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## Does Centralized Private Power Corrode the Rule of Law?

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# DOES CENTRALIZED PRIVATE POWER CORRODE THE RULE OF LAW?

JAMES G. WILSON\*

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## INTRODUCTION

Public reactions to major Supreme Court decisions are often unpredictable. Few people criticized the Court for protecting contraceptives in *Griswold v. Connecticut*,<sup>1</sup> but its subsequent decision in *Roe v. Wade*,<sup>2</sup> safeguarding a woman’s choice to have an abortion, remains a major, divisive political issue. Similarly, most Americans remained indifferent when the Court invalidated congressional efforts to limit private

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<sup>1</sup> 381 U.S. 485 (1965).

<sup>2</sup> 410 U.S. 113 (1973).

money's influence over political campaigns in *Buckley v. Valeo*<sup>3</sup> and several supplemental opinions. However, the Court's creation of a new First Amendment right, enabling corporations to spend unlimited amounts on favored politicians, in *Citizens United v. FEC*<sup>4</sup> triggered widespread outrage across the political spectrum.<sup>5</sup>

There have been many proposals either to overrule *Citizens United* or to limit its baleful effects. The accelerating cascade of polluting money continually reinforces this dissent. At a recent symposium sponsored by the *Cleveland State Law Review*, Professor Lawrence Lessig continued his campaign to implement a voucher system for political donations in which each citizen would receive a fixed amount of money to donate to any campaigner.<sup>6</sup> Lessig claimed the citizenry would increase their collective influence over Congress without necessitating an overruling of *Citizens United*. Professor Eugene Mazo recommended that Congress change its internal ethical rules to reduce campaign spending.<sup>7</sup> Professor Bruce Ledewitz proposed that Congress eliminate all caps on direct campaign donations to candidates, thereby increasing visibility of donors and diminishing the power of super PACs and other organizations that operate in the shadows.<sup>8</sup> Others have proposed a constitutional amendment.<sup>9</sup> Some believe that the Court should reverse itself. However, that hope leaves opponents of *Citizens United* in a stymied position: They must defeat the moneyed interests in several presidential and senatorial elections to gain an enduring majority on the Court. Most politicians from both parties line up at various watering holes favored by the plutocracy—the Hamptons, Hollywood, Houston, or Las Vegas—to obtain sufficient campaign donations to defeat or deter opponents. These wealthy donors winnow politicians in the “green primary” long before the average citizen votes.<sup>10</sup>

This Essay takes a different perspective on the relationship between money and politics to argue that the current political economy has become pervasively corroded. Eliminating the *Buckley* line of cases—including *Citizens United*—is a necessary but

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<sup>3</sup> 424 U.S. 1 (1976) (per curiam).

<sup>4</sup> 558 U.S. 310 (2010).

<sup>5</sup> In a 2012 poll, seventy-four percent of Republicans agreed with the statement that the decision would “lead to corruption. Only fifteen percent disagreed. *The Conservative Case for Overturning Citizens United*, DEMOCRACY IS FOR PEOPLE: A PUBLIC CITIZEN PROJECT, <http://www.citizen.org/documents/Conservative-Talking-Points.pdf> (last visited Feb. 12, 2016).

<sup>6</sup> See, e.g., LAWRENCE LESSIG, *REPUBLIC LOST: HOW MONEY CORRUPTS CONGRESS – AND A PLAN TO STOP IT* 273 (2011).

<sup>7</sup> Professor Mazo argued, as he does elsewhere, that these internal ethics rules would preclude court involvement under the “political question” doctrine. See Eugene D. Mazo, *The Disappearance of Corruption and the New Path Forward in Campaign Finance*, 9 DUKE J. CONST. L.A.W. & PUB. POL’Y 259, 293 (2014).

<sup>8</sup> See Bruce Ledewitz, *The Threat of Independent Political Spending to Democratic Life—And a Plan to Stop It*, 64 CLEV. ST. L. REV. 133 (2016).

<sup>9</sup> See, e.g., S.J. Res. 11, 113th Cong. (2013); H.J. Res. 10, 113th Cong. (2013).

<sup>10</sup> See Fredreka Schouten & Gregory Korte, *A Few Wealthy Donors Fuel Super PACs*, USA TODAY (last updated May 3, 2012, 12:40 AM), <http://usatoday30.usatoday.com/news/politics/story/2012-04-25/super-PAC-donations/54660672/1>.

insufficient step to enable the nation to achieve and sustain a humane republican society. Quite simply, private power has become too unified and too powerful. Large corporations routinely extract wealth from local communities by threatening to move operations elsewhere.<sup>11</sup> The corporate media's propaganda campaign begins with constitutionally protected advertising aimed at turning children into compulsive consumers and culminates with a faux debate between two political parties that have served the same economic special interests. Major corporations band together, funding the Chamber of Commerce's pro-business litigation strategy<sup>12</sup> and the American Legislative Exchange Council's ("ALEC") efforts to gut public power at the state level.<sup>13</sup> There is no quick campaign finance fix; for example, in other nations, such as England, private banks exert great power even though there is a strict limit on the amount candidates can spend.<sup>14</sup>

Any social reform, such as expanded health care, requires vast rent payments to private corporations. The country is unable to consider, much less resolve innumerable serious problems: environmental degradation, increased wealth inequality, resource depletion, continuing racial inequalities, degraded infrastructure, and so forth. In other words, America's challenges extend far beyond the Court's campaign finance doctrine. This class-based imbalance long predates *Buckley*, much less *Citizens United*. For well over a century, the United States has consistently lagged behind other developed countries in providing basic benefits to its citizenry.<sup>15</sup> At one time, the nation's exceptional economic growth ameliorated the problem, because for many, America was a land ripe with opportunity for the middle-class. But now, there is less upward mobility in this country than in most other economically advanced nations,<sup>16</sup> elsewhere, students pay little for tuition, while American youth are overwhelmed with debt.<sup>17</sup> The following nine charts verify the

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<sup>11</sup> See Thomas L. Evans, *The Taxation of Nonshareholder Contributions to Capital: An Economic Analysis*, 45 VAND. L. REV. 1457, 1468-69 (1992) (discussing how corporations can threaten to move their facilities from one locale to another).

<sup>12</sup> The "U.S." Chamber of Commerce is spreading its venomous version of deregulation throughout the world. See, e.g., Danny Hakim, *U.S. Chamber of Commerce Works Globally to Fight Antismoking Measures*, N.Y. TIMES (June 30, 2015), <http://www.nytimes.com/2015/07/01/business/international/us-chamber-works-globally-to-fight-antismoking-measures.html>.

<sup>13</sup> See Allison Boldt, *Rhetoric vs. Reality: ALEC's Disguise as a Nonprofit Despite its Extensive Lobbying*, 34 HAMLIN J. PUB. L. & POL'Y 35, 36 (2012) (discussing the operations and influence of ALEC).

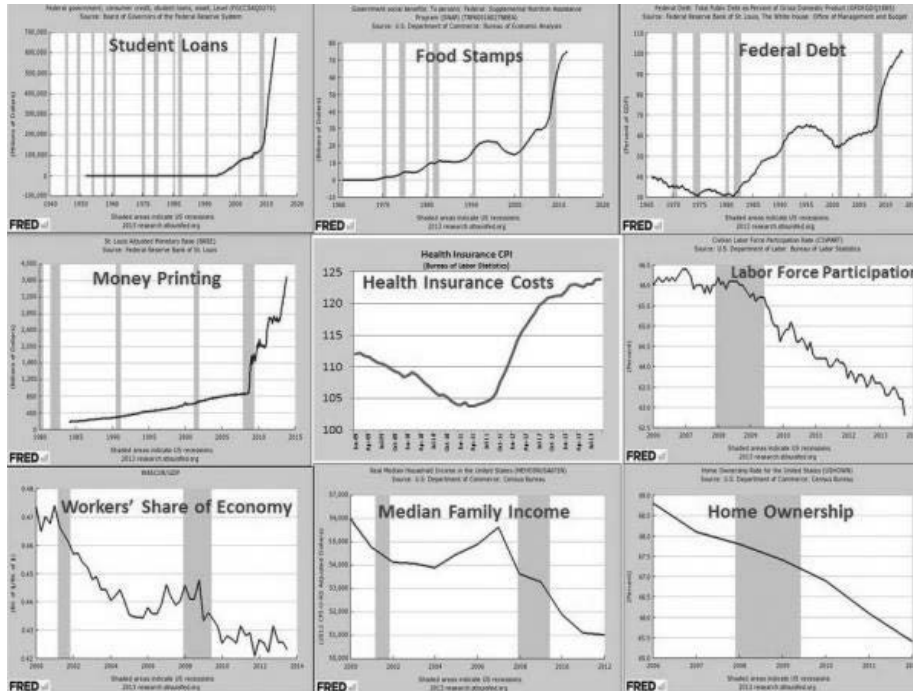
<sup>14</sup> See Paul Waldman, *How Our Campaign Finance System Compares to Other Countries*, AM. PROSPECT (Apr. 4, 2014), <http://prospect.org/article/how-our-campaign-finance-system-compares-other-countries>.

<sup>15</sup> See generally Irwin Garfinkel & Timothy Smeeding, *Wealth and Welfare States: What is the Real Story?*, INST. FOR RES. ON POVERTY (Oct. 2010), <http://www.irp.wisc.edu/publications/dps/pdfs/dp138710.pdf>.

<sup>16</sup> Elise Gould, *U.S. Lags Behind Peer Countries in Mobility*, ECON. POL'Y INST. (Oct. 10, 2012), <http://www.epi.org/publication/usa-lags-peer-countries-mobility>.

<sup>17</sup> Astra Taylor & Hannah Appel, *American Education Is Leaving Our Youth with a Debt Sentence*, THE NATION (Sept. 22, 2014), <http://www.thenation.com/article/american-education-leaving-our-youth-debt-sentence>.

accelerating decline of the middle class, a development obscured by bipartisan manipulation of such better-known measurements as inflation, unemployment, and GNP.<sup>18</sup>



It is doubtful that the judiciary can do enough by itself to address these fundamental issues, even if a new Supreme Court majority overruled *Citizens United*. Most courts have ignored corruption, because they cannot easily define the concept and/or do not want to monitor closely the more openly political branches.<sup>19</sup> Potentially potent legal doctrines, such as public trust or anti-lobbying provisions, have had little practical effect.<sup>20</sup> Even if judges were motivated to reinterpret or change the law they remain beholden to lax prosecutorial discretion to hear a case.<sup>21</sup> In other words, legal experts cannot successfully reform the underlying structural, economic, and political imbalances by manufacturing clever doctrine within the

<sup>18</sup> Tyler Durden, *Obama's Recovery in Just 9 Charts*, ZERO HEDGE (Sept. 16, 2015), <http://www.zerohedge.com/news/2015-09-16/obamas-recovery-just-9-charts>.

