

genuinely unknown, then the Court responded to uncertainty in a way that was justifiable under one view of its institutional role; it failed, however, to consider alternative — and potentially more appealing — approaches that would have taken into account the possibility of an unconstitutional infringement of individual rights. Beyond the politically unique context of the abortion right, the majority's unwillingness to tackle the problems posed by probabilistic harm and adjudication under uncertainty may impede the Court's ability to meaningfully apply judicial review to the array of governmental actions taken in the shadow of risk and uncertainty.

2. *Punitive Damages.* — The history of the Fourteenth Amendment is one of hierarchy and capitalism. In the Amendment's first 139 years, courts have consistently used it to perpetuate dominant notions of class and culture — to maintain deeply rooted inequality and resist meaningful changes in the areas of poverty, race, and gender. While the Amendment's beautiful language and spirit could have been used to ensure equality and meaningful participation in all aspects of a civil community, its words have instead been employed as a tool for just the opposite. Last Term, in *Philip Morris USA v. Williams*,<sup>1</sup> the Supreme Court used the Fourteenth Amendment to reaffirm and enrich procedural and substantive due process protections for corporations sued for punitive damages. This is the sad reality of a legal system and a culture that have often lacked the courage necessary to promote the practice of daily human life in a manner consistent with our values. But by reconceptualizing the kinds of harms that it addresses, we can transform the Amendment — now itself part of the machinery of cruel myth and illusion — into a tool for equality and justice.

Philip Morris is a large corporation. It is charged by law with making as much money as possible.<sup>2</sup> Over the course of the past half-century, Philip Morris has thrived in American capitalism, nurturing artificial wants through psychological manipulation<sup>3</sup> and pharmacological addiction. It has made billions for its shareholders.<sup>4</sup>

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<sup>1</sup> 127 S. Ct. 1057 (2007).

<sup>2</sup> See, e.g., *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (“A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.”).

<sup>3</sup> See *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1169 (Or. 2006) (describing internal Philip Morris memoranda, including one that advocated giving “smokers a psychological crutch and a self-rationale that would encourage them to continue smoking”). See generally Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420 (1999).

<sup>4</sup> Altria Group, Philip Morris's parent company, had net revenues of over \$101 billion in 2006. ALTRIA GROUP, INC., 2006 ANNUAL REPORT, [http://www.altria.com/AnnualReport/ar2006/2006ar\\_07\\_0500\\_01.aspx](http://www.altria.com/AnnualReport/ar2006/2006ar_07_0500_01.aspx) (last visited Oct. 6, 2007).

Philip Morris's products have also killed millions of people. Tobacco kills 438,000 Americans each year.<sup>5</sup> With a fifty percent market share,<sup>6</sup> Philip Morris's products cause one in every ten American deaths.<sup>7</sup> In total, smoking results in 5.5 million years of potential life lost annually in America alone.<sup>8</sup> Perhaps most astonishingly, cigarettes kill 38,000 nonsmoking Americans each year through secondhand smoke.<sup>9</sup> This is the equivalent of more than one September 11 attack each month.<sup>10</sup>

One of these victims was Jesse Williams, who died on March 17, 1997.<sup>11</sup> He was a sixty-seven-year-old retired public school employee who had been a smoker since he was twenty-five.<sup>12</sup> Mayola Williams, Jesse's widow, sued Philip Morris, the manufacturer of the product that killed her husband, for negligence and deceit.<sup>13</sup> An Oregon jury heard extensive evidence of Philip Morris's role in covering up the adverse health effects and addictive nature of its products for over forty years.<sup>14</sup> The jury awarded Williams \$821,000 in compensatory damages and \$79.5 million in punitive damages.<sup>15</sup> After the trial judge reduced the punitive award to \$32 million, both parties appealed.

