 U.S. 289, 300-01 (1975) (striking statute which limited right to vote in bond elections to those who paid property taxes that year).

¹²⁵ See *Katzenbach v. Morgan*, 384 U.S. 641, 656 (1966).

which, when coupled with the rise of new pluralistic groups to positions of power, means that democracy (and pluralism) are considered by some to be faulty simply because they have been successful.

Politics today is a matter of moving the masses, as congregated in groups. Groups dominate the political order.¹²⁶ At the same time, however, a counter-movement has arisen, one designed to retain (or regain) control by those with money and property through those elected to public office. We are witnessing, as Galbraith recently said, "the revolt of the rich against the poor."¹²⁷ The Supreme Court's opinions in *Bellotti* and elsewhere are part of that revolt.

A final note: I realize that some of what is said in this essay cuts against the grain of much of the popular wisdom or conventional writing about the Supreme Court. Many commentators, it seems, like to parse Court opinions to determine whether "neutral principles" were invoked,¹²⁸ or they assume that the Justices do not bring their heredity and biography with them when they join the High Bench. So much nonsense has been written about "neutral principles" and "reasoned elaboration" and similar unattainable goals that generations of students go through law school believing that judges so act, or, if they do not, that they should.¹²⁹ That they do not and, indeed, cannot has long been known, but also has been the subject of a conspiracy of silence among most who comment on the judicial process.

Judges are not fungible, as Justice William O. Douglas once said.¹³⁰ They bring their "can't-helps" to the bench with them. Try as they might to achieve a complete disinterestedness, the human mind is not up to that and myopia is the result. All judges, the late Judge Braxton Craven maintained, are "result-oriented" — the only difference between them be-

¹²⁶ See R. DAHL, *PLURALIST DEMOCRACY IN THE UNITED STATES* (1967); T. LOWI, *THE END OF LIBERALISM* 55-101 (2d ed. 1979); L. THURLOW, *THE ZERO-SUM SOCIETY* (1980).

¹²⁷ Galbraith, *How to Get Ahead*, N.Y. REV. OF BOOKS (July 19, 1979).

¹²⁸ The seminal essay on the "neutral principles" approach is Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) [hereinafter cited as Wechsler], criticized in A. MILLER, *THE SUPREME COURT: MYTH AND REALITY*, 51-87 (1978).

¹²⁹ For a celebration of Wechsler, *supra* note 128, see Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978) [hereinafter cited as Greenawalt]. Although both Wechsler and Greenawalt, and diverse others, promote the indispensability of a search for an identification of neutral principles of constitutional adjudication, it is odd but true that none of them has ever educated us as to when the Supreme Court has so acted. Are we not entitled to consider it a bootless quest? The same may be said for those who believe in "reasoned elaboration." See H. HART & A. SACKS, *THE LEGAL PROCESS* §§ 161-70 (10th ed. 1958); White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change* 59 VA. L. REV. 279 (1973).

¹³⁰ *Chandler v. Judicial Council*, 398 U.S. 74, 137 (1970) (Douglas, J., dissenting). Everyone knows that judges are not fungible, or at least they should know it, yet it is odd but true that not one of the coursebooks in constitutional law published for use in law schools makes reference to that fact of legal life. Those who plump for neutral principles or reasoned elaboration analysis, see note 129 *supra*, simply ignore the limits of the human mind.

ing that some know it and some do not.¹³¹ This essay opened with a quotation from Morris R. Cohen about the "imperfect knowledge or intelligence" of those in the legal machinery. It is not so much that as the evaluation placed by judges upon the data brought to them and upon information that should be known to all. Intelligence the Justices have, of that there can be no doubt, although some on the present Court surely rank intellectually higher than others. Again, however, it is how a Justice uses his intelligence that is important—to what ends, for what purposes, for whose benefit. For the *Bellotti* Court to speak of "democracy" as if it meant something precise, which emphatically it does not,¹³² and to equate the political powers of the natural person with that of corporate enterprise is, as Justice Robert H. Jackson said in another context, to extend "a promise to the ear to be broken in the hope, a teasing illusion like a munificent bequest in a pauper's will."¹³³

¹³¹ Craven, *Paeon to Pragmatism*, 50 N. CAR. L. REV. 977, 977 (1972). The term "result-orientation" has become fashionable in recent years as one of opprobrium for judges and commentators, who are enjoined by some deep-thinkers to eschew who wins—the results—and look to the reasons. See, e.g., Greenawalt, *supra* note 129, at 1021; Griswold, *Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 93-94 (1961); Wechsler, *supra* note 128, at 18. See also R. FUNSTON, CONSTITUTIONAL COUNTER-REVOLUTION? 29 (1977): ("Opinions based upon reasoned principle . . . are necessary to the very self-preservation of the Supreme Court. Assuming that the institution is worth preserving, Justices must sometimes sacrifice what they conceive to be a desirable result, if they cannot logically justify that result.") Professor Funston's statement is consummate nonsense. Judge Craven, of course, was correct. One does not have to agree with the results reached to argue that judges (and others) are result-oriented. It is one of the failures of legal (and other) scholarship for commentators to assume that they, too, are neutral or objective. See generally Miller, *The Myth of Objectivity in Legal Research and Writing*, 18 CATH. U. L. REV. 290 (1969).

¹³² There are at least 200 definitions of the term "democracy." See M. REJAL, DEMOCRACY: THE CONTEMPORARY THEORIES 23-48 (1967); E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE 130-31 (1960) ("The great deficiency of American democracy is intellectual, the lack of a good, usable definition."); see also Crick, *Introduction* to N. MACHIAVELLI, THE DISCOURSES 27 (B. Crick ed. 1970) ("to call government 'democratic' is always a misleading piece of propaganda. . . . It confuses doctrine with theory; we may want the democratic element in government to grow greater, but it is still only an element while it is government at all."); H. ARENDT, ON REVOLUTION 117 (1963).

¹³³ *Edwards v. California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring). See M. CARNOY & D. SHEARER, ECONOMIC DEMOCRACY 131 (1980) ("The principle of one person/one vote in the political arena . . . confronts the reality of unequal economic rights and an unequal distribution of economic power. The two cannot be separated. The 'free speech' of a General Motors is obviously greater than that of any individual."). See also Hart & Shore, *Corporate Spending on State and Local Referendums: First National Bank of Boston v. Bellotti*, 28 CASE WEST. RES. L. REV. 808, 829 (1979).