<sup>19</sup> See ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED 195-204 (2014). Professor Teachout described problems American courts encounter when regulating the often-disturbing relationships between public and private power. See *id.* at 195.

<sup>20</sup> See *id.* at 144-169.

<sup>21</sup> See, e.g., Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. OF BOOKS (Jan. 9, 2014), <http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions>.

judicial system.<sup>22</sup> The citizenry must reconsider the overall direction of the country, putting pressure on all three branches to revive an imperiled middle class republic.

To verify this Essay's accusation of systemic corrosion, we shall examine the question raised in this Essay's title: Does centralized private power corrode the rule of law? The basic argument, which can be traced back to ancient Greece, is that profound wealth inequality invariably creates an unstable, dual legal system.<sup>23</sup> The rich become largely immune from criminal sanctions, civil regulations, and taxation; the middle class carries the tax burden while the criminal justice system hammers the poor.<sup>24</sup> This perpetuates the fear of the Framers that America would decline if it ever adopted a class system similar to the European class structure, which was far more drastic.<sup>25</sup>

The infamous revolving door between the corridors of public and private power guarantees regulatory capture; high-level bureaucrats, members of Congress, and military leaders flock to the private sector, where they are fulsomely rewarded for past and future services (an inspiration for leaders still traveling in the public sector). The most dramatic recent example was former Federal Reserve Board Chairman Ben Bernanke's transition to an "advisor" to the giant hedge fund Citadel.<sup>26</sup> Bernanke claimed there was no "appearance of corruption," because the Federal Reserve Bank did not regulate Citadel and he would not be lobbying.<sup>27</sup> However, the Federal Reserve has done far more than regulate parts of the economy; it doled out trillions in direct and indirect subsidies<sup>28</sup> to all major players, including Citadel, to prop up stock prices.<sup>29</sup> Furthermore the lobbying rules are a farce, inapplicable to the most influential private players in Washington and New York.<sup>30</sup> These legal double standards are signifiers of social corruption and moral decline.

<sup>22</sup> See generally Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 397-98 (2009) (discussing how the Court is currently ahistorical and adrift when it comes to corruption).

<sup>23</sup> "Wealth is skilled at entering all places, sacred and profane, where a poor man, even if he entered, would not obtain his wish." Sophocles, *Aleadae*, in EARLY GREEK POLITICAL THOUGHT FROM HOMER TO THE SOPHISTS 53 (Michael Gagarin & Paul Woodruff, eds., trans., 1995) (fragment).

<sup>24</sup> See, e.g., MATT TAIBBI, *THE DIVIDE: AMERICAN INJUSTICE IN THE AGE OF THE WEALTH GAP* 399-400 (2014).

<sup>25</sup> See Jeffrey Bergner, *Europe is No Model: The Genius of American Politics*, WKLY. STANDARD (May 17, 2010), <http://www.weeklystandard.com/europe-is-no-model/article/439457>.

<sup>26</sup> Andrew Ross Sorkin & Alexandra Stevenson, *Ben Bernanke Will Work With Citadel, a Hedge Fund, as an Adviser*, N.Y. TIMES (Apr. 16, 2015), [http://www.nytimes.com/2015/04/16/business/ben-bernanke-will-work-with-citadel-a-hedge-fund-as-an-adviser.html?\\_r=0\\_](http://www.nytimes.com/2015/04/16/business/ben-bernanke-will-work-with-citadel-a-hedge-fund-as-an-adviser.html?_r=0_)

<sup>27</sup> *Id.*

<sup>28</sup> Press Release, Senator Bernie Sanders, *The Fed Audit* (July 21, 2011), <http://www.sanders.senate.gov/newsroom/press-releases/the-fed-audit>.

<sup>29</sup> Josh Zumbrun, *How Citadel and the Fed Crossed Paths Before the Hedge Fund Hired Ben Bernanke*, WALL ST. J. (Apr. 16, 2015), <http://blogs.wsj.com/economics/2015/04/16/how-citadel-and-the-fed-crossed-paths-before-the-hedge-fund-hired-ben-bernanke>.

<sup>30</sup> TEACHOUT, *supra* note 19, at 169-70.

This Essay proposes a useful set of definitions of crucial concepts containing multiple meanings and then applies those concepts to a few examples. The next Part of this Essay explores different conceptions of “private power.” Part II evaluates different theories of the “rule of law,” analyzing their strengths and inadequacies. Part III develops the terms “corrosion” and “corruption,” explaining how and why the Court erred in *Citizens United* by creating an untraditional definition of “corruption” that reduced this fundamental threat to republican norms and institutions to the rarely enforced crime of bribery. The Essay employs the term “corrosion” instead of “corruption” to escape the permutations and emanations of the Court’s constricted “corruption” doctrine. A broader conception of “corrosion” also reminds us how and why our problems run much deeper than competing interpretations of the First Amendment. Finally, Part IV provides specific examples of legal and market corrosion, caused by centralized private power’s evasion of the rule of law.<sup>31</sup>

### I. DIFFERENT CONCEPTIONS OF “PRIVATE POWER”

Crucial legal and political concepts, such as equality, property, power, or rule of law, have numerous meanings. Virtually all are enlightening in different situations. First, we need to find the particular definitions that best clarify the social problem being explored. Next, we should avoid the cheap rhetorical move of seizing upon syllogistic definitions, masquerading as sociological arguments, which eliminate the underlying cultural conflicts or evade powerful counterarguments. Highly abstract arguments create the impression that these problems are an exercise in formal logic instead of a moral inquiry.

If one agrees with Aristotle that middle-class republics are best suited to preserve a community and provide the opportunity for most individuals to pursue happiness,<sup>32</sup> some modes of private economic power are desirable.<sup>33</sup> People should be able to accumulate significant but not overwhelming wealth. They should be encouraged to own a home, obtain limited personal goods, fund their retirement, and create small businesses that can expand.

#### A. Creating Centralized Power

It is not easy to balance private and public power. The corporate form has proved useful in allowing peoples and societies to grow and accumulate wealth. State-granted immunities enable numerous private parties to combine capital to pursue riskier ventures. But it does not follow that corporations are entitled to extensive constitutional rights. Investors and managers should take the “bitter with the sweet” after benefitting from the state-created subsidy of personal immunity from most

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<sup>31</sup> This short Essay cannot be definitive. Often, the first step is to ask an interesting question requiring an empirical answer. The best way to refute this Essay’s charge of pervasive legal corrosion is to demonstrate that the public and private ruling classes are improving the nation and the planet for every person and most other beings, not primarily for themselves.

<sup>32</sup> Defined as enjoying “a life of excellence without impediment.” 2 ARISTOTLE, *THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION 2056* (Jonathan Barnes ed., Benjamin Jowett trans., 1984).

<sup>33</sup> *Id.* at 2057.

litigation. States should be able to condition corporate charters, precluding most corporations from directly participating in the public electoral process.<sup>34</sup>

When corporations become extremely large, they frequently control the particular market that previously limited their power through the dynamics of competition. Once they have enough wealth and market-share, they can pressure politicians to create a compliant regulatory system, which has enough rules to deter small competitors but not enough constraints to preclude massive profits and bonuses.<sup>35</sup> Economic power is also political power. While Karl Marx tragically misled generations by proposing armed revolutions, led by a small elite to create a “communist” society with no private power, he accurately described capitalism’s inherent tendency to amalgamate, often through technological innovation<sup>36</sup> and the “credit system.”<sup>37</sup> In particular, he described the excesses and dangers that arise when accumulated and consolidated private power mutate into centralized private power.<sup>38</sup> There is no bright line between consolidated and centralized private power. As a crude guideline, we might consider all companies within the Standard and Poor’s Five Hundred (along with similarly sized, privately held corporations such as Cargill and Koch Industries) to be examples of “centralized power” and the remaining companies on the major exchanges as illustrations of “concentrated private power.”<sup>39</sup>

### *B. Reducing Centralized Power*

The first step is to reduce centralized private power where it seems most unnecessary and where it has already threatened the long-term health and viability of the nation. Thus, we should first consider the major Wall Street banks. As soon as possible, private bankers should be excluded from the Federal Reserve System in either ownership or decision-making. Indeed, the Supreme Court ought to hold that commingling essential governmental functions such as, control of money supply and secret reallocation of great wealth, with centralized private power is an unconstitutional delegation of core public legislative and executive authority. The second step is to dissolve these vast banks. If they are “too big to fail” and “too big to prosecute,” then they are too big to exist. The third step is to institute robust antitrust law, sympathetic labor law (both on its face and as applied), a variety of

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<sup>34</sup> That is not to say, however, that corporations should have no constitutional rights. For example, private media companies, which should not be part of larger conglomerates and should have limited market share, need broad First Amendment protections under the Free Speech and Freedom of Press Clauses. In addition, private corporations accumulate individual, private property interests. Consequently, the government ought not to be able to confiscate corporate property without just compensation under the Fifth Amendment.

<sup>35</sup> See LESSIG, *supra* note 6, at 96.

<sup>36</sup> Technology also weakens the working class. “The machine . . . replaces the worker . . . .” 1 KARL MARX, CAPITAL 497 (Ben Fowkes trans., Pelican Books 1990) (1867).

<sup>37</sup> *Id.* at 777.

<sup>38</sup> See *id.*

<sup>39</sup> It is important to note that “centralized power” extends beyond legal and cultural definitions of “monopoly.” See Lawrence W. Reed & Michael D. LaFaive, *Regulation and Monopolies*, MACKINAC CENTER (Nov. 1, 1997), <http://www.mackinac.org/article.aspx?ID=683>.



increased taxes on high income, wealth, and excessive consumption, and major changes in campaign finance law would gradually reduce the plutocracy's disproportionate power.<sup>40</sup> For example, Congress could create a "Tobin tax" on all spot transactions, thereby raising revenues and undermining predatory high frequency trading.<sup>41</sup>

Aristotle warned that the rich, not the poor, typically constitute the greatest threat to republican stability.<sup>42</sup> Some opulent people are more interested in increasing their wealth and power than in democracy, the fate of fellow citizens, or the planet. They dedicate their lives to accumulating wealth, power, and glory or obtaining inherited fortunes that tend to make them spoiled, flaccid, and self-absorbed. It is not enough to redistribute some wealth to pacify the poor and declining middle class; we must reduce the capacity of a few unaccountable people to oversee so much of our society.

This problem has increased as the American economy has lost relative economic power, now deeply enmeshed in the "global economy."<sup>43</sup> Wealthy individuals from all over the world own and run gargantuan private institutions, and some international capitalists seem to have little or no concern about the future of the poor or middle class in America or anywhere else.