The Oregon appellate court reinstated the jury's original award.<sup>16</sup> On remand from the Supreme Court,<sup>17</sup> the Oregon courts again affirmed the judgment, noting the tragic and egregious conduct of large tobacco corporations.<sup>18</sup> Philip Morris appealed again to the Supreme Court, seeking refuge in the confines of the Fourteenth Amendment.

The Supreme Court reversed the Oregon courts. Justice Breyer, writing for the majority,<sup>19</sup> noted that the Court's past cases had been clear: due process protects corporations in punitive damage suits.<sup>20</sup> Al-

<sup>5</sup> Ctrs. for Disease Control & Prevention (CDC), Fact Sheet, Tobacco-Related Mortality (Sep. 2006), [http://www.cdc.gov/tobacco/data\\_statistics/Factsheets/tobacco\\_related\\_mortality.htm](http://www.cdc.gov/tobacco/data_statistics/Factsheets/tobacco_related_mortality.htm).

<sup>6</sup> Altria Group, Inc., 2006 Annual Report, Business Review, [http://www.altria.com/AnnualReport/ar2006/2006ar\\_05\\_0100.aspx](http://www.altria.com/AnnualReport/ar2006/2006ar_05_0100.aspx) (last visited Oct. 6, 2007).

<sup>7</sup> CDC, *supra* note 5.

<sup>8</sup> CDC, *Annual Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses — United States, 1997–2001*, MORBIDITY & MORTALITY WKLY. REP., July 1, 2005, at 625, 625.

<sup>9</sup> CDC, *supra* note 5.

<sup>10</sup> See Executive Summary, THE 9/11 COMMISSION REPORT 1–2 (2004).

<sup>11</sup> Joint Appendix, *Philip Morris*, 127 S. Ct. 1057 (No. 05-1256), 2006 WL 2147483, at \*6a.

<sup>12</sup> *Id.* at \*6a–7a.

<sup>13</sup> *Philip Morris*, 127 S. Ct. at 1060.

<sup>14</sup> See *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1168 (Or. 2006).

<sup>15</sup> *Philip Morris*, 127 S. Ct. at 1061.

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

<sup>17</sup> The U.S. Supreme Court initially remanded the case in light of *State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408 (2003). See *Philip Morris*, 127 S. Ct. at 1601.

<sup>18</sup> See *Philip Morris*, 127 P.3d at 1177, 1181–82.

<sup>19</sup> Justice Breyer was joined by Chief Justice Roberts and Justices Kennedy, Souter, and Alito.

<sup>20</sup> See *Philip Morris*, 127 S. Ct. at 1062–63 (citing cases).

though the Court had previously hinted that the *magnitude* of the award might itself have been per se unreasonable under the Due Process Clause, the Court in *Philip Morris* did not consider the issue.<sup>21</sup> Rather, the majority found that the judgment suffered from another fatal flaw: the jury instruction in the Oregon courts had allowed Philip Morris to be punished for harms to individuals other than Jesse Williams. While harms to thousands of other Oregonians might properly be considered to determine the *reprehensibility* of Philip Morris's conduct — which could then be used to determine punitive damages — they could not *directly* be considered as a basis for punishment.<sup>22</sup> The Oregon courts' failure to properly distinguish the two uses gave rise to constitutional error.

Justice Stevens dissented. He noted that punitive damages are the civil analog to criminal penalties, serving the ends of retribution and deterrence. He thus concluded that there is no principled reason why a jury should not take into account conduct that causes serious risks to others when assessing appropriate civil sanctions, given that such considerations are readily accepted in the calibration of criminal punishment.<sup>23</sup> Justice Stevens further noted that although the majority purported to forbid consideration of harm to parties outside the litigation when calculating punitive damages, it in fact allowed consideration of *these same harms* in determining the reprehensibility of the defendant's conduct.<sup>24</sup> He simply could not understand the distinction between the indirect use the majority would permit and the direct use it would constitutionally forbid.

