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The Fortification of Inequality: Constitutional Doctrine and the Political Economy*

KATE ANDRIAS[†]

INTRODUCTION

Ours is an economy and a political system from which many ordinary Americans feel excluded; they feel forgotten by those in power, and they worry that their opportunities are declining.¹ Their perceptions are based in reality. Numerous studies demonstrate the outsized influence of economic elites, both individuals and corporations, at every level of the legislative and administrative process.² The organizations through which working-class Americans previously influenced politics have withered.³

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[†] Assistant Professor, University of Michigan Law School. For helpful feedback on this Essay, I am grateful to Sam Bagenstos, Justin Driver, Richard Primus, Margo Schlanger, and Laura Weinrib. Thanks also to Allison Hight and Marissa Perry for excellent research assistance, to Hannah Clendening and the other editors at the *Indiana Law Journal* for their engagement with this project, and to Dawn Johnsen for organizing the symposium. All errors are my own.

1. For a few recent news articles on point, see Nathaniel Persily & Jon Cohen, *Americans Are Losing Faith in Democracy—and in Each Other*, WASH. POST (Oct. 14, 2016), https://www.washingtonpost.com/opinions/americans-are-losing-faith-in-democracy--and-in-each-othr/2016/10/14/b35234ea-90c6-11e6-9c52-0b10449e33c4_story.html [https://perma.cc/8DL4-Z2T5]; Greg Sargent, *Why Did Trump Win? New Research by Democrats Offers a Worrisome Answer*, WASH. POST: PLUM LINE (May 1, 2017), <https://www.washingtonpost.com/blogs/plum-line/wp/2017/05/01/why-did-trump-win-new-research-by-democrats-offers-a-worrisome-answer> [https://perma.cc/HHL9-W367]; Sabrina Tavernise, *Many in Milwaukee Neighborhood Didn't Vote—and Don't Regret It*, N.Y. TIMES (Nov. 20, 2016), <https://www.nytimes.com/2016/11/21/us/many-in-milwaukee-neighborhood-didnt-vote-and-dont-regret-it.html> [https://perma.cc/HH7U-TP3M]. For a more in-depth account, see ARLIE RUSSELL HOCHSCHILD, *STRANGERS IN THEIR OWN LAND: ANGER AND MOURNING ON THE AMERICAN RIGHT* (2016).

2. *E.g.*, LEE DRUTMAN, *THE BUSINESS OF AMERICA IS LOBBYING: HOW CORPORATIONS BECAME POLITICIZED AND POLITICS BECAME MORE CORPORATE* (2015); MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* (2012); KAY LEHMAN SCHLOZMAN, SIDNEY VERBA & HENRY E. BRADY, *THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY* (2012); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 *PERSP. ON POL.* 564, 576–77 (2014); *see also* Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 *U. PA. J. CONST. L.* 419 (2015) (collecting and analyzing literature).

3. Both labor unions and civic organizations more generally represent a fraction of their previous memberships, while political parties no longer function with significant grassroots participation. *See* JAKE ROSENFELD, *WHAT UNIONS NO LONGER DO* 10–30 (2014); THEDA SKOCPOL, *DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE* 128–74 (2003); Kate Andrias, *Hollowed-Out Democracy*, 89 *N.Y.U. L. REV. ONLINE* 48 (2014).

Meanwhile, income inequality in the United States is at its highest level since the period leading up to the New Deal.⁴ The top 1% of earners in the United States takes home nearly a quarter of our national income.⁵ The problem is not just the gap between the top and the bottom but the lived experience of the vast majority of Americans. Workers' real wages have barely grown during recent decades, even as productivity has increased.⁶ Nearly one-third of workers earn less than \$12 an hour, often with unpredictable schedules and poor working conditions.⁷ At the same time, economic mobility has declined, with elite education accessible disproportionately to the wealthy.⁸ The situation is most dire for people of color, particularly African Americans,⁹ but white Americans, particularly white men, have also suffered mounting health problems and diminishing opportunities.¹⁰ And although economic indicators have improved since the Great Recession ended in 2009, over 95% of the growth in the U.S. economy over the subsequent three years inured to the benefit of the top 1% of the income distribution.¹¹