In addition, conditioning capital flow would probably weaken centralized, global private power as much as eliminating *Citizens United*. Adam Smith's belief that local workers will usually benefit from deregulation and free trade since those policies tend to "increase the general industry of the society"<sup>44</sup> becomes more uncertain when capital, protected by state-subsidized military power, travels across the globe to find the most profitable locations in terms of low wages, weak labor laws, and minimal regulatory constraints.<sup>45</sup> A capitalist no longer has incentives to "employ his capital as near home as he can."<sup>46</sup> Thus, another of Smith's economic findings becomes more relevant: Capital creates employment wherever it resides.<sup>47</sup> In a global economy, free trade may promote the overall wealth of the species, but not the wealth of many individual nations or many people within nations. Smith comes close to conceding that point: "In manufactures, a very small advantage will enable foreigners to undersell our own workmen, even in the home-market."<sup>48</sup> Thus,

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<sup>40</sup> For an earlier exploration of the constitutional implications of private power, see James G. Wilson, *Noam Chomsky and Judicial Review*, 44 CLEV. ST. L. REV. 439 (1996).

<sup>41</sup> The "Tobin tax" was first proposed by Nobel Laureate James Tobin in 1972. See James Tobin, *A Proposal for International Monetary Reform*, 4 E. ECON. J. 153, 155 (1978). Tobin's theory would, in essence, impose a small tax (between 0.1% and 1%) to each round-trip currency transaction with the hope that the tax would curtail currency speculation and stabilize exchange rates. See *id.*

<sup>42</sup> See ARISTOTLE, *supra* note 32, at 2067.

<sup>43</sup> Paul B. Farrell, *U.S. Losing Economic War and Asia Loves It*, MARKET WATCH.COM (June 3, 2013), <http://www.marketwatch.com/story/america-the-quitter-getting-whipped-by-china-2013-06-01>.

<sup>44</sup> ADAM SMITH, *THE WEALTH OF NATIONS* 615 (Edwin Cannan ed., 5th ed., 2003) (1776).

<sup>45</sup> See *id.* at 423-46.

<sup>46</sup> See *id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 481.

Smith found more obvious benefits in permitting the importation of cattle or “rude produce of the soil” (assuming they can be raised more cheaply abroad) than manufactured goods because some “home manufactures would probably suffer, and some of them, perhaps, go to ruin altogether, and a consider part of the stock and industry at present employed in them would be forced to find some other employment.”<sup>49</sup> Therefore, conditioning capital flow would likely weaken centralized, global private power. Of course, so long as *Citizens United* exists, it will be hard to require corporations to keep some of their manufacturing in the United States because the wealthy continue to commit hundreds of millions to congressional and presidential elections.

Obviously, there would be massive resistance to significantly changing the current political economy. The rich could crash markets, taking their skills and wealth to other nations. Indeed, the value of many companies would decrease. If we were not facing so many pressing environmental and social problems, Burkean gradualism would be the best way to proceed. Thus, huge burdens remain on radical critics to demonstrate that the existing system has become so corroded that it has become dangerously unsustainable and to develop alternatives that protect legitimate private interests that create incentives, security, and a counterweight to excessive public power.

## II. DIFFERENT CONCEPTIONS OF THE “RULE OF LAW”

Without attempting to be comprehensive, this section considers several versions of the “rule of law.” Each conception provides some degree of protection to some or all of the populace and collapses in different ways. As the “rule of law” definitions become more substantive, they become increasingly controversial.

Some have criticized “the rule of law” as a conservative propaganda ploy that helps prop up an illegitimate ideological apparatus that supports oppressive “liberal” regimes.<sup>50</sup> Others see the phrase as a vacuous, outdated slogan that at best fails to describe current reality and at worst impedes executive discretion.<sup>51</sup> However, the phrase confirms humanity’s desperate need for law to protect basic rights, even if human judges inevitably apply law to new facts, interpret the law, and create new law, thereby legislating as well as adjudicating.<sup>52</sup> For example, five or more Supreme Court Justices (men and women, not laws) may eventually decide that the President has unlimited power to kill suspected “terrorists” anywhere, but we can hope the Court would never permit the President to slaughter political rivals in Congress or commit sexual assaults with total impunity. Perhaps the best we can hope for is “the rule of law and men.”

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<sup>49</sup> *Id.*

<sup>50</sup> See BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 45, 73 (2004).

<sup>51</sup> There are amoral radicals who seek to substitute the “rule of politics” for the “rule of law.” See ERIC A. POSNER & ADAM VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 12-15 (2010).

<sup>52</sup> See TAMANAHA, *supra* note 50, at 102.

*A. Traditional Positivist Conceptions of the Rule of Law*

We need positivism to understand any legal system. However, positivism cannot provide sufficient moral justification by itself, because some legal systems help create and perpetuate injustice by having laws that are imposing systemic injustice, applying current laws unfairly, creating flawed procedural systems, or combining these illegitimate tactics. More profoundly, we need a deeply substantive conception of the “rule of law” that protects individuals, the Republic, and the environment.

The crudest positivist description of the “rule of law” focuses on texts of legal rules and doctrines. There is limited “rule of law” in a legal regime that facially authorizes slavery and prohibits assault while hypocritically permitting slave owners to whip, brand, and rape slaves.<sup>53</sup> Women and freed African-Americans were generally denied many rights including the right to contract, vote, testify at trials, or serve on juries.<sup>54</sup> Slavers’ property rights were enhanced by this grotesque system, because they had access to legal force while their prey did not.<sup>55</sup> In other words, this narrow version of positivism enabled some people to obtain whatever benefits the legal system provided at the expense of others. Such regimes can be preferable (at least for favored citizens) to living in a violently anarchistic “state of nature” or under the whims of a tyrant with a gang of minions.

A broader positivist description of the “rule of law” considers not just the rule’s terminology, but also the legal system’s application of those rules: Every person is entitled to whatever protection the law actually provides them.<sup>56</sup> The American system allocates vast discretionary powers to judges, juries, prosecutors, and administrative officials. These authorities do not equally enforce all legal texts and doctrines. To use constitutional jargon, the laws may be appropriate “on their face,” but they often are improperly applied. For example, Southern voter literacy tests (which did not mention race) were designed to exclude black voters and immigrant workers even though they facially appeared to serve the somewhat more legitimate purpose of screening out allegedly unqualified voters.<sup>57</sup> The tests as applied were discriminatory because voting officials asked more difficult questions to African-Americans, such as naming all of the state’s county judges, stating the date Oklahoma became a state, or determining how many bubbles are in a bar of soap.<sup>58</sup>

Thus, a legal system can be horrifically flawed on its face (state-sanctioned slavery), facially and as applied (Southern *de jure* and *de facto* segregation after the Civil War), or as applied (racial disparities that permeate America’s existing

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<sup>53</sup> For horrific examples, see THE ANTI-SLAVERY EXAMINER & THE AMERICAN ANTI-SLAVERY SOCIETY, *THE SLAVE BOOK—THE DARK SIDE OF AMERICAN SLAVERY: TORTURE AS A TOOL OF CONTROL AND AS A FORM OF ENTERTAINMENT* (2015).

<sup>54</sup> Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 AKRON L. REV. 671, 672 (2003).

<sup>55</sup> See generally A. Leon Higginbotham, Jr. & Anne F. Jacobs, *The “Law Only as an Enemy”: The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia*, 70 N.C. L. REV. 969, 1045 (1992) (discussing how the assault of a slave was not recognized as a criminal offense in the eighteenth century).

<sup>56</sup> See TAMANAHA, *supra* note 50, at 99.

<sup>57</sup> See *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 53-55 (1959).

<sup>58</sup> ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE* 691 (2002).

criminal justice system—from the arresting process to sentencing and pardons).<sup>59</sup> These positivist regimes can be so horrific that many of us consider them to be unworthy of the appellation: “rule of law.” Thus, it is more accurate to say that there have always been varying, inadequate degrees of “rule of law” in America, than to argue that these dreadful statutes and bad faith implementations totally eliminated the “rule of law.”<sup>60</sup>

The problem with these positivist examples is that rulers have unfettered discretion to do whatever they want. They can pass odious laws, fail to enforce laws they do not like, and/or apply existing laws in bad faith. Any legal theorist who defines “rule of law” this narrowly has used the phrase as a purely descriptive device. Of course, there is nothing wrong with separating “is” from “ought.” We must know how existing law functions before proposing changes.

Like the Declaration of Independence’s inspiring phrase, “all men are created equal,”<sup>61</sup> the term “rule of law” can have normative as well as analytical dimensions, providing alternatives that show more precisely why current positivist conceptions of “rule of law” are grossly inadequate. Professor Lon Fuller argued that any legal system must have several procedural characteristics.<sup>62</sup> For example, if rulers do not promulgate laws, people have no notice of rights and responsibilities.<sup>63</sup> Similarly, retroactive laws punish those who made a good faith effort to comply with known, existing law.<sup>64</sup> Inspired by clauses such as prohibition on “ex post facto” laws and “impairment of contracts,” the Supreme Court has been appropriately wary of retroactive legislation, which reeks of confiscation and retaliation.<sup>65</sup>

The positivist conception of the “rule of law” helps describe the current alliance between American political branches and corporate capitalism. For example, congressional and state tax laws are facially flawed because they disproportionately favor the rich. Billionaire hedge fund managers pay a lower tax-rate than their secretaries.<sup>66</sup> Further, the enforcement of laws, or lack thereof, by the executive branches at the state and federal level demonstrate how our laws are flawed both facially and in their application. For instance, the executive branches at the state and

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<sup>59</sup> See TAMANAHA, *supra* note 50, at 93, 120.

<sup>60</sup> See *id.* at 114.

<sup>61</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>62</sup> LON FULLER, *THE MORALITY OF LAW* 24 (2d ed. 1969).

<sup>63</sup> See Tara Smith, *Neutrality Isn’t Neutral: On the Value-Neutrality of the Rule of Law*, 4 WASH. U. JUR. REV. 49, 56 (2011).

<sup>64</sup> David Luban, *The Rule of Law and Human Dignity: Reexamining Fuller’s Canons*, 2 HAGUE J. ON RULE L. 29, 29 (2010).

<sup>65</sup> See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) (“The Legislature’s unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsiveness to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.”).