Justice Thomas also dissented. He reiterated his position that the Fourteenth Amendment was not meant to apply to punitive damage awards.<sup>25</sup> Justice Ginsburg, joined by Justices Scalia and Thomas, added a third dissent. She found the Court's novel distinction particularly curious because nothing in the language of the Oregon trial court's jury instruction appeared contrary to the distinction's terms.<sup>26</sup>

While the majority's technical legal reasoning in *Philip Morris* is indeed quite curious, the Supreme Court's *conceptual* treatment of the Fourteenth Amendment in *Philip Morris* and its predecessors is far more troubling. Indeed, its consequences have been devastating. *Philip Morris* is only the latest example of how our society insists on

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<sup>21</sup> After *State Farm*, the 100-to-1 ratio that the punitive damages award bears to the compensatory damages award may be subject to constitutional attack because of its deviation from the "longstanding, historical practice" of setting that ratio at two-, three-, or four-to-one. See *Philip Morris*, 127 S. Ct. at 1061 (citing *State Farm*, 538 U.S. at 425).

<sup>22</sup> *Id.* at 1064.

<sup>23</sup> *Id.* at 1066 (Stevens, J., dissenting).

<sup>24</sup> *Id.* at 1066–67.

<sup>25</sup> *Id.* at 1067–68 (Thomas, J., dissenting).

<sup>26</sup> *Id.* at 1068 (Ginsburg, J., dissenting).

providing “due process” protections for wealth aggregations while ignoring the widespread losses of life and constraints on liberty that plague so many people and communities. To better understand the Court’s approach, we must take a closer look at the history and culture underlying its Fourteenth Amendment jurisprudence.

The Fourteenth Amendment was passed as the final blow to slavery and as a promise of equal rights to black Americans.<sup>27</sup> So much were this purpose and spirit beyond question that, in 1872, shortly after the Amendment’s adoption, the Supreme Court wrote: “We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.”<sup>28</sup> But left in the hands of future Justices, the Amendment became one of the cruelest ironies in American history. In the first seventy years of the Amendment, the Court struck down 232 state laws pursuant to its commands;<sup>29</sup> 179 of these cases were decided in favor of corporations — including fifty-five cases in favor of the burgeoning railroad industry.<sup>30</sup> Only nine times did the Court rule in favor of blacks.<sup>31</sup>

Thus, even though the Fourteenth Amendment was designed as a refuge for the least powerful Americans, the Supreme Court, under relentless pressure from the corporate bar,<sup>32</sup> turned it into a boon for railroads, monopolies, utility companies, bankers, and other large commercial interests.<sup>33</sup> American courts thus read protections into the Amendment that substantially benefited those in possession of capital and property but failed to find within its language much that might serve the groups seemingly most vulnerable to the state, including blacks, women,<sup>34</sup> and the poor.<sup>35</sup>

<sup>27</sup> See, e.g., WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT* 64–79, 124 (1988).

<sup>28</sup> *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 81 (1873). Ironically, this very opinion’s narrow reading of the Privileges and Immunities Clause effectively stripped the Amendment of much of its potential progressive force.

<sup>29</sup> See FELIX FRANKFURTER, *MR. JUSTICE HOLMES AND THE SUPREME COURT* 139 (1938).

<sup>30</sup> Statistics are calculated from case summaries provided in *id.* app. 1.

<sup>31</sup> This figure *includes* seven nearly identical cases forbidding the exclusion of blacks from juries. A tenth case granted relief to a white man who claimed that a law discriminating against blacks unconstitutionally deprived him of property. See *Buchanan v. Warley*, 245 U.S. 60 (1917).

<sup>32</sup> In the first forty years after the Amendment, 604 cases reached the Supreme Court under the Fourteenth Amendment. Only twenty-eight were brought by blacks. Corporations brought 312. See CHARLES WALLACE COLLINS, *THE FOURTEENTH AMENDMENT AND THE STATES* 46–47, 145 (1912).

