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## Commentary: Noam Chomsky and Judicial Review

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# NOAM CHOMSKY AND JUDICIAL REVIEW

JAMES G. WILSON<sup>1</sup>

I.	ARISTOTLE ON TYRANNY AND CONSTITUTIONAL PERVERSION . . .	445
II.	EDMUND BURKE ON HISTORY, LEGITIMACY, AND MIXED GOVERNMENT . . . . .	448
III.	MADISON ON MAJORITY TYRANNY, PROPERTY, FACTIONS, THE COMMON GOOD, PATRIOTISM, AND THE AMERICAN CONSTITUTIONAL STRUCTURE . . . . .	451
IV.	EVIL'S PROTEAN NATURE . . . . .	454
V.	ASSESSING THE SUPREME COURT'S USE OF JUDICIAL REVIEW . . .	460
VII.	THE SUPREME COURT'S CONTINUING ENHANCEMENT OF PRIVATE POWER DEMONSTRATES ITS FAILURE TO FULFILL ITS CONSTITUTIONAL COMMITMENT TO COMBAT THIS FORM OF PERVERSION AND FACTIONALISM . . . . .	463
	A. <i>Justice Holmes on Judicial Restraint in Constitu-</i> <i>tional Interpretation</i> . . . . .	463
	B. <i>The First Amendment And Campaign Financing</i> . . .	465
	C. <i>Anti-trust Law</i> . . . . .	470
VII.	CONCLUSION . . . . .	471

It is risky to read Noam Chomsky's political writings during dreary winter months. He continually reminds us of the extent of human suffering and cruelty throughout the world. His meticulous documentation of America's ruthless foreign policy triggers uneasy shame.<sup>2</sup> Even if one opposes much of what the American Government and American corporations have done abroad in our name, one can hardly resist the benefits, be they in lower clothing and

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<sup>2</sup>See NOAM CHOMSKY, *WORLD ORDERS OLD AND NEW* (1994). Chomsky is far from alone. One need barely dig beneath the mass media to find numerous tales of horror; see Charles Bowden, *While You Were Sleeping: In Juarez, Mexico, photographers expose the violent realities of free trade*, HARPER'S, Dec., 1996, at 44.

gas prices or higher stock markets.<sup>3</sup> As a law professor who has not practiced public interest law for some years, I do not believe I am doing all that I can to rectify the situation. I think more often about my pension than the widespread killings in East Timor<sup>4</sup> or Guatemala<sup>5</sup> that our government encouraged and abetted. My family is far more important to me than abstract conceptions of justice; I do not give away much of my relatively handsome income to the downtrodden. Yet my dwindling compassion seems downright maudlin when compared to the harshness of the Clinton-Gingrich regime, particularly its recent "Welfare Reform" Act.<sup>6</sup>

Such depressing thoughts, which could easily be extended in numerous directions, can become so incapacitating that one wants to put Chomsky's work down. Chomsky never has let such personal doubts or moral ambiguities render him silent. After all, he has benefited from teaching at the Massachusetts Institute of Technology, which was largely funded by the Pentagon during the 1950s and 60s.<sup>7</sup> Far more importantly, Chomsky has never given up hope, believing there are ample opportunities for humane change. He is even tentatively optimistic.<sup>8</sup> It is worth remembering that a written work has a life of its own, possibly being persuasive despite its author's inevitable shortcomings.

At first glance, Chomsky seems of little help in evaluating the United States Supreme Court's use of judicial review. Over the decades, his political analysis has primarily focused on American foreign policy, an area the Supreme Court

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<sup>3</sup>Professor Chomsky questions whether the average American actually benefits from the American empire. It is very hard to resolve that issue. For example, it costs a great deal more than in most other countries for parents to get a quality education for their children. This dilemma pressures them to make risky contributions to the capital markets to protect their children. In turn, many of these contributions are extremely demoralizing. Many of us seek the best possible rate of return, searching for virtual monopolies or companies that exploit labor to intolerable degrees; see Ted C. Fishman, *The Joys of Global Investing: Shipping Homes the Fruits of Misery*, HARPER'S, Feb., 1997 at 35.

<sup>4</sup>Noam Chomsky, *East Timor and World Order*, in POWERS & PROSPECTS 204-221 (1996) (United States supported Indonesian invasion of East Timor in 1975 that slaughtered 60,000 people within the first few months).

<sup>5</sup>EDWARD S. HERMAN & NOAM CHOMSKY, MANUFACTURING CONSENT 75 (1988) ("the number of civilians murdered between 1978 and 1985 may have approached 100,000, with a style of killing reminiscent of Pol Pot.").

<sup>6</sup>Grants to States for Aid and Services to Needy Families with Children and Children-Welfare Services, 42 U.S.C. § 601 (1996).

<sup>7</sup>NOAM CHOMSKY, CLASS WARFARE: INTERVIEWS WITH DAVID BARSAMIAN 99 (1996) [hereinafter, CHOMSKY, CLASS WARFARE].

<sup>8</sup>CHOMSKY, *Preface*, in POWERS & PROSPECTS, *supra* note 4, at xi.

generally has left to the elected branches' discretion.<sup>9</sup> Nor is it easy to see how the Court would or should play a major role in foreign affairs. Perhaps the judiciary could enforce the War Powers Resolution<sup>10</sup> a bit more rigorously, but Congress can alter such judicial efforts in this field through statute or treaty. Many international issues are appropriately beyond the Court's effective power. Who wants nine unelected, isolated Justices, having no direct contact with the citizenry, the intelligence agencies, or foreign officials, determining whether, when, and how we should bomb Serbia or Iraq (to take two recent examples)?

Chomsky's belief in anarchism presents a more fundamental problem. Anarchism seems inconsistent with the idea of a court system, much less any activist conception of judicial review. For those of us with a more dismal view of human nature than Chomsky, anarchism appears to be not only premature, but also misguided. For the foreseeable future we must have a Leviathan; the primary questions are its form and character. But Chomsky has acknowledged that immediate problems, particularly private power's world-wide dominance, necessitate strong government. He is willing to devise intermediate solutions that conflict with his long-term goal of humane anarchism.<sup>11</sup> Chomsky's anarchism remains an inspirational "vision," not an immediate "goal."<sup>12</sup>

Aside from anarchism, many of his norms, insights, and proposals are sufficiently incremental and traditional to generate a legal structure that resembles the current system in many ways. Chomsky believes in the concept of "rights."<sup>13</sup> For him, the Enlightenment and classical liberalism are sources of

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<sup>9</sup>Although Chief Justice Marshall established a broad scope of judicial review, he did not significantly extend constitutional judicial review to the conduct of foreign affairs:

[Many] subjects are political: They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived, by adverting to the act of congress establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president . . . The acts of such an officer, as an officer, can never be examinable by the courts.

*Marbury v. Madison*, 5 U.S. 137, 166 (1803).

<sup>10</sup>50 U.S.C. § 1541-1548 (1973).

<sup>11</sup>CHOMSKY, *Goals and Visions*, in POWERS & PROSPECTS, *supra* note 4, at 71.

<sup>12</sup>*Id.*

<sup>13</sup>It is also hard to reconcile anarchism with a strong theory of rights. In *Marbury v. Madison*, Chief Justice Marshall concluded that one cannot have a "right" without a "remedy." 5 U.S. 137, 163 (citing 1 WILLIAM BLACKSTONE, 3 COMMENTARIES 23). For example, humans have no meaningful right to free speech unless an institution exists that can use coercive sanctions to stop those who are violating their rights. People need a hierarchical, governmental court to determine when their rights have been violated and to create sanctions to protect those rights. They also need some form of an Executive branch to enforce such sanctions as damages, injunctions, or imprisonment. In addition, courts must determine and define which human actions are "rights" that deserve legal

edification and inspiration.<sup>14</sup> At least for now, he is relatively satisfied with the basic form of America's written Constitution. One need not accept Chomsky's ultimate goal of anarchism to benefit from many of his political insights and his empirical verifications of United States-inspired violence.

Chomsky is now closely analyzing many aspects of America's domestic political and economic culture. In his article that immediately precedes this Commentary, he discussed Big Business' satisfaction with the Clinton administration.<sup>15</sup> Referring to thinkers like Adam Smith, Thomas Jefferson, Alexis de Tocqueville, and John Dewey, Chomsky traced an intellectual history of arguments (supported by facts) explaining why societies should always fear the wealthy and powerful.<sup>16</sup> He concluded that America and the rest of the world have become increasingly dominated by large corporations, which he labels "private tyrannies" and "totalitarian."<sup>17</sup> He has used similarly provocative rhetoric elsewhere: "Transnational corporations now have an enormous role in the world economy. These are just incredible private tyrannies. They make totalitarian states look mild by comparison."<sup>18</sup>

Chomsky's analysis raises several interrelated questions. Is it useful to label large corporations as "private tyrannies" and "totalitarian?" Do these corporations, whatever their precise nature, actually dominate (or even control) the American economic and political/legal systems? Do private corporations serve the "common good" or are they the most dangerous faction? At this point in history, are they a greater threat or at least a more immediate threat to our liberty and tranquillity than our formal government? What role can courts play, if any, in combating this international concentration of corporate power (both in the aggregate and within a particular corporation)?

Although Chomsky has never discussed judicial review in any detail, he recently made several interesting observations. He believes America's governmental structure remains acceptable, even desirable, even though all three federal branches have not just failed to protect us from private power's

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protection. Some authority must have the power to declare what is a properly promulgated "law" that creates a lawful right.

In theory, courts could have power to declare all rights. But if one believes that the doctrine of Separation of Powers best prevents the type of tyranny that arises from concentrating power in one set of hands, a rights-protecting society also needs a separate Legislative branch to make most laws protecting particular rights. Elections are another necessary defense against governmental tyranny. In summary, the protection of rights requires a government consisting of separate legislative, executive, and judicial branches that are ultimately accountable to the People through elections.

<sup>14</sup>Chomsky, *Goals & Visions*, in *POWERS & PROSPECTS*, *supra* note 4, at 71.

<sup>15</sup>Noam Chomsky, *Consent without Consent: Reflections on the Theory and Practice of Democracy*, 44 CLEV. ST. L. REV. at 416.

<sup>16</sup>*Id.* at 420.

<sup>17</sup>*Id.* at 434.

<sup>18</sup>CHOMSKY, *CLASS WARFARE*, *supra* note 7, at 39.

excesses but instead have devoted far too much of their energy and power to enhancing private power.<sup>19</sup> The constitutional text creates a unique relationship between the Supreme Court and private power. Because the Court is staffed by unelected Justices who need not pander for money to be reelected, it is more independent of the rich and powerful than either of the elected branches. Consequently, the Court has an obligation to resist private abuses, a responsibility it has not adequately fulfilled. Nevertheless, the Court has done a better overall job than the two elected branches in making our society more just, particularly by expanding some individual human rights vis à vis the government. For example, the Supreme Court for many years led the battle against segregation, a particularly nasty combination of public and private malfeasances. This cluster of normative and descriptive claims, which I have never seen before, provides the impetus for the rest of this Commentary's discussion.