<sup>66</sup> See Meredith R. Conway, *Money, It’s a Crime. Share it Fairly, But Don’t Take a Slice of My Pie!: The Legislative Case for the Progressive Income Tax*, 39 J. LEGIS. 119, 170-71 (2013) (discussing how, with all the tax loopholes, the tax burden imposed on high-income taxpayers in reality is much less).

federal level do not prosecute pervasive white-collar crime with sufficient vigor, while the Supreme Court has simultaneously created innumerable technical obstacles to proving investment fraud.<sup>67</sup> This results in a system in which a compulsive or desperate, petty thief can be imprisoned for life under the “three strikes” rule, but a wealthy Wall Street banker has little to fear. In addition, the laws and the judicial doctrines are facially flawed by making investment fraud difficult to prove; this facial flaw is then exacerbated by the flaw in the application of the laws, mainly that federal and state executive branches do not prosecute white collar criminals with the same vigor as a common repeat offender. Indeed, the current system, under this positivist theory on the “rule of law,” is a sad variant of the famous quip that America established “socialism for the rich, capitalism for the poor.”<sup>68</sup> Perhaps more relevantly, this nation’s legal regime provides “subsidized anarchy for the rich, the rule of law against the poor.”

*B. A Blended Positivists Theory on the Rule of Law*

1. As-applied

The next conception of “the rule of law” blends positivism, which does not include a moral assessment of existing rules, with some moral content; state actors cannot invidiously discriminate when enforcing extant law. This narrow, substantive version of “rule of law” does not facially invalidate any statutes.<sup>69</sup> Instead, there must be substantive requirements to distinguish between illegal “invidious discrimination” and legally “permissible discrimination.”<sup>70</sup> Desirable external norms can be found in the Magna Carta, the Declaration of Independence, the Constitution, and various theories of Natural Law and Natural Rights. This blended approach follows the broad contours of the Supreme Court’s interpretation of the Equal Protection Clause, which requires equal enforcement of existing laws. A court usually will not invalidate facially neutral laws but can proscribe application of valid rules.<sup>71</sup>

Unequal enforcement of existing laws can be profoundly demoralizing and divisive. Thus, investors should be protected from fraud as much as consumers, purchasers of services, and homeowners. Many years ago, the great legal scholar, Henry Maine, explained that one of the primary functions of any legal system was to prevent the rich from using fraud to exploit weaker members of society.<sup>72</sup> Subsequent events have consistently confirmed his concern.

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<sup>67</sup> *E.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2416 (2014).

<sup>68</sup> *The Daily Show: Interview with Joe Biden, Part 2* (Comedy Central television broadcast Nov. 17, 2009), <http://www.cc.com/video-clips/5dodmo/the-daily-show-with-jon-stewart-joe-biden-pt--2>.

<sup>69</sup> DAVID DYZENHAUS, *RE-CRAFTING THE RULE OF LAW: THE LIMITS OF LEGAL ORDER* 155 (1999).

<sup>70</sup> TINSLEY E. YARBROUGH, *THE REHNQUIST COURT AND THE CONSTITUTION* 258 (2000).

<sup>71</sup> *See United States v. Salerno*, 481 U.S. 739, 745 (1987) (“A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.”).

<sup>72</sup> HENRY S. MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* 15 (10th ed. 2008) (1861).

## 2. Formal Equality

In order to make the “rule of law” more effective the Court has the power to invalidate statutory texts. It usually employs some substantive variant of “formal equality,” inferring egalitarian principles from constitutional texts. In *McCulloch v. Maryland*, the Court struck down a Maryland law that taxed the operations of a national bank.<sup>73</sup> The Maryland voters “targeted” an unpopular institution, gaining more in tax revenues than they paid in federal taxes to support the bank.<sup>74</sup> Chief Justice Marshall stated that Maryland could have assessed a general property tax that would have applied to the bank, but the legislators would never Levy such a tax because that would injure their voters much more than the national bank.<sup>75</sup> Current Justices continue to use Marshall’s methodology: laws discriminating either facially or in application on the basis of race, gender, religion, ethnicity, speech, and political viewpoint are presumptively invalid.<sup>76</sup>

The precise dimensions of formal equality remains highly contested. Current members of the Court disagree about extending all constitutional rights (including marriage) to homosexuals<sup>77</sup> or providing higher education admissions preferences to under-represented minorities.<sup>78</sup> *Citizens United* is another example: Conservatives argue that the First Amendment prohibits discrimination based upon status, i.e., private corporations should have the same speech rights as citizens or media outlets.<sup>79</sup> Of course, constitutional doctrine need not be pushed to its logical extreme. Few people consistently push formal equality to its limits: Justices across the political spectrum support speech constraints on military officials, government employees, private actors, and prisoners.<sup>80</sup>

Many legal theorists end their “rule of law” analysis with a version of formal equality that invalidates selected laws and actions “on their face” and “as applied.”<sup>81</sup> The conservatives on the Supreme Court usually limit judicial enforcement of “Equal Protection” or the Dormant Commerce Clause to statutes that facially violate their particular conception of formal equality.<sup>82</sup> But healthy republics also require a liberty-based conception of the “rule of law,” reinforced by the tyranny-preventing doctrine (a mixture of structure, process, and substance) called “separation of

<sup>73</sup> *McCulloch v. Maryland*, 17 U.S. 316, 399 (1819).

<sup>74</sup> *Id.* at 327.

<sup>75</sup> *Id.* at 361.

<sup>76</sup> *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

<sup>77</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting).

<sup>78</sup> *See Gratz v. Bollinger*, 539 U.S. 244, 251 (2003).

<sup>79</sup> *Citizens United v. FEC*, 558 U.S. 310, 342 (2010).

<sup>80</sup> *See* Josh Davis & Josh Rosenberg, *Government as Patron or Regulator in the Student Speech Cases*, 83 ST. JOHN’S L. REV. 1047, 1053 (2012).

<sup>81</sup> *See, e.g.*, David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41, 53-54 (2006).

<sup>82</sup> *See, e.g.*, *United States v. Morrison*, 529 U.S. 598 (2000) (holding, 5-4, that Commerce Clause did not provide Congress the authority to enact civil remedy provision of the Violence Against Women Act).

powers.” Personal mobility remains our most important personal freedom: prisoners have few rights and less happiness. The Court should closely monitor the executive to ensure he or she does not abuse his or her powers, particularly by expanding prerogatives when conducting and even fomenting innumerable wars on drugs, terrorists, nations, and poor people (usually of color). “Necessity,” now characterized as “national security” by the Court, always threatens to undermine legality, legitimating allocation of extensive discretionary power to a few powerful state actors.<sup>83</sup>

In particular, the Supreme Court created a disturbing precedent in *Hamdi v. Rumsfeld* by refusing to guarantee American citizens, charged with terrorism, their full panoply of textually guaranteed constitutional rights.<sup>84</sup> Military tribunals, overseen by the President as Commander-in-Chief, are no substitute for a trial by one’s peers, a substantive and procedural conception of the “rule of law” that can be traced back to the Magna Carta.<sup>85</sup> We should never forget that centralized state power remains a greater threat to republican freedoms and stability than centralized private power. This approach merges Fuller’s “proceduralism” with individual liberty and autonomy.

### C. A Natural Law Theory on the Rule of Law

The “rule of law” can also include much broader substantive conceptions of “justice,” such as a commitment to environmental viability, individual happiness, and creating a sense of community that is not riven by wealth disparity. While Justices no longer make “natural law” arguments, natural law-like reasoning permeates their analysis.<sup>86</sup> “Natural” or “higher” law is open-ended (assuming the legal system has remained faithful to the prior rule of law requirements).

Aristotle believed the appropriate distribution of wealth and power constituted a republic’s most important, difficult constitutional question.<sup>87</sup> Indeed, he distinguished illegitimate democracies, in which the majority seized all the wealth, from desirable “constitutional democracies,” in which the majority ruled but did not exploit those who obtained additional capital through their talents, good fortune, or birth.<sup>88</sup> His three “perverse” forms of government—democracy, oligarchy, and tyranny—could never be desirable because the leaders pursued their class interests

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<sup>83</sup> See *Boumediene v. Bush*, 553 U.S. 723, 797 (2008) (“Our opinion does not undermine the Executive’s powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch. Within the Constitution’s separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person.”).

<sup>84</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004). It is worth remembering that Justice Scalia, joined by Justice Stevens, wrote a powerful dissent attempting to preserve the Constitution’s many procedural protections provided to citizens. *Id.* at 554 (Scalia, J., dissenting).

<sup>85</sup> *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968).

<sup>86</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

<sup>87</sup> ARISTOTLE, *THE POLITICS OF ARISTOTLE* 65 (Peter L. Phillips trans., 1997).

<sup>88</sup> *Id.* at 84.

instead of the “common good.”<sup>89</sup> He explained that the rich were usually the greatest threat to the republic; the poor only revolt when they are deeply oppressed.

Aristotle also argued that laws should be predictable and non-arbitrary, finding that the rule of law is superior to the rule of man. Magistrates should be nothing more than “guardians and ministers of the law”; for if the law rules, no individual rules. He wrote, anyone “who bids the law to rule seems to bid god and intellect alone to rule, but anyone who bids a human being to rule adds on also the wild beast.”<sup>90</sup> He advocated for separation of powers, asserting that lawmakers should be separate from the judiciary

Legal corrosion in America, exacerbated by wealth inequality and imperialism, reinforces the discretionary rule of men in the public and private domains. Because there are few external constraints, they rule by pleasure instead of constrained judgment.

Most importantly, our species faces extraordinary perils. Not only do we continually risk nuclear war, but we also must address the damage billions of humans are doing to their surroundings. From the point of view of most other species, humans are the “few” oligarchs and the other species are the vulnerable “many.” Robust visions of the “rule of law” and the republics they promotes requires the world’s many cultures to change legal and social norms to foster courageous kindness that limits excessive greed.

### III. “CORROSION” AND “CORRUPTION”

Whenever the Supreme Court applies “heightened scrutiny” it follows a few Aristotelian techniques, formulated in *McCulloch v. Maryland*,<sup>91</sup> that empower it to do pretty much whatever it desires.<sup>92</sup> When the Court applies these techniques, it can strike down ends it does not like, means it finds repellant, or means it believes are poorly designed to serve legitimate ends.<sup>93</sup>

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<sup>89</sup> *Id.* at 61.

<sup>90</sup> *Id.* at 111.

<sup>91</sup> Incidentally, *McCulloch*’s pragmatic techniques reveal another oddity in the rhetoric of contemporary “conservative” jurisprudence. Some theorists do not want judges to ascertain the “purpose” of laws, because that technique generates a consequentialist, “policy”-based analysis commingling “law” and “politics.” See Julie Dickson, *Interpretation and Coherence in Legal Reasoning*, STAN. ENCYCLOPEDIA OF PHIL. <http://plato.stanford.edu/archives/sum2014/entries/legal-reas-interpret>. (revised Feb. 10, 2010), Yet every Supreme Court Justice interprets constitutional texts to preclude elected officials from pursuing certain ends while permitting them to pursue other goals. See generally John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1 (2014). In other words, every constitutional text has a cluster of functions, empowering governmental officials and/or constraining them from pursuing certain means and/or ends. Justices determine and implement the “purposes” of constitutional texts by second-guessing legislative “purposes.” Every “fundamental right” creates costs and benefits, and every “compelling state interest” fulfills governmental functions. I admittedly do not have as pure or precise a vision of legal reasoning as many contemporary conservatives, but this all sounds extraordinarily purposeful and “political.”