<sup>33</sup> See generally FRANKFURTER, *supra* note 28, app. 1.

<sup>34</sup> See, e.g., *Minor v. Happersett*, 88 U.S. 162, 177 (1875) (holding that the Fourteenth Amendment does not give women equal voting rights). The Court did not apply the Equal Protection Clause to protect women until 1971 in *Reed v. Reed*, 404 U.S. 71 (1971).

<sup>35</sup> See, e.g., *Lindsey v. Normet*, 405 U.S. 56 (1972).

Not much has changed. Much has been made of the Court's most recent Term, with even moderate observers noting that "[i]t has been decades since the most privileged members of society — corporations, the wealthy, white people who want to attend school with other whites — have had such a successful Supreme Court term."<sup>36</sup> But each seemingly egregious decision last Term fits comfortably within the traditional canon of Supreme Court jurisprudence and American political history more generally. Powerful, organized interests have consistently prevailed. Indeed, one of the most fascinating phenomena in modern history is the perpetuation of vast inequality on the basis of class, race, gender, and geography — even as formal laws and values have become quite hostile to such distinctions. We must be more in touch with what is really moving our laws.

This lesson is readily apparent in *Philip Morris* itself. The Court twists and strains the words "due process" to make esoteric and impractical doctrinal distinctions between "reprehensibility" and "punishment."<sup>37</sup> This intellectual exercise exemplifies a Court and a legal culture that debate the fine distinctions of subtle phraseology in punitive damages jury instructions while rarely addressing larger and more important questions about why these protections should be applied to large, anonymous aggregations of wealth but not other groups. Why should not many other constituencies — groups whose life and liberty remain subject to politics, bias, ignorance, and the caprice of corporate power — benefit from enforceable due process rights in our courts? For a better understanding of the evils inherent in our laws governing corporations vis-à-vis other potential objects of the Amendment's graces, we need look no further than some basic observations about the kind of world in which we currently live: for the same forces that corrupted the interpretation of the Amendment long ago are alive and well in our contemporary social and legal institutions.

A first basic observation concerns the type of conduct that we choose to punish. For example, tobacco is responsible for far more destruction of American life than marijuana, crack, and powder cocaine combined.<sup>38</sup> While Congress created the much-maligned 100:1 crack-cocaine disparity, the crack-cigarette disparity boasts a ratio of infinite

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<sup>36</sup> Editorial, *Justice Denied*, N.Y. TIMES, July 5, 2007, at A12. A prominent business lobby group proclaimed: "It's our best Supreme Court term ever." Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A18.

<sup>37</sup> That the Justices agonized over the minutiae of this distinction is particularly striking given that the text and history of the Amendment strongly suggest that its provisions were not meant to apply to corporations at all. See, e.g., *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 85–90 (1938) (Black, J., dissenting).

<sup>38</sup> In 2000, American deaths — both direct and indirect — from all illicit drug use numbered 17,000. Ali H. Mokdad et al., *Actual Causes of Death in the United States, 2000*, 291 J. AM. MED. ASS'N 1238, 1240, 1242 (2004). Tobacco caused more deaths by a factor of twenty-six.

proportions. The inner-city poor ensnared by the draconian drug laws that characterize our carceral state do not have shareholders and boards of directors with connections. They do not have armies of lobbyists or public relations specialists studying the latest social psychology research in order to design strategies to manipulate and exploit attitudes and behavior. Nor do they have Supreme Court Justices meticulously using their skills of legal reasoning to craft extratextual arguments that grant them relief. This dissonance between harmful social consequences and *the types of conduct we choose to punish* is part of a larger phenomenon of a society that defines deviant behavior in an irrational manner, often influenced by racial, socioeconomic, and psychological factors that have nothing to do with the stated goals of criminal law or punishment.<sup>39</sup>