Chomsky's descriptive claim is easy to verify. Under our constitutional text, Supreme Court Justices never face an election. Nor do they have to raise large amounts of money to be appointed. More importantly, they do not have to continually cultivate the support of the rich and powerful to keep their jobs. They can only be removed through congressional impeachment for "High Crimes and Misdemeanors." Thus, they have a singular capacity to resist private power. Of course, the moneyed interests watch the federal judiciary and its decisions very closely. The Justices are nominated by the President, who must run for office, and then confirmed by the Senate, whose members also face increasingly expensive electoral hurdles. While the average citizen may think the most important legal issues are abortion or affirmative action, the corporations want the Courts to protect and enhance their wealth and power. For them, legal fields like labor law, administrative law, securities law, and antitrust are far more important than such "social issues" as school prayer, "hate speech," or abortion.

Chomsky's normative claims are far more controversial. Many people will not conclude that private corporations have inordinate power. Nor will they see private capital as a major threat to liberty. Indeed, they might respond that private capital is and has been a major bulwark against tyranny. Furthermore, they may disagree that the Courts have a general obligation to check the abuses of private power. The Constitution grants "negative liberties" that only protect us from certain governmental abuses; it provides few "positive liberties" that can be asserted against either the government or private power.<sup>20</sup> In addition, Madison and his colleagues drafted the Constitution to protect private wealth

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<sup>19</sup>Chomsky believes that even when the government has provided or supported formal individual rights, it also has created a system that derives those rights of substance. He provides a metaphorical example: A person has a "right" to listen to a harmonica next door, but that "right" does not really mean much when someone has twenty-five boom boxes set up between you and your neighbor.

<sup>20</sup>Judge Richard Posner described the Constitution as a "charter of negative liberties; it tells states to let people alone." *Powers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

from "majority tyranny." Those who believe the Court should be bound by the Framers' intent can argue that Chomsky's analysis ironically demonstrates that the Court has appropriately fulfilled its mission. In addition, disputes about the distribution of wealth are so "political" that they should be left to the electoral branches, just like most foreign policy decisions.

Chomsky's terminology also needs to be considered. It may be desirable to limit the concepts of "tyranny" and "totalitarianism" to governmental power, which monopolizes authorized coercive force.<sup>21</sup> Chomsky's normative test of "legitimacy" should be further defined. Although his choice of words is debatable, disputes over precise meanings and applications should not distract from us describing, evaluating, and opposing the unjust actions and inactions of the powerful.

As noted, some of Chomsky's opinions, particularly his anarchism, are so unusual that they will not be persuasive in this legal/political culture, which is largely grounded on authority and continuity. Furthermore, many of us are wary of sweeping political abstractions and radical changes, despite our profound dissatisfaction with large parts of our existing culture. Perhaps unrealistically, we want many of the benefits of capitalism without so many of its excesses. One way to validate Chomsky's less extreme positions is to demonstrate their consistency with some of the most influential examples of Western political thought. This Commentary will consider four authorities who are hardly considered standard-bearers of the Left: Aristotle, Edmund Burke, James Madison, and Justice Oliver Wendell Holmes.

Insights from Aristotle, Burke, Madison, Holmes, and Chomsky will be combined into following set of propositions: (1) the Supreme Court has a constitutional and historical obligation to resist tyranny and other forms of constitutional perversion and factionalism; (2) the Supreme Court has a unique duty and capacity to combat abuses of private power; (3) private corporations and the well-to-do have gained so much power that they have become a dangerous faction that is turning our government and society into a perverse oligarchy, hostile to the common good of all; (4) the Supreme Court has acted illegitimately by enhancing rather than resisting the strength of this faction.

I am not asserting that any of these five thinkers would agree with these four propositions or their application to American society. Instead, I am utilizing these men's thoughts to develop a framework for evaluating different aspects of our constitutional culture, be it the Supreme Court or the escalating power of the affluent. The intellectual historian J.G. A. Pocock once described two modes of intellectual analysis. An intellectual historian like Pocock tries to determine what a writer or speaker meant by his words. This Commentary, however, falls into Pocock's second category:

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<sup>21</sup> Although this Commentary spends some time criticizing Chomsky's term "private tyranny," Chomsky observes that few people in our intellectual culture have such conceptual qualms about using Madison's famous term, "majority tyranny." If the majority can seize the government and pass tyrannical laws, why cannot certain minorities, particularly the rich and powerful, engage in equally tyrannical actions?



The non-historical practitioner is not concerned with what the author of a statement made in a remote past meant by it so much as with what he in his present can make it mean: what he can do with it for purposes of his own, which may or may not—and therefore do not have to—coincide with those of the author.<sup>22</sup>

# I. ARISTOTLE ON TYRANNY AND CONSTITUTIONAL PERVERSION

To analyze Chomsky's views and this article's propositions, we should try to determine what kinds of human behavior constitute "totalitarianism," "tyranny," "illegitimacy," and so forth. Aristotle's work is always a good place to start political analysis. Aristotle provided Western civilization with a variety of tools for describing and evaluating a society's strengths and weaknesses, its political vices and virtues. These descriptive and normative tools have survived the tests of time and experience; they are at the core of our culture. Furthermore, the Aristotelian perspective is more traditional, less threatening, and more accessible than the Marxist tradition, the abode of many contemporary progressives and Leftists. Most thoughtful people know that Marx would despise our culture. It is relatively easy to use Marxist analysis to explain many current problems. But too few people recognize how far our country has deviated from many of Western society's basic norms. Many social activists may recoil at this attempt to combine the best of progressive and conservative thought. Under such an approach, change tends to be incremental. Grand abstractions play less of a role. One has less confidence in one's analysis, predictions, and proposals for improvement.

Aristotle believed that our species could only be "human" in a political structure.<sup>23</sup> Humanity's political dilemma is to develop and protect the type of constitution that will most likely provide a stable culture which also facilitates individual pursuit of happiness through virtue and contemplation.<sup>24</sup> For Aristotle, the word "constitution"<sup>25</sup> emphasized actual distributions of wealth and power far more than formal, legal structures. There are three basic forms of government: majority rule (democracy), the rule by an elite (aristocracy) and a single ruler (monarchy). Each form's legitimacy or illegitimacy is determined by the rulers' actions and motives: "For tyranny is a kind of monarchy which has in view the interest of the monarch only; oligarchy has in view the interest of the wealthy; democracy, of the needy: none of them *the common good of all*."<sup>26</sup>

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<sup>22</sup>J.G.A. Pocock, *LANGUAGES AND THEIR IMPLICATIONS: THE TRANSFORMATION OF THE STUDY OF POLITICAL THOUGHT*, in *POLITICS, LANGUAGE, AND TIME* 7 (1989).

<sup>23</sup>Aristotle, *The Politics*, in 2 *THE COMPLETE WORKS OF ARISTOTLE* 1987 (Jonathan Barnes ed., 1984) ("man is by nature a political animal").

<sup>24</sup>See generally *id.*

<sup>25</sup>*Id.* at 2056.

<sup>26</sup>*Id.* at 2030 (emphasis added).

According to Aristotle, "constitutional democracy" is the preferred form of government.<sup>27</sup> Premised upon equality of citizenship, it is likely to be the most enduring,<sup>28</sup> the most just, and the most open to individual excellence and growth. Constitutional democracies usually have a vibrant middle class, which in the long run tends to be more reliable than either the upper or lower classes: "Great then is the good fortune of a state in which the citizens have a moderate and sufficient property."<sup>29</sup> "Constitutional democracy" can degenerate into a deviant form of government that Aristotle called "pure democracy." Under his definition of "pure democracy," the middle class/poor majority no longer protects the common good of everyone in the city; they maximize their personal interests at the expense of the rich. Indeed, Aristotle believes undemocratic systems can sometimes have more justice than particular democracies. A monarchy or an aristocracy can legitimately rule a society so long as it pursues the common good of all, not just its own interests. However, when a monarch seeks to fulfill only his own gratification, he becomes a "tyrant." When an aristocracy plunders the citizenry, they create an oligarchy.

Aristotle's basic normative standard of constitutional legitimacy, "the common good of *all*," has strong egalitarian and universalistic intimations. He does not limit his analysis to the "public interest" or the "common good," which are our culture's preferred terms. The social order must serve "all."<sup>30</sup> Thus, Aristotle's primary test for legitimacy is outcome: Do the rulers usually fulfill their private interests or do they enhance the common good of all? But he also focused on process, concluding that constitutional democracy was the form of government most likely to create the largest number of citizens capable of achieving virtuous "happiness" and protecting "the common good of all."

Strictly speaking, there can be no such thing as Chomsky's "corporate tyranny" in Aristotle's system. "Tyranny" is reserved for the monarch who seeks personal pleasure at the expense of everyone else. Yet Aristotle offered other terms, "perversion" and "despotism," that apply to other modes of injustice that are far more relevant to our inquiry. Any part of the constitution, be it the majority, the aristocracy, or the monarchy, that successfully pursues its interests at the expense of the "common good of all" becomes "perverse." Thus, the extent, distribution, and nature of private power are fundamental constitutional questions. At some point, the rich and powerful no longer act "legitimately."<sup>31</sup> They exploit the other classes, directly injuring those groups

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<sup>27</sup>*Id.* at 2056-58.

<sup>28</sup>Aristotle, *The Politics*, in 2 THE COMPLETE WORKS OF ARISTOTLE 2033 (Jonathan Barnes ed., 1989)

<sup>29</sup>*Id.* at 2057.

<sup>30</sup>This definition is still incomplete. Aristotle's constitution protects all "citizens." We next need to determine who are "citizens." In his preferred constitution, Aristotle excluded women, slaves, barbarians, and most of the "degraded" laboring classes.

<sup>31</sup>Chomsky observes that this definition of "legitimacy" is insufficient because it is purely outcome-oriented. We need "legitimate" processes and outcomes. For example, America could be ruled by a truly wise tyrant. He or she might even improve the

and destabilizing the society in the process. This Aristotelian reinterpretation of Chomsky does not prove that concentrated private power has perverted America's constitution, but it does permit us to question the legitimacy of such constitutional developments as the dramatic increase of the economic and political power of the well-to-do during the past twenty years.