<sup>92</sup> See *McCulloch v. Maryland*, 17 U.S. 316 (1819).

<sup>93</sup> See, e.g., *id.* at 436-37.



### A. Supreme Court Jurisprudence

#### 1. *Buckley*

The Supreme Court first narrowed congressional power to regulate campaign finance in *Buckley v. Valeo*. The Court stated that that Congress could only regulate campaign finance in pursuit of two purposes: (1) the prevention of corruption and/or (2) the prevention of the appearance of corruption.<sup>94</sup> This winnowing of ends enabled the Court to pick and choose among congressional means, upholding direct donation limits but voiding limits to personal spending. The Court concluded that using its own wealth cannot corrupt a candidate,<sup>95</sup> but a candidate can be inappropriately influenced by external donations. Whatever the intent of the distinction, the effect gave an advantage to wealthy candidates.

#### 2. *Citizens United*

After hemming and hawing about the scope of *Buckley*, the increasingly aggressive majority in *Citizens United* reduced the meaning of “corruption” to bribery.<sup>96</sup> There must be an immediate exchange of votes for money or other benefits.<sup>97</sup> The Court called this a “quid pro quo,” almost the equivalent of a contract. There is thus no problem if the vote is made because the politician is all but guaranteed a future lucrative job or a sinecure for a family member. Nor are politicians’ dependence on future contributions an appropriate legislative concern. Because so many Americans believe our political-economic system has become profoundly corrupt in the more traditional sense of the word,<sup>98</sup> the majority dropped “the appearance of corruption.”<sup>99</sup>

### B. Corruption, Corrosion, and the Rule of Law

Once again, the Court instructs the populace on how to perceive reality. Many years ago, the Court informed African-Americans that they should not have sensed any racism in Southern laws precluding them from fully utilizing public accommodations and resources; they were simply being paranoid.<sup>100</sup> More recently, the Court determined there was not sufficient proof that racism polluted public contracting in Richmond, Virginia,<sup>101</sup> or that racism still infects the electoral process in the Southern states.<sup>102</sup> Critics do not understand, much less appreciate, the wonderful world the Court has helped create. If you fear the executive’s exploding

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<sup>94</sup> *Buckley v. Valeo*, 424 U.S. 1, 45 (1976).

<sup>95</sup> *Id.* at 53.

<sup>96</sup> See *Citizens United v. FEC*, 558 U.S. 310, 356-57 (2010).

<sup>97</sup> See *id.* at 360 (citing *McConnell v. FEC*, 540 U.S. 93 (2003)).

<sup>98</sup> 75% in U.S. See *Widespread Government Corruption*, GALLUP (Sept. 19, 2015), <http://www.gallup.com/poll/185759/widespread-government-corruption.aspx>.

<sup>99</sup> *Citizens United*, 558 U.S. at 357.

<sup>100</sup> See *The Civil Rights Cases*, 109 U.S. 3 (1883).

<sup>101</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989).

<sup>102</sup> See *Shelby Cty. Ala. v. Holder*, 133 S. Ct. 2612 (2013).

powers, you suffer from “Tyrannophobia”<sup>103</sup> or if you think racism and sexism are still serious problems, you are “politically correct.”

One problem with legal doctrine is its tendency to ossify not only legal but also political and cultural discourse as well. Once the Court defines a word in a particular way, its usage becomes rhetorically privileged, filtering throughout American society. For lawyers, such linguistic conformity is understandable: Litigants must convince the Court that their position is consistent with pre-existing judicial precedent that contains necessarily dogmatic definitions.

Another major dimension of the “rule of law” is a reasonable amount of consistency over time, guaranteeing equal treatment of similarly situated parties.<sup>104</sup> In other words, *stare decisis* creates common law over time, not just within a jurisdiction. Relatively fixed and clear definitions are an essential component of the rule of law, not just for notice but also for temporal consistency. But there are costs whenever the Court’s doctrinal rhetoric permeates the broader culture. When Justice Blackmun claimed a generalized “right of privacy” protected a woman’s right to have an abortion in *Roe*, he pressured advocates and opponents to fit future arguments within that awkward terminology.<sup>105</sup> From one perspective, there is nothing very “private” about a medical procedure. Furthermore, his notion of “privacy” tended to emphasize the doctor-patient relationship, not the woman’s dilemma. Over time, he shifted, agreeing that the right enabled women to have more control over their bodies and destinies.<sup>106</sup> The “right to privacy” became “the right to choose.” Similarly, Justice Powell in *Bakke* limited racial affirmative action in higher education to achieving “diversity,” ignoring many benefits and costs.<sup>107</sup> For example, we need a racially mixed office corps to lead armies filled with a large number of minority troops. Providing access to the best and brightest of all races prevents ghettoization, racial polarization, and demoralization. Some of us believe that prior historical racial abuses require remediation. Successful minority leaders provide inspiration to youth of all colors. Whatever else he accomplished or failed to achieve, President Obama’s two elections made many people of all races feel better about their country, giving them long-term hope for a more harmonious racial future. Yet, according to Powell, those pragmatic considerations somehow need to be reduced to the single, obscure goal of “diversity” at the university level.<sup>108</sup>

Thus, one way to analyze case law is to avoid using relevant Supreme Court terminology, at least for a while. Here, we simply ask whether our political economy has become corroded—less effective at providing opportunities for average citizens, more polarized, unstable, ineffective, and obsessed with predation more than production. If we infer from the facts that the affluent have gained too much power

<sup>103</sup> See POSNER & VERMEULE, *supra* note 51, at 204.

<sup>104</sup> Juan C. Botero & Alejandro Ponce, *Measuring the Rule of Law* 8 (World Justice Project—Working Paper Series, WPS No. 001, 2010), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1966257](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1966257).

<sup>105</sup> *Roe v. Wade*, 410 U.S. 113, 153 (1973).

<sup>106</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 922 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>107</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978).

<sup>108</sup> *Id.*

and are collectively abusing that power, we might revisit the word “corruption,” concluding that the Court’s definition is too narrow. Or we could even engage in a lawyer’s cheap rhetorical move: Congress can purposefully fight corrosion as well as corruption (bribery). This maneuver would not totally repudiate the existing juristic conception of corruption; it simply consigns that definition to the marginal significance it deserves by permitting another Congressional “end.”

#### IV. A BRIEF EMPIRICAL DISCUSSION OF HOW PRIVATE CENTRALIZED POWER IS UNDERMINING THE RULE OF LAW

The final section of this Essay presents a small sample of outrageous behaviors that the state and federal governments refused to punish by filing criminal indictments. These inactions have sent a clear message: The powerfully rich can get richer by virtually any form of nonviolent crime. Such abuses of prosecutorial discretion mock the President’s textual constitutional responsibility to “faithfully execute the law.”<sup>109</sup> The “rule of law” is breaking down.

##### *A. Private Banking*

For years, major international banks catered to illegal drug traders. The Mexican branches of HSBC, a gigantic British bank that epitomizes “centralized power,” permitted drug dealers to “deposit hundreds of thousands of dollars in cash, in a single day, into a single account, using boxes designed to fit the precise dimensions of the teller windows.”<sup>110</sup> Similarly, Wachovia Bank laundered almost 400 billion dollars in drug cartel money.<sup>111</sup> The lead federal prosecutor stated: “Wachovia’s blatant disregard for our banking laws gave international cocaine cartels a virtual carte blanche to finance their operations.”<sup>112</sup> But, as has almost always been the case, no individual bankers were charged, much less convicted, for these criminal conspiracies.<sup>113</sup> While it is acceptable in society and profitable to large corporations to throw teenagers in jail for illegal drug usage and stigmatize them for life with a felony conviction in a dreadful job market, federal prosecutors understand that big bankers have an “unofficial immunity” precluding personal responsibility for facilitating and profiting from this illegal, often deadly business. Subsequently, a lawyer at the Justice Department honestly stated that the Department did not want to bring personal charges against bankers, because such cases undermine the market’s “confidence.”<sup>114</sup> In other words, the stock market prefers fraud to honesty, knowing

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<sup>109</sup> U.S. CONST. art. II, § 3.

<sup>110</sup> Matt Taibbi, *Outrageous HSBC Settlement Proves the Drug War is a Joke*, ROLLING STONE (Dec. 12, 2012), <http://www.rollingstone.com/politics/news/outrageous-hsbc-settlement-proves-the-drug-war-is-a-joke-20121213> (quoting Assistant U.S. Attorney General Lanny Breuer).

<sup>111</sup> Ed Vuovialliamy, *How a Big U.S. Bank Laundered Billions From Mexico’s Murderous Drug Gangs*, THE GUARDIAN (Apr. 2, 2011), <http://www.theguardian.com/world/2011/apr/03/us-bank-mexico-drug-gangs>.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Assistant Attorney General Lanny Breuer explained why the Justice Department was so timid: “Had the U.S. authorities decided to press charges, HSBC would almost certainly have lost its banking license in the U.S., the future of the institution would have been under threat,

that much of its valuation is premised upon institutionalized deceit. Fraud has become a core business model.

The highly syllogistic, neoclassical economic ideology assumes that markets are so wise and responsible that governmental regulation is presumptively unnecessary. All external interventions and events interfere with the internal “efficiency” of the markets, which somehow always produce the optimal amount of goods and services at the lowest price, an outcome that somehow always serves the common good.<sup>115</sup> The market, graced by a providential “Invisible Hand,” is “natural,” while government “interventions” are clumsy and counter-productive. Under this view, government officials can never plan well, but private bankers are visionaries subject only to market discipline (even as they continually work to eliminate competition).<sup>116</sup> However, there is little discussion of those bankers’ great enabler, the Federal Reserve, which constantly rearranges the economy to benefit the banks. Examples abound after the 2008 crash, which was caused by a profoundly deregulated market system instead of exogenous events. The processing of home mortgages was corroded by pervasive fraud, outlandish leverage, recklessness, and numerous accounting deceptions.<sup>117</sup> Many buyers, mortgage sellers, investment banks, Fannie Mae, and insurers such as AIG temporarily thrived in the low-interest, deregulated environment.<sup>118</sup>

### B. Subprime Loans

To make money, investment banks like Citigroup took title to rotten subprime loans before turning them into misleading, highly leveraged derivatives. For many profitable quarters, Citigroup garnered huge profits after the rating agencies cravenly

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and the entire banking system would have been destabilized.” Matt Taibbi, *Gangster Bankers: Too Big to Jail*, ROLLING STONE (Feb. 14, 2013), <http://www.rollingstone.com/politics/news/gangster-bankers-too-big-to-jail-20130214>.