A second observation is that this same phenomenon applies with equal force to how society *calibrates punishment* for deviant behavior. As *Philip Morris* demonstrates, the Court rushes to the aid of corporations when their conduct receives harsh rebukes from state juries. Yet the standard for excessive punitive damages that the Court concocted out of thin air in *Philip Morris's* predecessors has no analog in the doctrine of criminal punishment, where the Court has remained on the sidelines as sentences have reached absurd heights<sup>40</sup> and many individual Americans and impoverished communities are crushed by lengthy prison terms.<sup>41</sup> Moreover, the almost complete discretion afforded prosecutors and the inexplicably harsh and ever-expanding set of criminal laws at their disposal further contribute to unpredictable and grossly excessive sentences in criminal cases.<sup>42</sup> As a result, the number of American juveniles imprisoned for life without parole is 200 times the total number of juveniles serving such sentences in the rest

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<sup>39</sup> The factors contributing to this irrationality include political incentives, incomplete and inaccurate information about all aspects of crime and sentencing, cognitive biases, and appealing legitimating myths that justify the status quo. See generally Recent Case, 120 HARV. L. REV. 1988 (2007).

<sup>40</sup> The U.S. incarceration rate is now five times its historic average. See Bruce Western with Becky Pettit, *Mass Imprisonment*, in BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 13 & fig.1.1 (2006). Europe incarcerates almost seven times fewer people per capita. *Id.* at 14–15 & fig.1.2.

<sup>41</sup> For instance, the Court recently refused even to hear an appeal challenging the 159-year prison sentence of a fifty-year-old mentally disturbed woman who was a first-time, nonviolent offender. See *Hungerford v. United States*, 127 S. Ct. 2249 (2007) (mem.); see also, e.g., *Ewing v. California*, 538 U.S. 11, 30–31 (2003) (plurality opinion) (affirming punishment of up to life in prison for the theft of three golf clubs under California's three-strikes law); *Rummel v. Estelle*, 445 U.S. 263, 285 (1980) (upholding life sentence for successive convictions of credit card fraud, forgery, and obtaining money by false pretenses, all totaling less than \$230).

<sup>42</sup> See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 594 (2001). The Court is troubled by “unpredictable” punishments, but only when the affected party is a corporation.

of the world combined.<sup>43</sup> Unbelievably, America imprisons blacks at a rate six times that of South Africa during apartheid.<sup>44</sup>

But the troubling inconsistency between *Philip Morris* and the Court's criminal law jurisprudence is only a very small part of the story. While the Fourteenth Amendment secures corporations and their affluent owners their dominant position atop America's pyramid of wealth and power, the Court has repeatedly refused to use that same text in many other areas, including education, housing, and wages.<sup>45</sup> But these massive deprivations of liberty — these abdications of rational policymaking — are precisely the kind of widespread injustice and constraints on liberty that the Fourteenth Amendment could and should address.<sup>46</sup> The fact that judges and legal scholars have developed subtle doctrinal hooks to distinguish the protection of corporations from the protection of criminal defendants is indicative of the larger sociology and psychology of the legal academy, which, led by publications like the *Harvard Law Review*, is often so preoccupied with elitist traditional “legal reasoning” that it cannot see the forest of injustice through the trees of the status quo.

From this flawed legal reasoning emerges Fourteenth Amendment doctrine that we use to decide what conduct is directly or indirectly the result of collective choices to act or to omit to act, and who can sue for what kind of harm. But this doctrine boasts only superficial coherence. The chief culprits are an incomplete notion of state action and an arbitrary conceptual understanding of *which harms can qualify* for constitutional protection.

The result has been real costs to the liberty of ordinary people who, in the course of putatively gaining protection from “state action,” have actually been subjected to the whims of another, far more tyrannical force. The vicissitudes of the corporate state have become enshrined as a magical constitutional baseline. Primitive notions of state action

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<sup>43</sup> See AMNESTY INT'L & HUMAN RIGHTS WATCH, *THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES* 106, 124 (2005), available at <http://hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf>.