Aristotle's definitions must be modified to reflect major differences between Greek cities and contemporary America. Aristotle limited his conception of "democracy" to a relatively small group of somewhat poor, middle class, and aristocratic "citizens" who could meet together. He excluded women, slaves, or laborers. In the United States, the popular "majority" consists of a mixture of the lower and middle classes, but the current electoral "majority" is dominated by the rich and the upper middle class. If only fifty percent of the populace votes, the political party most deferential to the rich and their allies need only twenty-six per cent of the vote. For starters, it costs more and more money to win election to powerful offices. Nor could Aristotle have envisioned a country in which the majority has more wealth than almost any group in history.

However the terms are modified to reflect America's complex political and economic order, the country's constitution should be judged by Aristotle's ultimate standard: Does it serve "the common good of all?" In terms of foreign policy, Chomsky and others have provided ample data to answer that question negatively. Thousands of other sources, including Chomsky's article that immediately precedes this Commentary, demonstrate continual oppression within our homeland.<sup>32</sup>

Aristotle did not simply assert on moral grounds that constitutional democracy was superior to aristocracy, monarchy, or tyranny. He preferred democracy because it tended to create the most stable, self-sufficient governments.<sup>33</sup> Political stability was a precondition to achieving other human goals, a necessary but insufficient aspect of "legitimacy." Aristotle did not see stability as the only governmental responsibility; many savage tyrants established dynasties that lasted for centuries. Thus, Aristotle's analysis is not purely idealistic; it is also pragmatic and can be tested by historical experience. In other words, history may provide some justification for constitutional democracy. Recent history tends to support his conclusion. Albeit horribly flawed, the English and American forms of democracy have outlasted many forms of totalitarianism and dictatorship throughout the Twentieth Century. On the other hand, many democracies have malfunctioned: the Weimar Republic, Italy before Mussolini, France after the Revolution, and so forth.

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"common good of all." But he or she would still be wielding illegitimate authority.

<sup>32</sup> See generally EDWARD L. AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH CENTURY AMERICAN SOUTH* (1984) (describing appalling treatment of freed African-Americans through the "convict labor" system); HARRY CAUDILL, *NIGHT COMES TO THE CUMBERLANDS* (1962) (describing corporate rapine of Appalachia over past two centuries).

<sup>33</sup> Aristotle, *The Politics*, *supra* note 23, at 2057.

These casualties are grim reminders of democracy's perpetual vulnerability to external threats and internal moral decline.

## II. EDMUND BURKE ON HISTORY, LEGITIMACY, AND MIXED GOVERNMENT

It may initially appear bizarre to link Noam Chomsky to Edmund Burke, the Eighteenth Century founder of modern conservatism. Nevertheless, Burke's thinking provide additional means to integrate some of Chomsky's less radical claims into an evaluation of our legal/political/economic culture. Both men have been willing to battle what they perceive to be tyrannical. Chomsky's foreign policy critique goes back decades.<sup>34</sup> For ten years, Burke exhausted himself attempting to impeach Warren Hastings, the governor-general of Bengal.<sup>35</sup> Parliament eventually censured Burke's relentless pursuit of Hastings.<sup>36</sup>

Burke believed that most existing institutions had, by their very endurance, become legitimate.<sup>37</sup> He trusted the wisdom and experience of prior generations that were imbedded in long-lasting institutions, concluding that existing generations had a covenant with past and future generations to maintain their pre-existing institutions.<sup>38</sup> Conceptualization and reason, taken to extremes, undermine a healthy deference to the status quo, which usually is wiser than any particular person. Even people who run institutions often do not know how they actually work. Burkean analysis can easily be used to defend existing corporate power as a venerable use of power reflecting the common sense of the American populace. But Burke was not completely deferential to authority or the status quo; he supported the American Revolution as a lawful effort to protect their liberties.<sup>39</sup> At some moment, tyrannical actions strip an institution, even England's King in Parliament, of its right to rule. Thus, Burke determined an institution's legitimacy by its historical capacity to resist tyranny, not by purely abstract standards, such as longevity.<sup>40</sup>

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<sup>34</sup>See, e.g., NOAM CHOMSKY, *THE CHOMSKY READER* (James Peck ed., 1987).

<sup>35</sup>ISSAC KRAMNICK, *THE RAGE OF EDMUND BURKE: PORTRAIT OF AN AMBIVALENT CONSERVATIVE* 127 (1977).

<sup>36</sup>*Id.*

<sup>37</sup>Edmund Burke, *Reform of Representation in the House of Commons*, in 6 *WORKS* 146 (Bohn Edition, 1861) (1792). "Prescription is the most solid of titles, not only to property, but, which is to secure that property, to government . . ." *Id.*

<sup>38</sup>EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 22 (T. Mahoney ed. 1982) (1990) [hereinafter *REFLECTIONS*].

<sup>39</sup>Edmund Burke, *Speech On Conciliation With America*, in *BURKE'S SPEECHES* 82 (Francis Selby ed., 1974) (1775).

<sup>40</sup>In a prior article, I derived this principle from Burke's work. James G. Wilson, *Justice Diffused: A Comparison of Edmund Burke's Conservatism with the Views of Five Conservative, Academic Judges*, 40 U. MIAMI L. REV. 913, 919 (1986).

Burke later virulently opposed the French Revolution, believing that it unnecessarily and dangerously elevated political abstractions like equality and liberty over decent existing institutions. He correctly predicted that the French Revolutionaries' passion for conceptual purity would lead to violence.<sup>41</sup> Burke thereby reminds us that one cannot only use abstractions to determine when tyranny or perversion have emerged or triumphed. One must carefully assess particular facts before labeling as "justified" or "unjustified" such political events as the American and French Revolutions.<sup>42</sup>

Like Aristotle, Burke argued that every part of a constitution could become corrupt or impotent. Indeed, there are certain predictable, recurring constitutional arguments that one could always make against any part of government or society. Kings tend to become despotic and self-absorbed,<sup>43</sup> the masses ignorant and grasping,<sup>44</sup> and the aristocracy rapacious and decadent.<sup>45</sup> Consequently, abstract constitutional arguments cannot by themselves be sufficiently persuasive; they must resonate within a particular culture as valid explanations of a particular constitutional controversy. To paraphrase Burke, we need not debate long about whether any part of a constitution is "eligible" to be dangerous, we must determine if such danger is "imminent."<sup>46</sup> To take two relatively contemporary examples, there is little difference between Senator McCarthy's and Senator Erwin's conceptions of "executive privilege." Nevertheless, many people believe that McCarthy abused his Congressional power of investigation in the 1950s when he went hunting for alleged Communists in the Army, while Erwin appropriately asserted congressional prerogatives to expose executive branch wrongdoing that permeated the Nixon administration. Debates over the formal distributions of power often reflects partisan views over which party controls which part of the constitution. A few years ago, some Republicans railed against an "imperial Congress,"<sup>47</sup> but they stopped making such complaints after gaining control of Congress. One doesn't hear many Democrats talking about an "imperial Presidency" while President Clinton remains in office. Many people base their views of the Special Prosecutor's Act upon which party is holding the presidency.

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<sup>41</sup>BURKE, REFLECTIONS, *supra* note 38, at 42.

<sup>42</sup>On this point Burke commented, "[c]ircumstances (which some gentlemen pass for nothing) give in reality to every political principle its distinguishing color and discriminating effect." *Id.* at 8.

<sup>43</sup>EDMUND BURKE, A VINDICATION OF NATURAL SOCIETY 45 (1756).

<sup>44</sup>*Id.* at 53-55.

<sup>45</sup>*Id.* at 57-59.

<sup>46</sup>Edmund Burke, *Thoughts On The Present Discontents*, in 2 THE WRITINGS AND SPEECHES OF EDMUND BURKE, 268 (Paul Langford, ed. 1981) (1770).

<sup>47</sup>See GORDON S. JONES & JOHN A. MARINI, THE IMPERIAL CONGRESS: CRISIS IN THE SEPARATION OF POWERS (1988).

By questioning the legitimacy of every branch of the English Constitution, Burke extended the notion of "tyranny" beyond Aristotle's corrupt despots. Aristotle had insufficiently differentiated class distinctions from the formal structure of government. New standards were needed to evaluate particular governmental structures. First, Burke believed that the best form of government was "mixed government," which combines the powers and interests of the Monarchy, the aristocracy, and the populace. The English Constitution was praiseworthy because it blended all three parts of society into the formal system called "The King in Parliament." For something to become law, it had to meet the approval of the House of Commons, representing the majority, the House of Lords, representing the aristocracy, and the King. Second, Burke agreed with Montesquieu that there should be some institutional division of these constitutional powers. The structure of society ought to reproduce itself in the legal structure of government. One must study not just the rival groups' actual powers but also the powers of the particular governmental institutions that tended to represent them. The goal was to maintain a healthy constitutional equilibrium between the three branches and three economic groups: "Our constitution stands on a nice equipoise, with steep precipices, and deep waters upon all sides of it. In removing it from a dangerous leaning towards one side, there may be a risque of oversetting it on the other."<sup>48</sup>

Burke's views can be combined with Aristotle's analysis to generate a standard to help evaluate Chomsky's less radical positions as well as the decisions of the Supreme Court: Every component of society or government gains its "legitimacy" not just through its current activities, but also through its historical capacity to resist tyranny and constitutional perversion. Assuming this interpretation of Burke is appropriate, Chomsky's arguments can be recast as follows: The Supreme Court, which is uniquely immunized from private power, has acted illegitimately by failing to resist private corporate tyranny and by enhancing that power, which has grown steadily over the past two centuries into a powerful faction that is driving the political/legal system toward a perverse oligarchy. This reconceptualization blends Chomsky's claims about the Supreme Court's unique powers and obligations with his notion of "illegitimacy."

There are several advantages to focusing on a political institution's historical capacity to resist tyranny and perversion. First, it is somewhat easier to develop a consensus over the "bad" than the "good." For instance, almost all of us oppose racism, but the continuing debate over affirmative action demonstrates that we remain deeply divided over the appropriate role of race in the meaning of "equality." Next, the Framers passed and a significant portion of the People ratified the Constitution to protect themselves from "tyranny."<sup>49</sup> At some point

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<sup>48</sup>Burke, *Thoughts on the Present Discontents*, in 2 THE WRITINGS AND SPEECHES OF EDMUND BURKE, *supra* note 46, at 252.

<sup>49</sup>There will always be disputes over how and when to apply the Aristotelian standards, which operate at a very high level of abstraction. After all, most of us consider

argument expires: Opposition to tyranny is a premise that ultimately must be accepted intuitively as "self evident."