<sup>115</sup> See James Kwak, *Incentives and Ideology*, 127 HARV. L. REV. F. 253, 257 (2014) (“What Alan Greenspan, Larry Summers, and Tim Geithner have in common is not just that all supported policies that were friendly to the financial sector; they also shared an ideology: the belief that lightly regulated financial markets are good for the economy.”).

<sup>116</sup> FIN. CRISIS INQUIRY COMM’N, THE FINANCIAL CRISIS INQUIRY REPORT xvii (2011), <http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf> (“We [Financial Crisis Inquiry Commission] conclude widespread failures in financial regulation and supervision proved devastating to the stability of the nation’s financial markets. The sentries were not at their posts, in no small part due to the widely accepted faith in the self correcting nature of the markets and the ability of financial institutions to effectively police themselves.”).

<sup>117</sup> *Id.* at xxiii (“We [Financial Crisis Inquiry Commission] conclude collapsing mortgage-lending standards and the mortgage securitization pipeline lit and spread the flame of contagion and crisis. When housing prices fell and mortgage borrowers defaulted, the lights began to dim on Wall Street. This report catalogues the corrosion of mortgage-lending standards and the securitization pipeline that transported toxic mortgages from neighborhoods across America to investors around the globe.”).

<sup>118</sup> *Id.* at 79 (“In the run-up to the crisis, AIG, the largest U.S. insurance company, would accumulate a one-half trillion dollar position in credit risk through the OTC market without being required to post one dollar’s worth of initial collateral or making any other provision for loss.”).

(and profitably) turned its collection of high-risk loans into “AAA” products.<sup>119</sup> Once the housing market started declining, long-term investors balked.<sup>120</sup> Citigroup was stuck with a growing portfolio of toxic loans and even more dangerous highly leveraged derivatives. To continue selling its products, it secretly gave the buyers the right to return the investments if dissatisfied.<sup>121</sup> To accomplish this and other subterfuges, Citigroup created 427 offshore accounts that hid continuing liabilities from investors, shareholders, tax collectors, and regulators.<sup>122</sup> Many other companies engaged in similar deceptive practices.<sup>123</sup>

The Obama administration did not indict anyone at Citigroup.<sup>124</sup> Although you do not hear this claim made very often in liberal circles, the Bush Presidents were more faithful to enforcing the “rule of law” than their recent Democratic counterparts. After the savings and loan scandal broke in the 1980s, under the first Bush administration, hundreds of bankers went to jail.<sup>125</sup> After the 2008 crash, the Obama administration scattered indictments at a few mid-level bankers, generating a smidgen of convictions.<sup>126</sup>

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<sup>119</sup> Christina Rexrode, *Citigroup Hopes to Finally Close Chapter on Subprime-Lending Venture*, WALL ST. J. (Oct. 2, 2014, 2:14 PM), <http://www.wsj.com/articles/citigroup-hopes-to-finally-close-chapter-on-subprime-lending-venture-1412273645>.

<sup>120</sup> *Id.*

<sup>121</sup> *Citigroup Announces Agreement to Resolve Certain Private-Label Securitization Repurchase Claims*, CITIGROUP (Apr. 7, 2014), <http://www.citigroup.com/citi/news/2014/140407b.htm>.

<sup>122</sup> Lynnley Browning, *U.S. Subsidiaries in Offshore Tax Havens*, N.Y. TIMES (Jan. 16, 2009), [http://www.nytimes.com/2009/01/17/business/17tax.html?\\_r=0](http://www.nytimes.com/2009/01/17/business/17tax.html?_r=0).

<sup>123</sup> *Id.* Enron engaged in similar accounting fraud during the second Bush administration; its top executives were disgraced, convicted of fraud. See Thomas S. Mulligan, *Enron's Top Executives Are Convicted of Fraud*, L.A. TIMES (May 26, 2006), <http://articles.latimes.com/2006/may/26/business/fi-enron26>. One of George W. Bush's allies, Ken Lay, faced years of imprisonment but died before going to jail. Carrie Johnson, *Enron's Lay Dies of Heart Attack*, WASH. POST (July 6, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/05/AR2006070500523.html>.

<sup>124</sup> Jesse Eisinger, *Why Only One Top Banker Went to Jail for the Financial Crisis*, N.Y. TIMES (Apr. 30, 2014), [http://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html?\\_r=0](http://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html?_r=0).

<sup>125</sup> See Noel Brinkerhoff, *Saving and Loan Scandal of '80s and '90s: 102 High-Level Executives Convicted; 2008 Financial Crisis Scandal: 1*, ALLGOV (Sept. 15, 2014), <http://www.allgov.com/news/top-stories/saving-and-loan-scandal-of-80s-and-9...vel-executives-convicted-2008-financial-crisis-scandal-1-140914?news=854255>; see also Peter Cohan, *Today's Financial Meltdown vs. The 1990s S&L Crisis: Which Was Worse?*, DAILY FINANCE (July 3, 2010, 9:00 AM), <http://www.dailyfinance.com/2010/07/03/financial-meltdown-vs-savings-loan-crisis-recession>.

<sup>126</sup> See *Two Financial Crises Compared: The Savings and Loan Debacle and the Mortgage Mess*, N.Y. TIMES (Apr. 13, 2011), <http://www.nytimes.com/interactive/2011/04/14/business/20110414-prosecute.html>.

When the banks became insolvent during the crash, Congress permitted sloppy accounting rules to hide the mess and donated 700 billion dollars.<sup>127</sup> That colossal amount turned out to be a relative pittance, because the Federal Reserve Board secretly provided trillions to large private banks and corporations throughout the world.<sup>128</sup> When the Federal Reserve's disturbing violations of basic constitutional principles was exposed, Congress and the mass media provided cursory attention.<sup>129</sup> The ultimate losers were investors, taxpayers, and pensioners who are still bailing out the banks by loaning the banks their money at artificially low interest rates. One might have thought that this crash would have ended the lucrative fairytale of the independence of contemporary capitalism from government support.

### C. JP Morgan Chase

Following the 2008 crash, the megabank, JP Morgan, avoided public scandals while continuing to engage in scandalous behavior. In 2010, *The New York Times* described CEO Jamie Dimon as "America's least-hated banker."<sup>130</sup> Over subsequent years, the SEC repeatedly charged and fined JP Morgan for violating the law.<sup>131</sup> Although penalties ranged from the hundreds of millions to the billions, those sanctions had little effect on the bank's bottom line or its fraudulent business practices as it continued increasing market share after many of its rivals collapsed during the crash.<sup>132</sup> These civil penalties were another shell game, regulatory tribute posing as deterrence. Indeed, for many years, powerful corporate defendants never had to admit wrongdoing (thereby reducing the possibility of shareholder litigation and failing to provide the populace with information about the government's lax supervision of venal practices by concentrated private power). Despite such consistently lawless behavior, the federal government continues to subsidize the major investment banks in numerous ways since the 2008 crash. Like every other

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<sup>127</sup> See David M. Herszenhorn, *Congress Approves \$700 Billion Wall Street Bailout*, N.Y. TIMES (Oct. 3, 2008), <http://www.nytimes.com/2008/10/03/business/worldbusiness/03iht-bailout.4.16679355.html?pagewanted=all>.

<sup>128</sup> See Tracey Greenstein, *The Fed's \$16 Trillion Bailouts Under-Reported*, FORBES (Sept. 20, 2011, 1:26 PM), <http://www.forbes.com/sites/traceygreenstein/2011/09/20/the-feds-16-trillion-bailouts-under-reported>.

<sup>129</sup> *Id.*

<sup>130</sup> Roger Lowenstein, *Jamie Dimon: America's Least-Hated Banker*, N.Y. TIMES (Dec. 1, 2010), <http://www.nytimes.com/2010/12/05/magazine/05Dimon-t.html>.

<sup>131</sup> Jared Cummins, *JP Morgan's Fines To Date: A Brief History (JPM)*, DIVIDEND UNIV. (Dec. 19, 2014), <http://www.dividend.com/dividend-education/a-brief-history-of-jp-morgans-massive-fines-jpm>.

<sup>132</sup> See Peter Evans, *Steep Penalties Taken in Stride by JPMorgan Chase*, N.Y. TIMES (Jan. 7, 2014), <http://dealbook.nytimes.com/2014/01/07/steep-penalties-taken-in-stride-by-jpmorgan-chase>.

major corporation, JP Morgan paid its fines with taxpayer money.<sup>133</sup> Corporations were even permitted to deduct some of the fines from their taxes.<sup>134</sup>

Separation of powers, the “rule of law,” transparency, and accountability were summarily discarded when JP Morgan’s “least-hated banker” lobbied the federal government to settle a case out of court for billions of dollars. A non-profit group sued the federal government for bypassing the legal system (a procedural violation of the rule of law similar to those Fuller described), but the judge threw the case out for lack of “standing.”<sup>135</sup>

Periodically, the Obama administration talked a bit tougher. But when the Justice Department determined that JP Morgan had deceptively marketed many mortgage products before the crash, it settled with the bank for thirteen billion dollars without even filing a complaint in court.<sup>136</sup> Previously, serious judicial oversight sometimes caused problems: United States District Court Judge Rakoff continually harangued the SEC for its docility before he was undercut by the Court of Appeals for the Second Circuit.<sup>137</sup> In early 2016, Goldman Sachs paid a multibillion-dollar fine for violating the law in relation to its mortgage security business before the 2008 collapse; once again, nobody was indicted.<sup>138</sup>

#### *D. Corrosion and the Emergence of Crony, Corporate Welfare*

Conservative libertarians often use the phrase “crony capitalism” to describe the current political economy, while more left-leaning critics prefer “corporate welfare.”<sup>139</sup> Perhaps the best phrase is “crony, corporate welfare,” a phrase that captures the interweaving of powerful, connected individuals, centralized private corporations, and governments.

Few Americans have been better cronies than Jon Corzine. After making millions helping transform Goldman Sachs into a far more predatory trading institution that

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<sup>133</sup> Matt Taibbi, *The \$9 Billion Witness: Meet JPMorgan Chase’s Worst Nightmare*, ROLLING STONE (Nov. 6, 2014), <http://www.rollingstone.com/politics/news/the-9-billion-witness-20141106>.

<sup>134</sup> Patricia Cohen, *When Company is Fined, Taxpayers Often Share Bill*, N.Y. TIMES (Feb. 3, 2015), <http://www.nytimes.com/2015/02/04/business/when-a-company-is-fined-taxpayers-often-share-the-punishment.html>.