<sup>44</sup> See LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY* 263 (2002). Black men constitute 41% of the more than 2 million men in custody — a rate almost seven times that of white men. See BUREAU OF JUSTICE STATISTICS, *PRISON AND JAIL INMATES AT MIDYEAR 2006*, at 9 (2007), available at <http://ojp.usdoj.gov/bjs/pub/pdf/pjimo6.pdf>.

<sup>45</sup> The Court has never held that the Amendment requires a living wage, and it has explicitly refused to guarantee education, see *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 58–59 (1973), and housing, see *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

<sup>46</sup> A constitution's formal commitment to certain values is meaningless in the absence of the substance required for their realization. See generally Martha C. Nussbaum, *The Supreme Court, 2006 Term—Foreword: Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 HARV. L. REV. 4 (2007).

have been shoved awkwardly into a world that demands nuance.<sup>47</sup> But because our collective choices are everywhere, any coercion and violence that exist fall at our feet, whether by act or by omission.

To understand this point, we must better understand the sociology of coercive force. A society concerned with the value of individual liberty must recognize all the myriad ways in which the liberty of individuals and groups within it can be compromised. From the individual's perspective, it matters not *which agent* — whether it be the government, suburban parents, men, or wealthy boardrooms — is depriving her of liberty or constraining her set of available choices and behavior. In each case, external forces are imposing their will on human liberty with the same effect.

Even a cursory examination of widely accepted and legally protected corporate conduct reveals tremendous harm and coercion. This less salient “corporate” coercion is pervasive because Philip Morris is not an anomaly. Philip Morris, like most corporations, while publicly proclaiming for decades that the health and safety of its customers was its paramount concern,<sup>48</sup> was quietly pursuing its only real and legally-sanctioned goal: profit. This hypocrisy would border on comedy if it were not so prevalent in corporate culture — if the illusion of socially just institutions did not mask and legitimate so much suffering. Tobacco companies no longer engage in the deceit they once did, and yet they are still causing enormous harm. The influence of corporations on wealth distributions, local communities, unskilled labor, and the environment is often devastating. Corporate manipulation of foreign policy, including regime change, has been one of the ugliest and most consistent characteristics of American society for the last century.<sup>49</sup> Corporate influence on elections makes politicians slaves to money and the desire for profit. The stranglehold of large corporations over communication shapes the knowledge and interests of the populace.<sup>50</sup> Corporations determine conceptions of beauty and fashion. Profit de-

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<sup>47</sup> See generally Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: State Action, Equal Protection, and California's Proposition 13*, 81 HARV. L. REV. 69 (1967).

<sup>48</sup> At the very start of the controversy over the health effects of cigarettes, the tobacco industry proclaimed: “We accept an interest in people’s health as a basic responsibility, paramount to every other consideration in our business.” See Hanson & Kysar, *supra* note 3, at 1486.

<sup>49</sup> See generally, e.g., STEPHEN KINZER, *OVERTHROW* (2006) (describing the many instances in the twentieth century in which America used military violence to protect corporate interests, including interventions in Hawaii, the Philippines, Nicaragua, Guatemala, Cuba, Puerto Rico, Iran, South Vietnam, Chile, Grenada, and Panama).

<sup>50</sup> Five large corporations — Time Warner, Disney, Bertelsmann, News Corporation, and Viacom — now control almost the entire mass media industry, including local and national TV stations, movie studios, internet service providers, publishers, newspapers, radio stations, and magazines. See BEN H. BAGDIKIAN, *THE NEW MEDIA MONOPOLY* 3 (6th ed. 2004). In 1983, fifty corporations controlled a media empire of similar proportions. *Id.* at 27.

cides which drugs are manufactured and which diseases are treated.<sup>51</sup> Large corporations influence every basic decision that is of any importance in our society. The aggregate of these decisions, all pointed toward profit, can have real effects on equality and individual liberty. All this has also led to an uninformed and disengaged population, a materialistic culture, and superficial interests and interactions. All this takes basic decisions about how to realize our values out of the various fora of *collective choice* and subjects them to the whims of profit.