### III. MADISON ON MAJORITY TYRANNY, PROPERTY, FACTIONS, THE COMMON GOOD, PATRIOTISM, AND THE AMERICAN CONSTITUTIONAL STRUCTURE

Although aware of the notion of "mixed constitutions," Madison believed that the American Constitution was fundamentally "democratic" in Aristotle's best sense of the word. The Constitution created a constitutional democracy that would protect the "common good." The Constitution had to be ratified by the People through special Constitutional conventions. Directly or indirectly, all major government officials, including federal judges, could trace their employment back to the electorate. Nevertheless, Madison's Constitution mimicked some of the virtues of Burke's mixed government by creating three institutions that were in form monarchical, democratic, and aristocratic. The Presidency, elected by a select group in the Electoral College, resembled Monarchy. The tenured Court, insulated from direct political pressure, looked like a hereditary aristocracy, with a particular charge to protect the Constitution and private rights.<sup>50</sup> The Senate combined aristocratic and democratic motifs; the Senators were not directly elected by the people. Yet they had to run for office every six years as a State Legislator and then persuade a majority in their State Legislature that they ought to go to Washington. The House of Representatives was the only direct representative of the majority.

This design was hardly coincidental. One need not be a Marxist to recognize that one of James Madison's primary goals in drafting the American Constitution was to protect the wealthy from "majority tyranny."<sup>51</sup> For Madison, unequal distribution of the wealth was an inevitable and desirable result of inequality in talents: "The diversity in the faculties of men from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the *first object of Government*."<sup>52</sup> He justified that goal in a letter to Jefferson that described important aspects of the proposed Constitution: "A reform therefore which

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many of Aristotle's views to be perverse, even tyrannical. He supported slavery, perceived women to be inferior, and thought Greeks were inherently superior to other races.

<sup>50</sup>THE FEDERALIST No. 78, at 89 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("This independence of the judges is equally requisite to guard the Constitution and the rights of individuals . . .").

<sup>51</sup>THE FEDERALIST No. 10, at 79-80 (James Madison) (Clinton Rossiter ed., 1961). Although he foresaw other sources of political division, Madison thought "the unequal distribution of property" was the "most common and durable source of factions." *Id.* at 79.

<sup>52</sup>*Id.* at 78 (emphasis added).

does not make provision for private rights, must be materially defective."<sup>53</sup> Once again, we encounter the Aristotelian anxiety about class conflict, but now largely concerned about the fate of the wealthy. Under the proposed Constitutional system, Madison predicted that the greatest tyrannical threat would come from the majority's representative, the Legislative Branch. This prediction is very Aristotelian; Aristotle feared that "constitutional democracies" would degenerate into perverse "democracies" in which the poor pillaged the rich at the expense of the common good.

Madison's desire to protect the rich clearly clashes with Chomsky's ideology and several of this article's propositions. If the most immediate purpose of the Constitution is to protect the rich from majority threats, the Constitution and the Court have fulfilled their functions quite well. The "aristocratic" part of the formal Constitution, the judiciary, has done an exemplary job of supporting the most powerful element in the American aristocracy, the rich. Under certain interpretations of the Constitution, our whole inquiry is over: Using judicial review to battle private injustices appears contrary to the Framers' intentions. After all, the Framers put several clauses into the Constitution and the Bill of Rights to protect private property rights.

Although there can be no doubt that Madison was particularly worried about the fate of the well-to-do, there is also little doubt that he wanted the Constitution to accomplish other ends, ends that can conflict with special concern for the rich. Madison was a patriot; he wanted a Constitution that would serve the entire country well over the long run.<sup>54</sup> He frequently utilized Aristotelian terms, such as "the common good."<sup>55</sup> The Constitution's primary goal was to benefit all Americans, not just the affluent (even though they were the favored minority). He must have also known that threats could emerge elsewhere. The American Revolution was a reaction to abuses by King George III as well as by Parliament.<sup>56</sup> The Society of the Cincinnati, consisting of ex-military officers, considered a coup d'état to put George Washington into complete power.<sup>57</sup> Madison probably agreed with his colleague, Alexander Hamilton, when Hamilton wrote in another Federalist Paper that the judicial branch was "the least dangerous to the political rights of the Constitution."<sup>58</sup>

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<sup>53</sup>Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 1 THE DEBATE ON THE CONSTITUTION 199 (Bernard Bailyn, ed., 1993).

<sup>54</sup>*Id.* at 193. "It appears to be the sincere and unanimous wish of the Convention to cherish and preserve the Union of the States." *Id.*

<sup>55</sup>"[A]ll the deputations composing the Convention, were either satisfactorily accommodated by the final act; or were induced to accede to it, by a deep conviction of the necessity of sacrificing private opinions and partial interests to the public good." THE FEDERALIST No. 37, at 231 (James Madison) (Clinton Rossiter ed., 1961).

<sup>56</sup>See THE DECLARATION OF INDEPENDENCE (U.S. 1776).

<sup>57</sup>See GARRY WILLS, CINCINNATUS: GEORGE WASHINGTON AND THE ENLIGHTENMENT 138-48 (1984). Washington's greatest contribution to our country was refusing that offer.

<sup>58</sup>THE FEDERALIST No. 78, at 4 (Alexander Hamilton) (Clinton Rossiter ed., 1961).



Observe that Hamilton said the judiciary was the least dangerous branch, not that it or either of the other two branches were incapable of becoming dangerous. Thus, these two men, like Burke, were aware that constitutional instability and injustice could emerge from a variety of sources.

It is possible that Madison would continue to believe that the rich could never constitute a faction that could become so "dangerous" under our electoral, republican form of government that they could undermine our constitutional order, economically, politically, and legally. It is a fool's game to state how someone two hundred years ago would analyze and decide a particular problem today. If I were miraculously reconstituted two hundred years from now, I would first want to learn what had happened before I expressed any political opinions. I would not want to apply my existing analysis in a vacuum. Subsequent human experience probably would convince me that many aspects of my political/moral philosophy were wrong, flawed, irrelevant, while other views remained valid.

Furthermore, Madison opposed excessive inequality of wealth. He split with Alexander Hamilton when Hamilton, acting as Secretary of the Treasury, paid all the unpaid debts for the Revolutionary War to the existing holders of debt instruments. Unless they had kept the paper, the soldiers who fought the war for next to nothing received no further compensation.<sup>59</sup> Thus, Madison included at least some notion of "public values" within his conception of "private rights." Nor was Madison alone. During the ratification debate over the Constitution, Noah Webster wrote: "The liberty of the press, trial by jury, the Habeas Corpus writ, even Magna Charta itself, although justly deemed the palladia of freedom, are all inferior considerations, when compared with a general distribution of real property among every class of people."<sup>60</sup>

Madison surely knew that tyranny comes in many forms. Dismayed by Shay's Rebellion and pro-debtor State legislation, he decided that the majority's capacity to exploit the rich was the most probable danger.<sup>61</sup> Yet majority tyranny could not be the only possible internal threat to our Constitutional community. Some non-majoritarian factions could subvert or overcome the republican principle of majority rule.<sup>62</sup> Madison was particularly concerned about religious factions. I suspect he believed that the evolutionary nature of the Constitution, both in terms of political practices and the common-law nature of judicial decision-making, should combat tyranny, factionalism, and

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<sup>59</sup>IRVING BRANT, JAMES MADISON, FATHER OF THE CONSTITUTION 119, 174-75 (1950).

<sup>60</sup>Noah Webster, *A Citizen of America*, in 1 THE DEBATE ON THE CONSTITUTION, *supra* note 53, at 158. Aristotle expressed similar sentiments: "Great then is the good fortune of a state in which the citizens have a moderate and sufficient property; for where some possess much, and the others nothing, there may arise an extreme democracy or pure oligarchy . . ." Aristotle, *Politics*, *supra* note 23, at 2057.

<sup>61</sup>Madison, *Letter*, *supra* note 53, at 204. "The paper money faction in Rh. Island is hostile." *Id.*

<sup>62</sup>THE FEDERALIST No. 1, at 407 (James Madison) (Clinton Rossiter ed., 1961).

perversion, whatever their particular manifestation. It would be odd for him to cling to all his predictions and fears, knowing some of them could not come true. For instance, he predicted that the Legislature would consist of the finest men in the land, i.e., aristocratic gentlemen like himself. That prediction quickly proved inaccurate, much to the despair of many members of his class.<sup>63</sup> If he had known that the government would be run by less refined men, would he have changed his other views on any aspects of the formal Constitution?<sup>64</sup>

Even if Madison still would believe that the Constitution can be vulnerable to only one form of tyranny, majority tyranny, there is no reason for us to be bound by such a naive vision. It is better to take Burke's and Aristotle's views, being perpetually alert to the possibility of oppression coming from any direction. Only the foolish remain wedded to their initial experiences of tyranny, turning them into the exclusive sources of future injustice. History and the Framers' views are important factors in constitutional adjudication but should never be exclusive factors.

#### IV. EVIL'S PROTEAN NATURE

To apply this article's four propositions, we need more precise definitions of totalitarianism, tyranny, perversion, and factionalism. Aristotle limited the term "tyranny" to self-seeking monarchs. Burke concluded that problems could arise within any governmental branch or class, as well as from the government as a whole. Echoing Montesquieu, Madison emphasized the tyrannical danger coming from one faction/person's effective control of all governmental powers or from the "majority." Such structural analysis meant that enlightened monarchies, Aristotle's ideal form of government, were tyrannies because true monarchs had all governmental powers under their control. But Madison additionally worried about the majority's using the government to confiscate wealth from the rich; his structural analysis quickly commingled with class consciousness. Chomsky has reapplied these notions to the modern corporate system, labeling corporations as "private tyrannies" and "corporate totalitarianism" to dramatize how our conventional techniques of political analysis tend to focus on "governmental tyranny" and "majority tyranny," not nefarious "private tyranny."

Words like "totalitarian," "tyrannical," "perverse," and "factional" can be applied to many forms of evil and oppression. Applications of these terms may overlap so much that the more potent terms lose some of their significance. In many ways, all these terms are "conclusions of politics" that resemble technical "conclusions of law," such as "negligence" or "fraud." One can never know whether a particular injury was caused by "negligence" without closely

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<sup>63</sup>*Id.* at 409.

<sup>64</sup>Chomsky notes that a semi-democracy run by "refined men," even if they were decently motivated, would still be illegitimate. It is not enough to have either the right form of constitution or the right outcomes. One must have both to have true constitutional "legitimacy."

studying the particular facts. The same process applies to determining when a society or part of that society has become "tyrannical" or "totalitarian." Furthermore, political and legal terms include prevailing community standards. Rivals in any heated political debate have used and are likely in the future to employ this type of conclusory political terminology. During the slavery debate, abolitionists claimed slavery was tyrannical, while Southerners replied that confiscating that form of property was the real tyranny. In our era, Right to Lifers could easily characterize abortion as private tyranny: The mother murders the fetus. Pro-Choicers could reply that the government would tyrannically seize their bodies should it outlaw abortion. At times, the concept of tyranny comes close to being the flip side of "natural law" and/or "natural rights," profoundly ambiguous terms.