<sup>135</sup> See *Better Markets, Inc. v. U.S. Dep’t of Justice*, 83 F. Supp. 3d 250 (D.D.C. 2015).

<sup>136</sup> See Devlin Barrett & Dan Fitzpatrick, *J.P. Morgan, U.S. Settle for \$13 Billion*, WALL ST. J. (Nov. 19, 2013, 6:05 PM), <http://www.wsj.com/articles/SB10001424052702304439804579207701974094982>.

<sup>137</sup> Ben Protess, *Judge Rakoff Says 2011 S.E.C. Deal With Citigroup Can Close*, N.Y. TIMES (Aug. 5, 2014, 12:01 PM), <http://dealbook.nytimes.com/2014/08/05/after-long-fight-judge-rakoff-reluctantly-approves-citigroup-deal>.

<sup>138</sup> Matthew Goldstein, *Goldman to Pay Up to \$5 Billion to Settle Claims of Faulty Mortgages*, N.Y. TIMES (Jan. 14, 2016), <http://www.nytimes.com/2016/01/15/business/dealbook/goldman-to-pay-5-billion-to-settle-claims-of-faulty-mortgages.html>.

<sup>139</sup> E.g., *Corporate Welfare and the Crony Capitalism That Enriches the Rich*, CORP. CRIME REP. (July 17, 2015, 5:27 AM), <http://www.corporatecrimereporter.com/news/200/corporate-welfare-and-the-crony-capitalism-that-enriches-the-rich>.

relied upon extracting wealth by sneakily trading with “counterparties” instead of an investment bank providing needed capital to business “clients,” Corzine became the Democratic Senator of New Jersey.<sup>140</sup> After his stint in politics, Corzine became CEO of the trading firm MF Global.<sup>141</sup> Like so many other titans of industry, Corzine was paid extravagantly by the board of directors for his alleged expertise and connections.<sup>142</sup> Initially, the connections paid off; Corzine convinced the New York Federal Reserve to make MF Global a “primary dealer.”<sup>143</sup>

Corzine’s greed was unbounded. After the 2008 crash, Congress made some efforts to reduce financial companies’ leverage. Corzine avoided those constraints by setting up an office in London, which had even weaker regulations, to buy European government bonds at a forty to one debt to equity ratio.<sup>144</sup> When the market moved against him, his firm illegally engaged in “re-hypothecation” of clients’ accounts. In this context, re-hypothecation is a Wall Street euphemism for “theft.”<sup>145</sup> After these activities became public, Corzine claimed to be totally ignorant of his company’s basic operations.<sup>146</sup> His defense was he did not “intend” to break the law.<sup>147</sup> more likely, he did not “intend” to be caught.

<sup>140</sup> Ross Kaminsky, *The Collapse of Jon Corzine*, AM. SPECTATOR, Feb. 2012, <http://spectator.org/articles/36208/collapse-jon-corzine>. Corzine lost his bid for re-election after crashing into a tree without a seat belt, driving ninety miles an hour while being escorted by state troopers to a late meeting. David Kocieniewski & David W. Chen, *New Jersey Governor is Injured in Car Crash*, N.Y. TIMES (Apr. 13, 2007), [http://www.nytimes.com/2007/04/13/nyregion/13corzine.html?\\_r=0](http://www.nytimes.com/2007/04/13/nyregion/13corzine.html?_r=0).

<sup>141</sup> Bryan Burrough & Bethany Mclean, *Jon Corzine’s Riskiest Business*, VANITY FAIR, Feb. 2012, <http://www.vanityfair.com/news/business/2012/02/jon-corzine-201202>.

<sup>142</sup> See Matthew Leising & Cristina Alesci, *Corzine Resigns from MF Global Four Days After Bankruptcy Filing*, BLOOMBERG BUS. (Nov. 4, 2011, 12:39 PM), <http://www.bloomberg.com/news/articles/2011-11-04/jon-corzine-said-to-plan-resigning-from-mf-global-after-bankruptcy-filing>; see also Kaminsky, *supra* note 140.

<sup>143</sup> Suzanne McGee, *Jon Corzine: Sorry Just Doesn’t Cut It*, FISCAL TIMES, (Dec. 9, 2011), <http://www.thefiscaltimes.com/Columns/2011/12/09/Jon-Corzine-Sorry-Just-Doesnt-Cut-It>. The Federal Reserve, which has been significantly privatized since its creation in 1913, uses many opaque techniques to subsidize major banks. Whenever it prints money to prop up the economy, it first sells that money to private “primary dealers” at a market discount. *Primary Dealers*, BIG PICTURE (Feb. 17, 2009, 12:01 PM), <http://www.ritholtz.com/blog/2009/02/primary-dealers>. The dealers profitably redistribute that money to favored clients and a myriad other institutions. *Id.*

<sup>144</sup> Miles Weiss, Cristina Alesci & Matt Leising, *Corzine Pushed Europe Bet to \$11.5 Billion as Board Balked*, BLOOMBERG BUS. (Nov. 29, 2011, 1:21 PM), <http://www.bloomberg.com/news/articles/2011-11-29/corzine-pushed-fatal-europe-bet-to-11-5-billion-as-mf-global-board-balked>.

<sup>145</sup> Janet Tavakoli, *Rehypothecation is an Old Story: MF Global’s Story is a Different Story of Filched Funds*, HUFFINGTON POST (Feb. 15, 2012, 5:12 AM), [http://www.huffingtonpost.com/janet-tavakoli/rehypothecation-is-an-old\\_b\\_1153378.html](http://www.huffingtonpost.com/janet-tavakoli/rehypothecation-is-an-old_b_1153378.html).

<sup>146</sup> *Id.*

<sup>147</sup> Silla Brush & Lorraine Woellert, *Corzine Testifies He Didn’t “Intend to Break Rules on Funds*, BLOOMBERG BUS. (Dec. 8, 2011), <http://www.bloomberg.com/news/articles/2011-12-08/corzine-to-tell-panel-he-doesn-t-know-where-missing-mf-global-millions-are>.



Although many high-ranking MF executives testified about seemingly criminal behavior, nobody was indicted.<sup>148</sup> Subsequently, Corzine raised more than five hundred thousand dollars for President Obama's 2012 presidential campaign.<sup>149</sup> When this kickback was exposed, the Obama operatives removed Corzine as a "bundler" but kept the money.<sup>150</sup> There were no professional ramifications for Corzine; he considered launching a hedge fund in 2015.<sup>151</sup>

These few examples are not even the tip of the iceberg. Just as high-ranking American government officials have not been incarcerated for committing numerous war crimes in the Middle East, such as systemic torture in Abu Ghraib and elsewhere, leading executives of large corporations (centralized capital) now have an unwritten, unofficial immunity from criminal prosecution. General Motors can knowingly sell dangerous cars that kill 174 people, only to be slapped on the wrist with a 900 million dollar fine that only hurts stockholders.<sup>152</sup> Coal companies dump toxins in rivers, and BP turned the Gulf of Mexico into a chemical cesspool.<sup>153</sup> Truck stops fraudulently gouge customers.<sup>154</sup> And gigantic Wall Street investment banks and other financial organizations, supported by trillions in off-shore money as well as all government central banks, continue their crime spree: fixing Libor rates, manipulating energy markets, committing fraud during mortgage foreclosures, engaging in high frequency trading that strips value from ultimate purchasers, facilitating Bernie Madoff's Ponzi scheme, gouging consumers, selling shoddy

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<sup>148</sup> Peter Schweizer, *Corzine, MF Global Will Face No Criminal Charges*, BREITBART (Aug. 16, 2012), <http://www.breitbart.com/big-government/2012/08/16/jon-corzine-and-mf-global-will-face-no-criminal-charges>.

<sup>149</sup> Daniel Halper, *Jon Corzine Still Bundling for Obama*, WKLY. STANDARD (Apr. 20, 2012), [http://www.weeklystandard.com/blogs/jon-corzine-still-bundling-obama\\_640493.html](http://www.weeklystandard.com/blogs/jon-corzine-still-bundling-obama_640493.html).

<sup>150</sup> Alexis Simendinger, *Corzine, Amid Scandal, Is Among Obama's Top Bundlers*, REAL CLEAR POL. (Apr. 21, 2012), [http://www.realclearpolitics.com/articles/2012/04/21/corzine\\_amid\\_scandal\\_is\\_among\\_obam\\_as\\_top\\_bundlers.html](http://www.realclearpolitics.com/articles/2012/04/21/corzine_amid_scandal_is_among_obam_as_top_bundlers.html).

<sup>151</sup> Julie Steinberg & Rob Copeland, *Jon Corzine Considers Launching Hedge Fund*, WALL ST. J. (Apr. 19, 2015, 7:05 PM), <http://www.wsj.com/articles/jon-corzine-considers-launching-hedge-fund-1429484718>.

<sup>152</sup> See Danielle Ivory & Bill Vlastic, *\$900 Million Penalty for G.M.'s Deadly Defect Leaves Many Cold*, N.Y. TIMES (Sept. 17, 2015), [http://www.nytimes.com/2015/09/18/business/gm-to-pay-us-900-million-over-ignition-switch-flaw.html?mtrref=www.google.com&gwh=9C6B7AD350735B450FF5A01135FCFA18&gwt=pay&assetType=nyt\\_now](http://www.nytimes.com/2015/09/18/business/gm-to-pay-us-900-million-over-ignition-switch-flaw.html?mtrref=www.google.com&gwh=9C6B7AD350735B450FF5A01135FCFA18&gwt=pay&assetType=nyt_now).

<sup>153</sup> Katie Valentine, *Coal Giant Dumped Waste Directly into Rivers, Now Faces Criminal Charges*, CLIMATE PROGRESS (Feb. 23, 2015, 9:33 AM), <http://thinkprogress.org/climate/2015/02/23/3625717/duke-energy-coal-ash-charges>; Mark Fischetti, *BP Oil Spill 5 Years Later: The Coast Is Still Struggling*, SCI. AM. (Apr. 20, 2015), <http://www.scientificamerican.com/article/bp-oil-spill-5-years-later-the-coast-is-still-struggling-video>.

<sup>154</sup> Brian Solomon, *FBI Says Recordings Expose Jimmy Haslam's 'Jacking the Discount' Fraud at Pilot Flying J*, FORBES (Apr. 19, 2013, 3:06 PM), <http://www.forbes.com/sites/briansolomon/2013/04/19/fbi-says-billionaire-jimmy-haslam-knew-of-pilot-flying-j-fraud-secret-recordings-expose-jacking-the-discount-scheme>.