Because the Court now protects much of this corporate conduct, it may be forced to invalidate state action that is beneficial in the aggregate because it violates the Fourteenth Amendment “rights” of a certain (perhaps the only) group that the law recognizes. In a better legal world, the courts would have to balance affirmative demands of *many different groups* for state action by weighing the respective consequences to life, liberty, and property in the aggregate. *Every* law or legislative omission affects life and liberty — there are always trade-offs. The Fourteenth Amendment must recognize this reality and embrace an affirmative obligation to consider the effects of potential action or inaction on *all* constituencies. Only then can the Amendment combat all forms of coercion. Instead, by turning the Fourteenth Amendment into an essentially negative right to protection from only the most obvious forms of direct government action, the Supreme Court has made government a mere neutral observer in any repeated societal interactions that have the properties of a zero-sum game, closing its eyes to many forms of coercion that are in reality just as harmful as more salient state action. Then, by further developing significant protections for only *certain groups* within this negative rights framework (indeed, by only conceptualizing some of society’s many potential aggregations as protected entities and only some types of coercion as actionable harms), the Court has handicapped other interests in this competition, fostering even greater inequality.

This increased inequality exemplifies the Court’s insensitivity to certain kinds of harms. But we must be far more perceptive of subtle forms of physical and psychological coercion that are often the hidden consequences of our cultural norms and legal rules, such as deaths from secondhand smoke, third world poverty, and the psychological effects of inequality. Indeed, inequality is deeply felt and painful; it penetrates the psyches of individuals and groups and colors every action and interaction each day, from looking in the mirror to walking

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<sup>51</sup> See, e.g., Rhona MacDonald & Gavin Yamey, Op-Ed., *The Cost to Global Health of Drug Company Profits*, 174 W. J. MED. 302, 302–03 (2001) (noting that large pharmaceutical companies test drugs on the poor in third world countries and refuse to produce or market drugs when and where they are not profitable).

into a classroom.<sup>52</sup> Inequality constrains behavior, thought, and consciousness — it kills liberty.

This inattentiveness to inequality and other less salient harms highlights perhaps the greatest contradiction in the history of human societies: never before has a culture proclaimed — indeed, convinced itself of — its own realization of justice and opportunity for each human being while creating a world in which the poorest fifty percent of the population controls a mere one percent of the world's wealth.<sup>53</sup>

The reality is that there is not an easy solution, and nobody can recount the details that would characterize a more just society with the kind of specificity often desired by defenders of the status quo. But just as the laws and doctrine governing our current world were crafted organically over time to match the complexity of modern life, so too could a more just approach to the Fourteenth Amendment chart its course. The basic tenets of such an approach would be fairly simple.

The Fourteenth Amendment currently offers no protection to the 38,000 American citizens who die each year just by breathing our air. It should. The money in a corporate bank account is a constitutionally protected interest. If that money is threatened, the great forces of justice and courts and power and violence will come to its defense. Yet the Justices do not rush to the defense of the 400 million children who are chronically hungry.<sup>54</sup> What has happened to their lives and their liberty? Why not protect the poor in third world countries? Why not have an amendment that said to them: your limbs will not be wearied, your children will not be malnourished, your homes will not be pillaged, polluted, and destroyed, and your people will not be murdered so that I may enjoy a jewel. Why not say to our own workers: you have a right to a living wage because without that, forces beyond your control are depriving you of life and liberty. It is indeed a strange world in which a lifeless wealth aggregation can have more protection than millions of starving children. It was so when corporations received more justice than blacks who were lynched and women who could not vote. Still it is so. We must develop a set of constitutional doctrines that gives enforceable rights to these groups and to these communities — for they experience constitutional harms that we have

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<sup>52</sup> See, e.g., *Recent Case*, 120 HARV. L. REV. 651 (2006) (describing the psychological burden of makeup on women in a world of gender inequality); see also *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–95 (1954) (discussing schoolchildren and the stigma of racial inequality).