Of course, no modern politician will say he or she is primarily interested in his or her own glory and wealth. The politician will dress up actions, no matter how vile, in the rhetoric of virtue. Consequently, we always must plunge beneath the prevailing rhetoric to make case-by-case determinations of the nature and extent of evil within a particular society or parts of it, relying on norms within that society as well as more enduring, "universal" norms, such as those provided by Aristotle. I doubt that we all can or should agree on a precise definition of "tyranny," any more than we will concur on a particular definition of "fraud." Nor will we concur on our applications of any agreed-upon definition to particular facts. After all, legal terms like "negligence" and "fraud" are left significantly indeterminate so they can be applicable to novel situations warranting legal punishment. We shouldn't want our political pejoratives to be any less responsive to new manifestations of injustice. Humanity's capacity to invent new modes of evil is far too well known.

One solution is to apply the terms "tyranny" and "totalitarianism" only to governments, which directly control most uses of coercive force. Under such a definition, there can be no such thing as Chomsky's "private totalitarianism" or "private tyranny." I tend to believe the most damning pejorative, "totalitarianism" should rarely be used and should only be applied to governments. Totalitarian regimes are governments which are immune from elections, use a sweeping ideology to dominate virtually every aspect of a society, and often slaughter large numbers of people in the process.<sup>65</sup> Hitler's Germany, Pol Pot's Cambodia, and Stalin's Soviet Union are classic examples. We need a special category for the purest forms of evil that our species has so far invented. However, virtually every major power in World History has engaged in what Chomsky calls "mass murder." Witness the Japanese in China earlier this Century, the late Soviet Union in Afghanistan, and the United States in Southeast Asia and Central America.<sup>66</sup>

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<sup>65</sup> See, e.g., HANNA ARENDT, *THE ORIGINS OF TOTALITARIANISM* (1973).

<sup>66</sup> Amnesty International published some leaked government documents demonstrating that the United States government has been knowingly supplying arms to "every Columbian military unit that Amnesty has implicated in murdering civilians

As is the case with legal reasoning, such political categories should not be built solely through abstractions but should rely on examples that provide grounds for subsequent analogies. The average Aristotelian tyrant is not as ambitious as the totalitarian tyrant. Aristotle's tyrant doesn't seek to regulate all thoughts and actions, but merely wants all political power and the wealth and pleasure that come with such power.

One can limit tyranny, like totalitarianism, to public governmental action, but history suggests otherwise. The courts and the Constitution facilitated for decades a pernicious form of private tyranny: slavery. As a Southern state court judge explained in *State v. Mann*,<sup>67</sup> slave-owners need to be able to shoot recalcitrant slaves (even in the back) to make the system work: "The power of the master must be absolute, to render the submission of the slave perfect."<sup>68</sup> Backed by state and private power, slave-owners could do almost whatever they wanted to their victims. From the slave's perspective, a slave-owner resembles a dictator. In short, state-endorsed and enforced slavery is a form of "private tyranny."

Chomsky's phrase "private tyranny" thus has enduring analytic value. The more difficult question is determining its scope. Chomsky appears to use the phrase "private tyranny" in three ways. First, he is describing the internal structure of large, private corporations. Next, "private tyranny" includes corporate practices, particularly in the Third World. Third, he is referring to the corporations' effective control of our government's domestic and foreign policy.

Perhaps "private tyranny" should be limited to institutions and individuals who engage in activities resembling slavery. With the fairly minor exception of security guards, private power in America does not have direct power over the use of governmental force (although its influence is pervasive). The private sector cannot use violence to keep Americans on the job (although it can injure them deeply by firing them).<sup>69</sup> Furthermore, the written Constitution's basic structure still provides significant protection against private power's gaining complete control of the system, particularly through the Thirteenth Amendment's general prohibition against slavery. But such a definition generates the argument that the Thirteenth Amendment has made "private tyranny" impossible. Perhaps we need to develop some new terminology, with relatively definable limits, to describe the species' continual ability to create novel forms of oppression, just as Hanna Arendt did with "totalitarianism."

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two years ago." *The Columbia Papers: Amnesty Obtains Documents on Misuse of U.S. Arms*, AMNESTY ACTION, Winter, 1997 at 1, 8. Thus, the "war on drugs" has often been a war on political dissent and the peasantry.

<sup>67</sup> 13 N.C. 263 (1829).

<sup>68</sup> *Id.* at 266.

<sup>69</sup> Chomsky replies that the slave-owners had no more direct power over governmental force than corporations do today, thus, the term "private tyranny" is equally applicable.

On the other hand, Chomsky's critique should remind us that most modern corporations are incredibly centralized. Corporate leaders assert politically unaccountable legislative, executive, and judicial functions within their realm. Although they cannot use much force, bosses have powerful weapons: hiring, firing, promoting, demoting, ignoring. Every corporate culture dictates to varying degrees how one should dress, talk, and act—characteristics of tyranny and totalitarianism. Every corporation can redefine any employee's purpose and life at any moment. Furthermore, these corporations make many political decisions—such as locating factories, determining the amount of pollution, and donating huge amounts of money to politicians' campaigns—yet they are not at all accountable to the People.

Aristotle, Burke, and Madison believed that the role of private wealth and power, presently expressed primarily through corporate control, should be part of constitutional analysis. It is always appropriate to assert, as a matter of theory and practice, that internal and international wealth can undermine or even destroy a society. A faction need not have complete control before doing irreparable damage. I believe that contemporary private corporate power can best be described as a dangerous Madisonian faction that is attempting to turn our country into the perversion that Aristotle called oligarchy. This faction has not yet become so powerful that it has distorted every aspect of our constitution into a permanent oligarchy, much less a "tyranny" or a "totalitarian society." However, I agree with Chomsky that the wealthy and their corporate fictions are presently the "most dangerous branch" of our constitution. They have excessive power within the formal government and throughout society.<sup>70</sup>

For decades, Chomsky has demonstrated how American foreign policy has reflected corporate interests. For example, he has shown the extension of the "free market" actually means the invasion of governmentally supported private power into other countries.<sup>71</sup> The developing world must comply with free market principles,<sup>72</sup> while modern industrial corporations rely on state subsidies and military support. Similar problems arise domestically. Now that

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<sup>70</sup>For Aristotle, the wealthy's degree of power and use of power were basic constitutional questions. Because America's political economy is so different than Aristotle's Athens, it is harder to separate the powerful from the less powerful, to define the "ruling class" with precision. Large, privately held corporations exclusively benefit their wealthy owners. But the middle class and the upper middle class also own large percentages of most publicly held corporations. However, such public corporations are run by powerful individuals who feel constrained primarily by market norms. Furthermore, these powerful entities need support from politicians, inventors, and private lawyers. Consequently, I would argue that the United States' Aristotelian aristocracy basically consists of the very wealthy, those who run the major corporations, and their most important servants, a large group of politicians and professionals.

<sup>71</sup>NOAM CHOMSKY, CHRONICLES OF DISSENT: INTERVIEWS WITH DAVID BARSAMIAN 166 (1992) [hereinafter CHOMSKY, CHRONICLES OF DISSENT].

<sup>72</sup>*Id.* at 191.

it costs hundreds of millions of dollars to run a Presidential campaign,<sup>73</sup> where is a candidate going to get that kind of money? Either directly from the wealthy or their surrogates, private corporations. In 1989, before the recent stock market boom, the wealthiest one percent owned forty percent of our country's wealth. One needed at least \$2.3 million to qualify as a member of that group.<sup>74</sup> The top twenty per cent received 55% of all after-tax income and controlled 80% of the wealth.<sup>75</sup> Using Aristotle's model, the wealthy and their supporters rely on their own power and the power of private corporations to enhance their own interests, not the "common good of all." Indeed, the primary legal duty imposed on private corporations is to increase shareholder value. Particular corporations and bosses come and go, but the rich are getting richer, particularly in the past twenty years.

Private power's effective control of the government does not yet come close to effective, continuing control. Legally and formally, America maintains the structure of a republic. The populace can still vote and organize. Chomsky can write his scathing critiques. Nor will all the middle class be completely exploited in the foreseeable future. The wealthy and their corporations need many talented individuals to keep the system running. Certain segments of the voting population, particularly the aged and the upper middle class, receive decent provisions. Many Americans have supported these constitutional changes simply because they have prospered from them.

Widespread support for the status quo, particularly among the active electorate, suggests that the internal system is not so oppressive as to be characterized as narrowly "oligarchic." Aristotle never envisioned a society where so many people would be so well off financially, where a very large segment is "rich." From the perspective of the average human living under the global market, the average middle class American resembles an aristocrat, consuming far more than his or her share of the world's goods. In terms of the world's constitution, America has become something close to an oligarchy, not very interested in the common good of all. Like too many aristocrats before them, many Americans are excessively self-seeking and pleasure-seeking. They only ask what the country can do for them. In other words, millions of Americans remain satisfied with the system even though (perhaps even because) it exploits so many people within America and millions more throughout the world.<sup>76</sup>

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<sup>73</sup>Ira Cinoy, *In Quest for Presidency, Candidates Learned They Could Count on Finance Laws*, WASH. POST, Nov. 5, 1996, at A17.

<sup>74</sup>Keith Bradsher, *Income Disparity Grows, Studies say: 1% of rich own about 40% of Wealth*, HOUSTON CHRONICLE April 17, 1995, at A2.

<sup>75</sup>*Id.*

<sup>76</sup>Chomsky notes that Americans may be doing relatively well economically, but they still are being exploited by the powerful. In other words, the average American would be much better off, economically and psychologically, if the rich did not dominate the political order.

If this analysis is valid, Chomsky's diagnosis that our culture is evolving into primarily being a "private corporate tyranny" is not so farfetched. Aristotle equated the tyranny of one with aristocratic oligarchy and "democracy"; all three are "perverse" forms which ignore the common good of all. Madison worried about one economic faction, the majority. But Madison's underlying anxieties about factional and class conflict might take a different direction in a different era.

If a relatively pure American oligarchy is ever realized, the story could get much worse. The powerful interests may conclude that most of the middle class is as expendable as the working class (much less the poor). Already, it is much harder for well-trained college students to get decent jobs with basic benefits. Corporations hire highly trained workers abroad at a fraction of the cost. Oligarchy is often a precursor to Aristotle's worst form of government, tyranny. Some demagogue will promise to attack the "special interests" on behalf of the People, demanding the sacrifice of many freedoms to combat corruption. Such rhetoric already abounds within the contemporary political debate. Imagine its effective utilization by a villain.