“financial innovations,” and constantly lobbying to revive the excessively libertarian “shadow banking system” that crippled the global economy in 2008.<sup>155</sup> JP Morgan has relentlessly violated federal laws, concluding that lawlessness and fraud are excellent business models, because immediate profits and bonuses dwarf any possible future penalties assessed to shareholders should the fraud ever be discovered.

By its very nature, financial fraud is difficult to discover, much less prove in court.<sup>156</sup> Who knows how many other sleazy deals have been successfully completed but never exposed? We will get another glimpse of the extent of market corrosion after the next crash. In other words, legal, political and market corrosion feed on each other, leading to social corrosion as all the new wealth goes to financial hustling instead of production, savings, and consumption.

These tawdry tales, which could be multiplied *ad nauseam*, do not logically “prove” that centralized power can undermine the rule of law. However, they are sufficiently widespread and troubling. They support the claims that the current political/legal economy facially discriminates (too many tax breaks for the uber-wealthy), distributes massive benefits to the rich, enforces the criminal law against the poor but not the ruling class, degrades basic procedures, transparency norms, and separation of power principles by eliminating judicial oversight over gigantic settlements, and is helping create a society wastes too many resources. Just as Aristotle warned, wealth and income inequality are threats to humane, stable republics.

#### CONCLUSION

One defense of the legal coddling of these moneylords is that they generate most of the nation’s wealth. Some of that wealth “trickles down” to average people, who allegedly provide little value to the economy. In other words, a hierarchical “capital theory of value” replaces Marx’s “labor theory of value,” two simplistic polarities

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<sup>155</sup> See Jesse Colombo, *This New Libor ‘Scandal’ Will Cause A Terrifying Financial Crisis*, FORBES (June 3, 2014, 1:51 PM), <http://www.forbes.com/sites/jessecolombo/2014/06/03/this-new-libor-scandal-will-cause-a-terrifying-financial-crisis>; see also *Big Banks Conspire with Giant Oil Company to Manipulate Currency Markets*, WASH. BLOG, (Dec. 31, 2014), <http://www.washingtonsblog.com/2014/12/big-banks-conspire-bp-oil-company-manipulate-market.html>; Zach Carter, *Mortgage System Still Victimized Homeowners, Watchdog Finds*, HUFFINGTON POST (Aug. 22, 2013, 11:27 AM), [http://www.huffingtonpost.com/2013/08/21/mortgage-abuses-foreclosure\\_n\\_3791448.html](http://www.huffingtonpost.com/2013/08/21/mortgage-abuses-foreclosure_n_3791448.html); David Brodwin, *Flash Trading: Where Your Money Goes to Die*, U.S. NEWS (Apr. 4, 2014, 10:45 AM), <http://www.usnews.com/opinion/economic-intelligence/2014/04/04/its-about-time-regulators-looked-at-high-frequency-trading>; Ben Protess & Jessica Silver-Greenberg, *JPMorgan Is Penalized \$2 Billion Over Madoff*, N.Y. TIMES (Jan. 7, 2014, 9:41 AM), [http://dealbook.nytimes.com/2014/01/07/jpmorgan-settles-with-federal-authorities-in-madoff-case/?\\_r=0](http://dealbook.nytimes.com/2014/01/07/jpmorgan-settles-with-federal-authorities-in-madoff-case/?_r=0); Emily Peck, *ATM Fees Have Never Been Higher*, HUFFPOST BUS. (Oct. 5, 2015, 12:02 AM), [http://www.huffingtonpost.com/entry/atm-fees-soar-to-new-heights-omg-pray-for-us\\_560ebabbe4b0af3706e08aec](http://www.huffingtonpost.com/entry/atm-fees-soar-to-new-heights-omg-pray-for-us_560ebabbe4b0af3706e08aec); Bob Sullivan, *Chase to Pay \$166 Million for ‘Shoddy & Illegal’ Debt Collection Practices*, CREDIT.COM (July 9, 2015), <http://blog.credit.com/2015/07/chase-to-pay-166-million-for-shoddy-illegal-debt-collection-practices-120517>; Barry Eichengreen, *Financial Crisis: Revisiting the Banking Rules that Died By a Thousand Small Cuts*, FORTUNE (Jan. 16, 2015, 2:36 PM), <http://fortune.com/2015/01/16/financial-crisis-bank-regulation>.

<sup>156</sup> Rakoff, *supra* note 21.

that deny an obvious reality: Modern economies require capital *and* labor. Both provide value. Admittedly, there is no way to prove that the American economy would be stronger if the rich had not become so powerful over the past few decades. Perhaps this alleged economic boon justifies maiming the “rule of law” and its supporting memes, such as separation of powers, reducing the appearance of corruption, and a common-law system equally applicable to all.

The charts from this Essay’s Introduction show the opposite conclusion: profound wealth inequality tends to accelerate, crippling the middle class. Even a cursory, comparative look at the current American system reveals a nation that has become a playground for the rich. The hotel magnate Leona Helmsley was a visionary when she allegedly complained after being convicted for tax evasion: “[o]nly the little people pay taxes.”<sup>157</sup> In 2011, an enterprising *New York Times* reporter confirmed her observation by comparing the tax rates of janitors, security guards, and average residents in the Helmsley Building:<sup>158</sup>

	<b>NYC Janitor</b>	<b>NYC Security Guard</b>	<b>Average Filer in Helmsley Building</b>
Adjusted Gross Income	\$ 33,080	\$ 27,640	\$1,167,708
Income tax	\$ 3,168	\$ 2,350	\$159,515
Employee payroll tax	\$ 2,531	\$ 2,114	\$5,918
Employer payroll tax	\$ 2,531	\$ 2,114	\$5,918
Total tax	\$ 8,229	\$ 6,579	\$171,352
<b>Effective Tax Rate</b>	<b>24.9%</b>	<b>23.8%</b>	<b>14.7%</b>

Instead of providing easy access to higher education, young adults are burdened with over a trillion dollars in non-dischargeable student loans.<sup>159</sup> Most young people, even with college degrees, find it hard to get decent jobs with reasonable benefits. Upward mobility is among the lowest in the developed world.<sup>160</sup> Economic disparity is among the highest.<sup>161</sup> While there has been a partial “recovery,” more than half the

<sup>157</sup> Robert W. Wood, *10 Notorious Tax Cheats: Queen of Mean Leona Helmsley Proved Little People Can Put You in Jail*, FORBES (Apr. 17, 2015, 8:34 PM), <http://www.forbes.com/sites/robertwood/2015/04/17/10-notorious-tax-cheats-queen-of-mean-leona-helmsley-proved-little-people-can-put-you-in-jail>.

<sup>158</sup> Martin A. Sullivan, *At the Helmsley Building, the Little People Pay the Taxes*, 130 TAX NOTES 855 (Feb. 21, 2011).

<sup>159</sup> Anya Kamenetz, *5 Ideas to Ease the Burden of Student Loans*, NPR (June 26, 2015), <http://www.npr.org/sections/ed/2015/06/26/412870161/5-ideas-to-ease-the-burden-of-student-loans>.

<sup>160</sup> Elise Gould, *U.S. Lags Behind Peer Countries in Mobility*, ECON. POL. INST. (Oct. 10, 2012), <http://www.epi.org/publication/usa-lags-peer-countries-mobility>.

<sup>161</sup> Mark Gongloff, *The U.S. Has the Worst Income Inequality in the Developed World, Thanks to Wall Street: Study*, HUFFINGTON POST (Aug. 16, 2012, 12:08 PM), [http://www.huffingtonpost.com/2013/08/15/income-inequality-wall-street\\_n\\_3762422.html](http://www.huffingtonpost.com/2013/08/15/income-inequality-wall-street_n_3762422.html).

nation's populace continues to live in a depression-like situation. The seeming low unemployment rate is profoundly and deliberately misleading: labor work force participation rate has dropped by four percent over the past twenty years.<sup>162</sup> Meanwhile, trillions continually flow to large international banks. In the meantime, the average American reads less, withdrawing from their political world, degraded by relentlessly tawdry political advertisements, into a self-deluded world of entertainment and addictions. Such widespread despair is another symptom of corrosion. "Demoralization" can be read literally: a person abandons or loses personal and political morality.

Consider the rather lengthy quote by James Madison, made at the Virginia Ratifying Convention, that included a warning as well as a ray of hope—whatever the fate of *Citizens United*:

I consider it reasonable to conclude, that [the legislators] will as readily do their duty, as deviate from it: Nor do I go on the grounds mentioned by gentlemen on the other side—that we are to place unlimited confidence in them, and expect nothing but the most exalted integrity and sublime virtue. But I go on this great republican principle, that the people will have virtue and intelligence to select men of virtue and wisdom. Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks--no form of government can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea. If there be sufficient virtue and intelligence in the community, it will be exercised in the selection of these men. So that we do not depend on their virtue, or put confidence in our rulers, but in the people who are to choose them.<sup>163</sup>

Hope for profound change is no longer a dream residing far outside the "mainstream." At the time this Essay was written, the electorate was seriously considering these problems for the first time. Unlike Barack Obama, who raised millions from financiers to fund his election, Hillary Clinton faces widespread criticism for raising vast amounts of money from Wall Street and for being paid over two hundred thousand dollars per speech to talk to financiers like Goldman Sachs. Bill and Hillary Clinton have received a total of \$153 million in speaking fees since Bill was President.<sup>164</sup> Many voters support Bernie Sanders and Donald Trump because they are tired of crony, welfare capitalism.<sup>165</sup> Whatever the media and

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<sup>162</sup> Brent Nyitray, *The Labor Force Participation Rate Ticks Up From Its Lows*, MKT.REALIST (June 10, 2015, 4:58 PM), <http://marketrealist.com/2015/06/unemployment-rate-ticks-5-5>.

<sup>163</sup> JAMES MADISON, VIRGINIA RATIFYING CONVENTION (William T. Hutchinson et al. eds., *The Founders' Constitution 1962-1977*) (1788).

<sup>164</sup> Robert Yoon, *\$153 Million in Bill and Hillary Clinton Speaking Fees, Documented*, CNN (Feb. 6, 2016), <http://www.cnn.com/2016/02/05/politics/hillary-clinton-bill-clinton-paid-speeches>.

<sup>165</sup> Robert Reich, *The Real Reason Donald Trump Appeals to Working-Class Whites*, SALON (Nov. 10, 2015), [http://www.salon.com/2015/11/10/robert\\_reich\\_the\\_real\\_reason\\_donald\\_trump\\_appeals\\_to\\_working\\_class\\_whites\\_partner](http://www.salon.com/2015/11/10/robert_reich_the_real_reason_donald_trump_appeals_to_working_class_whites_partner).

Supreme Court may say, tens of millions of citizens believe that centralized capital has gained effective control of state and federal governments, enabling this narrow faction to create two legal systems, one for the poor and middle class, the other for the rich.