<sup>53</sup> James Davies et al., *The Global Distribution of Household Wealth*, WIDER ANGLE, Dec. 2006, at 4.

<sup>54</sup> See World Food Programme, *Into School, Out of Hunger*, [http://www.wfp.org/food\\_aid/school\\_feeding/index.asp?section=12&sub\\_section=3](http://www.wfp.org/food_aid/school_feeding/index.asp?section=12&sub_section=3) (last visited Oct. 6, 2007).

too long ignored at the hands of collective choices that we have too long refused to embrace as our own.<sup>55</sup>

One small child dies of starvation every five seconds.<sup>56</sup> That child is one of nearly ten million people who die every year because of hunger.<sup>57</sup> It would be hard for us to imagine watching a child die. In fact, if it were happening in front of us, most of us would do everything in our power to stop it. We must understand and confront the powerful psychological forces that allow us to put the face of this child out of our minds when we interpret constitutional language that purports to bind us to thinking seriously about life and liberty. Yet we live with this world, and we live with this Amendment. And we violate it every five seconds.

#### D. Freedom of Speech and Expression

1. *Campaign Finance Regulation.* — Corporations influence our electoral process through contributions to and expenditures on behalf of candidates.<sup>1</sup> For a century, Congress has struggled to constrain this influence,<sup>2</sup> lest individual constituents be sidelined in the democratic process in favor of corporations with deep pockets. The Supreme Court has pushed back, limiting congressional prohibitions in the interest of protecting corporate speech rights.<sup>3</sup> Five years ago, Con-

<sup>55</sup> This approach seems radical, complex, and infeasible. But we must remember the decades of work and the millions of people that labored in the evolution of our current approach, which only seems less complicated and more feasible because it has the air of familiarity.

<sup>56</sup> See World Food Programme, Facts & Figures, [http://www.wfp.org/aboutwfp/facts/hunger\\_facts.asp](http://www.wfp.org/aboutwfp/facts/hunger_facts.asp) (last visited Oct. 6, 2007).

<sup>57</sup> See *id.*

<sup>1</sup> See, e.g., Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 121 (2004) (“[R]epresentatives have been influenced by campaign contributions: money buys access and in some cases, may buy votes.”).

<sup>2</sup> In 1907, Congress passed the Tillman Act, prohibiting corporate contributions “in connection with any election to any political office.” Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864. The Act aimed to “prevent the subversion of the integrity of the electoral process” by corporations inclined to use their financial might for political purchase, and sought to “sustain the active, alert responsibility of the individual citizen . . .” *United States v. UAW*, 352 U.S. 567, 575 (1957). In the 1940s, Congress extended the prohibition to unions, see War Labor Disputes (Smith-Connally) Act, Pub. L. No. 78-89, § 9, 57 Stat. 163, 167–68 (1943), and altered its scope to encompass expenditures as well as outright contributions, see Labor Management Relations (Taft-Hartley) Act, 1947, Pub. L. No. 80-101, § 304, 61 Stat. 136, 159–60. In the 1970s, Congress passed the Federal Election Campaign Act (FECA), which created the Federal Election Commission (FEC), established disclosure rules, and set forth additional contribution limits. See Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of 2, 18, and 47 U.S.C.).

<sup>3</sup> See, e.g., *FEC v. Mass. Citizens for Life (MCFL), Inc.*, 479 U.S. 238 (1986); *Buckley v. Valeo*, 424 U.S. 1 (1976). The *MCFL* Court limited FECA’s reach to “express advocacy,” defined as ads containing express terms that are “pointed exhortations to vote for particular persons,” as opposed to “discussion of issues and candidates.” *MCFL*, 479 U.S. at 249. These terms, some-