Even if the "corporate faction" never gains formal control of the entire system, their beliefs and powers may so influence and permeate the government and culture that they undermine our society. Every advertisement contains a corrosive political message: You are redeemed and defined by what you purchase. There is no need to wait until this faction has prevailed. Everyone has a right to oppose forces and factions that are pushing their society towards decline and perversion. The American Revolutionaries did not wait until England acted hideously. England's relatively mild revenue stamps triggered wide-spread dissent that eventually led to revolution.<sup>77</sup>

While Chomsky sees the ruling class as the source of most contemporary problems, my views are somewhat more pessimistic. Chomsky believes that the corporations have manipulated public opinion so much that the public does not know its own interests and cannot have its way. I think many members of the middle and working classes knowingly support the status quo. Many average Americans know most of their politicians are hypocrites. How else could they re-elect President Clinton and House Speaker Gingrich? For instance, many Americans understood that the war with Iraq was about petroleum, not "naked aggression," nuclear proliferation, or even saving the slaveowners who ran Kuwait. The average voter would get few of the profits but would be able to purchase cheaper gasoline from a more "stable" source than Saddam Hussein. Although our official culture is compulsively sentimental and optimistic, many Americans know they are extremely well off, perhaps more affluent than they deserve.

Americans are no more immune than anyone else from the basic tragedies of life: children dying, disease, family conflict, and fear of the future. But at least in public discourse, they prefer to present a more enthusiastic image. Nor

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<sup>77</sup> See Pauline Maier, *Popular Uprisings and Civil Authority in Eighteenth-Century America*, 27 WILL. & MARY Q. 3 (1970).

is that hopeful energy all bad; it helped build and solidify this country. One of the greatest risks of corporate ascendancy is that corporate power will strip the average American family of any realistic expectation of improvement by moving and threatening to move so many jobs abroad.

At this point, one might conclude that all these hedges and distinctions reduce the foregoing analysis to mush. How important is it to define different forms of venality? Does it really matter if we call corporations "tyrannies" or only "factions" that are perverting our Constitution? The debate over political categories is important, but not the central issue. For instance, Chomsky stated in an interview that the term "genocide" should be limited to those situations in which one group seeks to eliminate an entire population because of different racial or ethnic status. Every other form of governmental massacres is a "mass killing."<sup>78</sup> Chomsky applied these definitions to conclude that Hitler's atrocities were genocidal, while the recent Indonesian invasion of East Timor, an act of aggression supported by the Clinton administration, was a "mass killing."<sup>79</sup> But Chomsky acknowledged that many decent people apply the term "genocide" to what he considers to be "mass killings." The main thing is to oppose all the venal actions that properly fall under the rubric of genocide and mass murder, not to obsess over definitions and terminology. My preference is to keep "genocide" and "totalitarianism" as separate as possible from "mass murder," "tyranny," "illegitimacy," "faction," and "perversion." It seems better to describe the existing political conflicts in America as struggles between factions. But overall, I would much rather have somebody disagree with my terminological models than conclude that Nazi politics, however characterized, are admirable.

#### V. ASSESSING THE SUPREME COURT'S USE OF JUDICIAL REVIEW

How does this cluster of definitions, observations, and norms influence our evaluation of the Supreme Court's performance? Aristotle's least controversial political goal is to create a society free from civil war and capable of resisting invasion. This Hobbesian standard is easier to verify than many other normative criteria. In many ways, the Anglo-American societies have flourished compared to their neighbors. Over the last three hundred years, England has not suffered from invasion or civil war. Since the Revolutionary War, America has survived one civil war and one brief, unsuccessful invasion in 1812. Their constitutions have outlasted all others. It is likely that this

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<sup>78</sup>CHOMSKY, *CLASS WARFARE*, *supra* note 7, at 159.

<sup>79</sup>*Id.* Chomsky has not always applied this distinction in the same way; he earlier described the Indonesian slaughter as "genocide." CHOMSKY, *CHRONICLES OF DISSENT*, *supra* note 71, 16-18. Such "contradictions" do not "refute" Chomsky. Quite the contrary. Categories, be they political, legal, or scientific, are tools to achieve greater ends: "We begin any inquiry with puzzles about unexplained phenomena, which we try to sort out into categories that which seem to fall together, caring little about boundaries, and not expecting the categories to survive inquiry." CHOMSKY, *POWERS & PROSPECTS*, *supra* note 4, at 32.



stability is in part attributable to having an electoral system and a tradition of judicial participation via the common law method of adjudication. Without their particular legal structures, it is more likely that these two countries' histories would have been worse. One virtue of the legal process is its continuing requirement that judges openly provide culturally acceptable reasons for outcomes. It is hard for our courts to repudiate such widely held norms as equality, individuality, or liberty. Once those humane concepts have been introduced into a legal system, they can develop internal momentum and external support. As E.P. Thompson explained in his classic book, *Whigs and Hunters*:

The rhetoric and the rules of a society are something a great deal more than sham. In the same moment they may modify, in profound ways, the behavior of the powerful, and mystify the powerless. They may disguise the true realities of power, but, at the same time, they may curb that power and check its intrusions. And it is often from within that very rhetoric that a radical critique of the practice of society is developed. . . .<sup>80</sup>

Stability was not Aristotle's exclusive political norm. Cruel despots can create systems that last for centuries. Aristotle only approved of stable societies that also provide for individual happiness and the common good of all. In some ways, America and England have had admirable records. Since 1688, neither the English nor American governments has plunged into tyranny by permanently eliminating elections or concentrating all power permanently in the hands of a single person or group. No branch of government has remained completely immune from public opinion or judicial review.<sup>81</sup> Both societies have created and enforced many new and important individual rights, enabling individuals to pursue more easily their "happiness." The two societies have often compromised fundamental rights during wartime but have returned to better practices after particular threats have subsided. Indeed, important First Amendment rights expanded during the Viet Nam War.<sup>82</sup> Chomsky believes that America is the freest country on earth in terms of citizens' legal rights.

This Commentary will not going to provide much empirical data to support its normative claim that private corporate power has become a dangerous, destabilizing faction, approaching but not yet reaching the status of a perverse oligarchy. In other words, America presently has the formal structure of a mixed government, grounded on popular sovereignty, but its functional distribution of power approaches that of an oligarchy fueled by imperial

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<sup>80</sup>E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 265 (1975).

<sup>81</sup>See James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 B.Y.U. L. REV. 1037.

<sup>82</sup>*New York Times v. United States*, 403 U.S. 713 (1971) (invalidating lower court injunction against publication of Pentagon Papers) and *Cohen v. California*, 403 U.S. 15 (1971) (permitting person to wear coat with the slogan "Fuck the Draft").

ambitions. Arguments and evidence for both sides can be found in abundance elsewhere. For savage criticism, one can turn to works like the article written by Chomsky that precedes this Commentary or almost anything written in *The Progressive*. The editorial page of the *Wall Street Journal* and magazines like *Forbes*<sup>83</sup> relentlessly defend corporate power. Their main lament is that the rich and the corporations do not have enough wealth and power. They want capital gains taxes eliminated and Social Security taxes for the working and middle classes increased. As Steve Forbes intimated by running for President, the best "capitalist tool" is the U.S. government.

Perhaps there are no serious problems in buying toys made by many millions of child laborers and slaves; reallocating more and more wealth to the top one percent of the population; having Presidential elections that cost at least eight hundred million dollars; reducing assistance to impoverished children;<sup>84</sup> seeing the defense and intelligence agencies' budgets expand at the expense of national security<sup>85</sup> even though the Cold War is long over; and watching many of our country's children turn into barbarians in the shadow of subsidized sports arenas. But for those of us who have become increasingly disenchanted with the overall direction of our country, this Chomsky-inspired mode of analysis may be particularly helpful.

As with other conclusory normative categories that are part of any system of law and politics, we will disagree about particular facts and the normative implications of those facts even if we accept the basic Aristotelian standard that the constitution should serve the "common good of all." This Commentary's analytical structure has been presented at a sufficiently high level of abstraction that it will be helpful to those who disagree with my particular applications and conclusions. To put the matter bluntly, someone could easily reapply this approach on behalf of corporate America. Here are a few of the many arguments that corporate advocates might make. Workers are free to leave any corporation and work elsewhere; shareholders can sell their interests and invest in other companies; market competition precludes economic domination. The elected government can, and does, regulate and modify corporations. Most Americans prefer the existing mix of public and private power. The Thirteenth Amendment's ban on slavery prevents widespread private tyranny, at least within the United States. Private power has been as responsible as the legal system for America's freedom and stability. If we were to rerun American history without private and corporate power, we might end up with destitution similar to that existing in the now-collapsed Soviet Union.

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<sup>83</sup>Sometimes these magazines ascribe as much power to private power as Noam Chomsky does. For example, a recent *Forbes* cover claimed "Cyber Power gives financial markets a veto over the President and Congress." *FORBES*, Dec. 2, 1996.

<sup>84</sup>Twenty-five per cent of all American children under the age of six live in poverty. Melinda Beck, *Next Population Bulge Shows Its Might*, *WALL ST. J.*, Feb. 3, 1997, at B1.

<sup>85</sup>See, e.g., DAVID HACKWORTH, *Hazardous Duty* (1996).

VI. THE SUPREME COURT'S CONTINUING ENHANCEMENT OF PRIVATE POWER  
DEMONSTRATES ITS FAILURE TO FULFILL ITS CONSTITUTIONAL COMMITMENT TO  
COMBAT THIS FORM OF PERVERSION AND FACTIONALISM

*A. Justice Holmes on Judicial Restraint in Constitutional Interpretation*

The Supreme Court has always been aware of the political/economic implications of its decisions. For two centuries, the Supreme Court usually has interpreted the Constitution to protect private wealth and private property rights. In the nineteenth century, it invented doctrines like "vested rights"<sup>86</sup> and "substantive due process."<sup>87</sup> It protected slavery before the Civil War and facilitated private and public segregation despite the passage of the Civil War Amendments. On the other hand, the Warren Court was less deferential to corporate power. But in the last two decades, the Court has interpreted the First Amendment to limit elected governments' power to regulate advertising and campaign spending. Although there is little reason to expect any change for the better in the foreseeable future, the Court should try to construe statutes to limit the power of wealth. It also should, at the least, leave most legal constitutional disputes over the structure of the economic constitution to the body politic.

There are many reasons why even a progressive Supreme Court should not aggressively use constitutional law to resolve Aristotle's constitutional issue of wealth distribution. In his famous dissent in *Lochner v. New York*, Justice Holmes chastised the majority for constitutionalizing their particular economic ideology of Social Darwinism.<sup>88</sup> The *Lochner* Court had interpreted the Fourteenth Amendment's Due Process Clause to preclude States from limiting the number of hours that bakers could work. The majority concluded such laws violate a constitutionally protected "right to contract." The Court thereby elevated laissez-faire economics above such rivals as the Progressive Movement and socialism. Justice Holmes believed the Supreme Court should leave the basic structure of the economic system to the elected branches, which can be more flexible and responsive to shifts in public opinion about proper economic relationships. In other words, elections resemble nonviolent civil wars; the victors could and would use the law to gain enormous power over their rivals. The courts could regulate skirmishes and prevent individual acts of violence, but they could and should do relatively little to resolve basic class conflicts.

Furthermore, courts do not have the competence to regulate national economies. They are isolated from rapid shifts in any economic and political system. Their tool, constitutional doctrine, is a blunt instrument that cannot make the nuanced, flexible decisions that invariably are part of generating and

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<sup>86</sup>*Marbury v. Madison*, 5 U.S. 137, 166 (1803) ("[A federal officer] cannot at his discretion sport away with the vested rights of others.").

<sup>87</sup>*See Lochner v. New York*, 198 U.S. 45 (1905) (prohibiting States from regulating the number of hours bakers could work).

<sup>88</sup>*Id.* at 75 (Holmes, J., dissenting).

distributing wealth. In his *Lochner* dissent, Justice Holmes observed that the Supreme Court had previously upheld other allegedly "tyrannical" regulations of the market and individual liberties, such as governmental limitations on the right to buy a lottery ticket.<sup>89</sup> In a later decision, he noted that the legislature can pass laws that will drive businesses to the point of ruin.<sup>90</sup> After all, there is no constitutional right to sell cocaine.

Courts must make legalistic distinctions over time that will neither be internally coherent nor economically effective. For example, the *Lochner* majority did not overrule a previous case which had held that States could regulate miners' hours.<sup>91</sup> According to the *Lochner* Court, mining was so much more dangerous than baking that it could make a constitutional distinction between the two occupations. Aside from the fact that baking was very arduous, life-threatening work during this era,<sup>92</sup> it seems absurd that unelected, elderly judges should convert into constitutional stone their hunches about the riskiness of other professions. Constitutional doctrine is relatively inflexible and hard to change. The Court either has to reverse its views or the Constitution has to be amended, a slow and difficult process requiring supermajoritarian support.

Justice Holmes' arguments continue to have weight. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*<sup>93</sup> then-Justice Rehnquist complained that the Supreme Court was getting too involved in protecting a particular economic system, Adam Smith's laissez-faire economics, when it provided commercial speech First Amendment rights under the Constitution.<sup>94</sup> Writing for the majority, Justice Blackmun blithely conceded that his interpretation protects capitalism: "So long as we preserve a predominately free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions."<sup>95</sup> In a subsequent case extending these new rights even further, Justice Rehnquist analogized the Court's protection of capitalist advertising to the *Lochner* Court's doctrine of "substantive due process."<sup>96</sup> He believed the legislative

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<sup>89</sup>*Id.*

<sup>90</sup>*Bi-Metallic Investment Co. v. State Bd. of Equalization of Colorado*, 239 U.S. 441, 445 (1915). "General Statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin."

<sup>91</sup>*Holden v. Hardy*, 169 U.S. 336 (1898).

<sup>92</sup>In his *Lochner* dissent, Justice Harlan referred to a study demonstrating that few bakers live more than fifty years 198 U.S. at 70-71 (Harlan, J., dissenting).

<sup>93</sup>425 U.S. 748 (1976).

<sup>94</sup>*Id.* at 784 (Rehnquist, J., dissenting).

<sup>95</sup>*Id.* at 765.

<sup>96</sup>*Central Hudson Gas and Electric Corp. v. Public Service Com'n of New York*, 447 U.S. 577, 589 (Rehnquist, J., dissenting) (1980). Many modern legal "conservatives" quickly label the abortion rights cases as "illegitimate" but do not seem to apply the same

branch should be primarily responsible for determining the appropriate amount of advertising.

Theoretical political abstractions don't mean much if they do not suggest possible resolutions of particular problems. There is a gap between universal and particulars, but both are necessary to make reasoned decisions. The following two sections shall briefly consider the Supreme Court's actions in two important areas of federal law, anti-trust and campaign financing. The following solutions, which are not original, are only offered as examples. Significant reform in anti-trust law and campaign financing are necessary, but woefully insufficient remedies to combat the excessive concentration of private power presently plaguing America.

### *B. The First Amendment And Campaign Financing*

As Justice Blackmun's quote in *Virginia State Board of Pharmacy* indicates, the modern Court has often ignored Justice Holmes' warnings about using constitutional doctrine to resolve basic questions of wealth and power. It is no coincidence that both the major political parties have become ever more solicitous of corporations and wealthy donors after the Supreme Court protected the rich in *Buckley v. Valeo*<sup>97</sup> by holding that Congress could not limit the amount of money people spent "independently" on behalf of particular candidates. This huge loophole allowed Political Action Committees (P.A.C.s) and wealthy supporters to pour hundreds of millions of dollars into the campaign process. The end result is a television spectacular of thirty-second, negative advertisements which leave large segments of the population indifferent or nauseated. Whether intended or not, the overall message of these ads is that all politicians and thus all governments are despicable. Consequently, one should not rely on the government for assistance. One can only trust the "invisible hand of the market."

The *Buckley* Court also gave rich individuals a perpetual advantage in elections by allowing them to spend as much of their own money on elections while not permitting less wealthy rivals to obtain similar amounts of money from a single source.<sup>98</sup> In other words, the rich have the inside track to win elections. These days, the best qualification an entry level candidate can have is personal wealth. One sees very few rich people willing to work their way up the system, thereby having some contact with local governments, small businesses, and the average person. Most affluent politicians prefer to start at the top, running for major state or federal office. Many of these wealthy people did little to deserve this political and economic power except to inherit their fortune. Although Presidents like Madison, Jefferson, and Franklin Delano Roosevelt demonstrate that aristocrats can be better-than-average Presidents,

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analysis to the Court's constitutional protection of corporations, commercial advertising, and the power of money in political campaigns.

<sup>97</sup>424 U.S. 1 (1975).

<sup>98</sup>*Id.* at 51-54.

we do not want to let the modern wealthy aristocracy, which in the aggregate has an ever-diminishing sense of noblesse oblige, maintain their overwhelming constitutional advantage.

In 1996, the Supreme Court gave the well-to-do even more power within the political/legal system in *Colorado Republican Finance Campaign Committee v. Federal Election Commission*.<sup>99</sup> By a seven-to-two vote, the Court held that Congress could not limit the amount of "independent expenditures" that any party could make "in connection with" a "general election campaign." According to the Court, this practice is permissible so long as it is not "coordinated." Consequently wealthy people and P.A.C.s can donate as much money as they want to a particular party, thereby gaining influence and "access," allegedly without corrupting the process or even appearing to corrupt politics. Apparently the going rate for "access" to both parties' leadership is to provide at least \$250,000.<sup>100</sup> Although particular candidates (with the notable exception of the Presidential nominee who heads the party) cannot redirect that party money to themselves, it is easy to imagine that somehow they could find out how much of their supporters' money was later siphoned back. Furthermore, if they want to get more money from the party in the future, they better not offend the party or its richest donors.

The whole notion of "independent expenditures" is largely a fiction. To take an infamous example, the "independent" group that sponsored the Willie Horton ad in the 1988 Presidential campaign had worked very closely with Lee Atwater, George Bush's most important political advisor, in designing and presenting that advertisement.<sup>101</sup> Most of the money donated to the two parties in 1996 somehow ended up in the Presidential campaign. Perhaps it is because the Presidential candidate has effective control of the flow of party funds. The corrosion runs in ever more troubling directions. The parties have received a great deal of money from abroad.

Writing for a plurality of three in the Colorado case, Justice Breyer claimed that the government had not proven that these independent campaign efforts created any "corruption." Justice Breyer narrowly defined "corruption" as something akin to bribery: "exchanges of large financial contributions for political favors."<sup>102</sup> Justice Breyer did not even discuss the possibility that there

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<sup>99</sup>116 S. Ct. 2309.

<sup>100</sup>Wealthy Democratic donors who give or raise \$250,000 get to have dinner with President Clinton. Julia Malone, *\$250,000 gets you into Clinton Dinner*, THE AUSTIN AMERICAN-STANDARD, June 11, 1997, at A1. Those who agree to raise \$250,000 for the Republicans can have lunch with the Republican leadership, pose for photos, and attend private receptions. Marc Lacey, *Outcry Doesn't Halt GOP's \$11.3 Million Fund-Raiser*, L.A. TIMES, May 14, 1997, at A4.

<sup>101</sup>Atwater said about Michael Dukakis, the Democratic Presidential nominee who lost to Bush in 1988: "[I] would strip the bark off the little bastard [and] make Willie Horton his running mate." *quoted in* John Brady, *I'm Still Lee Atwater*, WASHINGTON POST SUNDAY, Dec. 1, 1996, at W16.

<sup>102</sup>116 S. Ct. at 2315.

might be an "appearance of corruption" or the ample evidence that many people across the political spectrum have concluded that the American political process was becoming hopelessly corroded by money. Several leading politicians recently resigned, in part because they had to spend so much of their time fundraising. Justice Breyer also failed to mention that Congress has tightened the budget of the Federal Election Commission to prevent that agency from ferreting out wide-spread violations of campaign laws.<sup>103</sup> Criminal bribery is notoriously hard to prove. Nor is bribery a crime that ambitious United States Attorneys are likely to bring against powerful politicians unless the proof is overwhelming. Thus Justice Breyer buried his preference for private power in such lawyer's tools as "burdens of proof." He knew the government could not possibly prove the wide-spread existence of criminal bribery. Notice how easy it is to change the outcome by altering the "burden of proof." A Justice tolerant of campaign reform can just as easily state that the government's compelling state interest in maintaining the appearance and reality of uncorruptability requires the plaintiff to prove that there is no "appearance of impropriety in existing campaign finance activities."

The facts support a far more dismal interpretation of our existing political system than Justice Breyer's rosy image. Consider the following report from *Barron's*, published immediately after the 1996 elections:

Republican Alfonse D'Amato of New York, chairman of the Senate Banking Committee, will drop his Whitewater hearings in return for Clinton support for sweeping banking reforms. Legislation sought by D'Amato would not only knock down barriers between banks and securities firms, but would help D'Amato raise campaign funds from the financial-services industry in time for his 1998 re-election bid.<sup>104</sup>

The news from the elected branches is equally outrageous. Whenever they hear enough complaints from their focus groups and advisors, every Presidential candidate and many Congressional candidates will suddenly support campaign reform. But after the election is over, the system fails to produce any real "reform," except for "reforms" that amplify the power of politicians' wealthy patrons. In 1996, before the Court came to the wealthy's rescue by immunizing party donations from meaningful legislative oversight, Congress sought to permit individuals to donate up to three hundred thousand dollars to political parties.

It is easy to envision this Supreme Court soon permitting corporations to donate billions to political parties. According to the Court, corporations are "persons" deserving significant First Amendment rights. There is no "principled" way to distinguish individuals from corporations. The Court's political maneuvers in this field should be a central issue in every upcoming election; the Court should be very deferential to this part of the democratic

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<sup>103</sup>See, e.g., John F. Harris, *Clinton Backs FEC on Funding Request*, WASH. POST, April 18, 1997, at A13.

<sup>104</sup>Jim McTague, *Center Cut*, BARRON'S, Nov. 11, 1996, at 15.

process. In our modern society, what question can be more "political" than the proper relationship between money and politics? Furthermore, the Supreme Court's increasing surveillance of this major political issue allows Congress to avoid its constitutional responsibilities. Because of cases like *Buckley*, Congress can not do much, even if the electorate pressured them to truly reform the laws.

This line of cases that protect wealthy candidates and wealthy donors clashes with Justice Holmes' warning in *Lochner* that the Court should stay out of most political/economic disputes. The Court's doctrine constitutionally increases the power of the wealthy at the expense of the rest of us. These cases demonstrate how the Court has not only failed to resist the increasing power of the affluent, but also has actually strengthened their position. One very rarely hears a modern "conservative" lamenting this form of judicial activism, activism that cannot be explained in terms of text, history, or tradition. It is also a ludicrous fiction to believe that money does not tend toward a point of view. Money likes capitalism very much. More particularly, most rich people love more money. Money may talk, but it is not speech. Basic contract law should remind us that giving away money is a form of conduct called a "gift." Nor does the Internal Revenue Service look at gifts as unregulatable "speech."

What is the solution? Given the tawdry record of all three branches on this issue, the body politic should make campaign financing a non-negotiable concern. The people should put pressure on their leaders to change the system through laws and judicial appointments. They should stop obsessing for awhile about such important, divisive issues as affirmative action, homosexuality, abortion, gun control, and term limits—at least until they get their electoral system back. The major question at forthcoming Supreme Court nomination proceedings should be the nominee's views on campaign financing. If the public thought revising campaign spending were of primary importance, Justice Breyer would never have been confirmed. The optimal solution would be to pass a constitutional amendment, which could either give Congress complete discretion or provide some guidelines to limit that discretion.<sup>105</sup> Of course, such progressive actions would only be a prelude to continuing class conflict. The rich had special "access" to the government long before they could overtly buy it. In 1795, wealthy land speculators bribed the state legislature to sell them millions of acres for as little as one and a half cents per acre.<sup>106</sup> Chief Justice Marshall did not void the scheme in *Fletcher v. Peck*.<sup>107</sup> Marshall's decision was arguably "rightly" decided. But ever since, private power knew it could raid the public sector with relative impunity, gaining such valuables as land, subsidies, and exclusive rights to use public airways.

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<sup>105</sup>Ex-Senator Bill Bradley is presently leading a coalition proposing such an Amendment; see Albert R. Hunt, *Politics and People: The GOP's Special Interest Protection Campaign Bill*, WALL ST. J., July 18, 1996, at A13.

<sup>106</sup>C. PETER MAGRATH, YAZOO: THE CASE OF FLETCHER V. PECK 15 (1966).

<sup>107</sup>10 U.S. 87 (1810).



Perhaps the Court should be more active in limiting the wealthy and its two allies, the Republican and Democratic Parties. The Court could require more fair, open, and diverse political debate. For example, it could characterize the private sector's control of the media airways and cable as a "public function." In *Marsh v. State of Alabama*,<sup>108</sup> the Supreme Court held that a Jehovah's Witness had the constitutional right to deliver leaflets on private property in a privately owned town. Because of the scope of its dominion, that town had assumed a "public function," which required it to permit constitutionally protected speech on its private property. The modern communications industry's control of the airways resembles a company town. In addition, the public owns the airways; they should not have to rely completely on the market to determine what they need and want to hear. To quote Chief Justice Rehnquist, the private media should be forced to take "the bitter with the sweet."<sup>109</sup> The Court might even require the airways to simultaneously broadcast some political speeches, debates, and presentations from a wide range of political parties to enhance "representation reinforcement."<sup>110</sup> Admittedly, a lot of people would turn off their televisions. But that, too, could be a benefit.

Holmes' constitutional jurisprudence provides a compromise for those who find such judicial redirection inappropriate. Even if the Court should not aggressively interpret the Constitution to constrain the power of the rich, it should stay out most of the time. At a minimum, it should be very deferential to the elected branches' regulation of campaign financing. The Court should mainly insure access to the political process for the poor and minor political parties to prevent the two existing parties from becoming a perpetual duopoly. Aggressive First Amendment intervention is only warranted when the government has engaged in "particularized viewpoint discrimination." For example, the Court should overrule a campaign finance statute that prevented a single group, such as Ross Perot's Reform Party, from raising or spending any money.

Constitutional doctrine is a crude instrument, difficult to formulate and even more difficult to change. The Bork and Thomas nominations should remind all of us why we need to keep the Court somewhat above ordinary political disputes. The Constitution, the Supreme Court, and the "rule of law" are powerful adhesives that help keep our diverse, contentious society from disintegrating. The Constitution left resolution of most economic issues to the body politic, as should be the case. Indeed, the Constitution explicitly protects individual private property rights in several passages yet says nothing about the overall distribution of wealth. When it comes to regulating the economy, Congress and its administrative agencies have a much better capacity to respond to subtle distinctions within the economy, changes in circumstances, and shifts in public opinion.

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<sup>108</sup>326 U.S. 501 (1946).

<sup>109</sup>*Arnett v. Kennedy*, 416 U.S. 134, 153 (1974).

<sup>110</sup>*See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST* (1980).

*C. Anti-trust Law*

The entire judicial review equation changes when the Supreme Court interprets a statute regulating economic issues. The Court is no longer constrained by the rigidity of Constitutional doctrine. An elected legislative majority and President can effectively reverse any judicial doctrine by amending the relevant statute. Consequently, the Chomsky-inspired model of judicial review becomes much more compelling when applied to statutory interpretation.

Once again, the Supreme Court has fallen short of its constitutional obligations. Congress has already directly delegated to the Court tremendous power and authority to prevent corporate abuses. In 1890, Congress passed the Sherman Anti-Trust Act in response to public outrage over myriad corporate wrongdoings. Its sponsor, Senator Sherman, analogized consolidated corporate power to tyranny:

If the concentrated powers of this combination are entrusted to a single man, it is a kingly prerogative, inconsistent with our form of government, and should be subject to the strong resistance of the state and national authorities. . . . [This Act will] enforce, by civil process in the courts of the United States, the common law against monopolies. How is such a law to be construed? Liberally, with a view to promote its object.<sup>111</sup>

That statute not only mandates that the Court battle corporate malfeasances, but also provides the Court with sufficient authority, discretion, and remedies to make significant reforms. Its conclusory language leaves many normative, political choices to the Court: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

The supporters of the Anti-Trust Act were concerned about many forms of corporate abuse, not merely a single person's domination of a corporation or market. When the Supreme Court did not initially interpret the Act "liberally," Congress passed the Clayton Act in 1914 to require the Court to become more aggressive.

Under a broad reading of statutory text and supporting legislative history, one can argue that Congress passed the two Anti-Trust Acts to delegate sufficient power and responsibility to the federal courts to resist many (perhaps even all) aspects of corporate aggression. The Court's basic doctrine in this field—the "rule of reason"—is inherently flexible and policy-laden. We will always disagree about which actions are substantively unreasonable. Consequently, one can appropriately criticize the Court for failing to use this power to sufficiently battle the increasing consolidation of private power over the last one hundred years.<sup>112</sup> Of course, Congress also has not fulfilled its

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<sup>111</sup>21 CONG. REC. 2457 (1890).

<sup>112</sup>On the other hand, the Court would need far more direction and support from Congress to launch a thorough attack on existing corporate abuses.

constitutional obligations; it should to draft new legislation to reverse the Court's expanding deference to corporate power.

The Court should develop Anti-Trust doctrine that limits the concentrations of wealth and power in so few hands. At the least, it should revive and strengthen discarded doctrines that limited market share. The Court also could formulate a broader conception of "unreasonable" business practices. For example, it could start by blocking Westinghouse Electric's plan to gain greater control of the radio market.<sup>113</sup> If we are opposed to "kingly prerogatives," we should be particularly wary of any single person's or group's control of information.

## VII. CONCLUSION

The Supreme Court again interpreted the First Amendment to protect vast private power in *Turner Broadcasting System v. Federal Communications Commission*.<sup>114</sup> The F.C.C. had attempted to require Turner Broadcasting to include all broadcast television stations on its cable systems so those stations would not go out of business, thereby depriving non-paying customers of any television. To justify her opinion that cable television is a private forum largely immune from governmental regulation, Justice O'Connor stated: "But the First Amendment as we understand it today rests on the premise that it is government power, rather than private power, that is the main threat to free expression."

It is this basic premise—the government is always to be feared more than the private sector—which Chomsky's critique calls into question. Admittedly, the government remains the ultimate threat against free expression. It has much more coercive power than any private entity. But in the meantime, private power can so manipulate public opinion and personal livelihoods that it seizes effective control of government. In other words, perverse distribution of wealth and power provides an opportunity for perverse control of governmental power.

This is not a paranoid fantasy. In the 1990s, Italy elected as its leader the Neo-Fascist Berlusconi, who owned many of Italy's privately held television networks. During his campaign he had used that power to persuade many voters that he had their interests at heart. His television channels became propaganda machines. Perhaps such a thing can't happen here even though Ross Perot's first presidential campaign suggests otherwise.<sup>115</sup> But the

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<sup>113</sup>*Westinghouse, Infinity Deal Sets Stage For Other Radio Groups Seeking Mergers*, WALL ST. J., June 21, 1996, at A3.

<sup>114</sup>114 S. Ct. 2445 (1994).

<sup>115</sup>Chomsky believes that to a certain degree "it" has already happened here. For instance, the corporate media have consistently supported government policies abroad (which in turn usually benefit other corporate entities); see generally, HERMAN & CHOMSKY, *MANUFACTURING CONSENT*, *supra* note 5. More recently, powerful interests have received many billions of dollars via the Savings and Loan Bailout, the cellular

Supreme Court should not prevent Congress, the people's representative, from taking necessary measures to prevent such a disaster.

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phone service giveaway, the recent Telecommunications Act, and numerous other "low-interest" loans and direct subsidies.