Donald Trump was elected President in part because of this constellation of problems in the political economy, problems that I will refer to, in shorthand, as “economic

4. See THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 24 (Arthur Goldhammer trans., 2014).

5. See, e.g., *id.* at 23–24; ESTELLE SOMMEILLER, MARK PRICE & ELLIS WAZETER, ECON. POLICY INST., *INCOME INEQUALITY IN THE U.S. BY STATE, METROPOLITAN AREA, AND COUNTY* 2, 7 (2016), <http://www.epi.org/files/pdf/107100.pdf> [<https://perma.cc/P3LQ-8ZCA>].

6. See LAWRENCE MISHSEL, ELISE GOULD & JOSH BIVENS, ECON. POLICY INST., *WAGE STAGNATION IN NINE CHARTS* (2015), <http://www.epi.org/files/2013/wage-stagnation-in-nine-charts.pdf> [<https://perma.cc/9KFW-3DGS>]; Claudia Goldin & Lawrence F. Katz, *Long-Run Changes in the Wage Structure: Narrowing, Widening, Polarizing*, BROOKINGS PAPERS ON ECON. ACTIVITY, no. 2, 2007, at 135, 135; Thomas Piketty, Emmanuel Saez & Gabriel Zucman, *Distributional National Accounts: Methods and Estimates for the United States* 2–4 (Nat'l Bureau of Econ. Research, Working Paper No. 22945, 2016), <http://gabriel-zucman.eu/files/PSZ2016.pdf> [<https://perma.cc/2HFT-8TBJ>].

7. Michelle Chen, *Trump's Budget Proposal Is an Attack on the Working Class*, NATION (Feb. 28, 2017), <https://www.thenation.com/article/trumps-budget-proposal-is-an-attack-on-the-working-class> [<https://perma.cc/C8QD-BQJE>].

8. See Raj Chetty, David Grusky, Maximilian Hell, Nathaniel Hendren, Robert Manduca & Jimmy Narang, *The Fading American Dream: Trends in Absolute Income Mobility Since 1940*, 356 SCIENCE 398 (2017).

9. See Neil Irwin, Claire Cain Miller & Margot Sanger-Katz, *America's Racial Divide, Charted*, N.Y. TIMES: THE UPSHOT (Aug. 19, 2014), <https://www.nytimes.com/2014/08/20/upshot/americas-racial-divide-charted.html> [<https://perma.cc/3GTB-JXXD>].

10. See Anne Case & Angus Deaton, *Rising Morbidity and Mortality in Midlife Among White Non-Hispanic Americans in the 21st Century*, 112 PROC. NAT'L ACAD. SCI. 15078 (2015); Thomas B. Edsall, Opinion, *The Increasing Significance of the Decline of Men*, N.Y. TIMES (Mar. 16, 2017), <https://www.nytimes.com/2017/03/16/opinion/the-increasing-significance-of-the-decline-of-men.html> [<https://perma.cc/K58B-4XQY>] (collecting research).

11. See EMMANUEL SAEZ, *STRIKING IT RICHER: THE EVOLUTION OF TOP INCOMES IN THE UNITED STATES* tbl.1 (2013), <https://eml.berkeley.edu/~saez/saez-USopincomes-2012.pdf> [<https://perma.cc/33S5-ZD7W>].

inequality.”¹² Though economic inequality was by no means the only cause of Trump’s victory over Hillary Clinton,¹³ the 2016 election, like others around the globe, reflected voters’—and *nonvoters*’—widespread dissatisfaction with political elites and the economy they oversee.¹⁴ Indeed, both Trump and Bernie Sanders spoke directly to voters’ economic anxiety, channeling it in opposite directions.¹⁵ Meanwhile, many nonvoters, particularly in communities of color, stayed home due to a sense of economic and political impotence.¹⁶ Still others were discouraged or prevented from participating in the election through a range of obstacles that disproportionately burden the poor.¹⁷

Unfortunately, every indication is that the problems in the political economy that shaped the 2016 election will only grow worse under Trump’s watch. The GOP majority in Congress, with Trump’s support, has sought to repeal much of the Affordable Care Act, reducing or eliminating access to health care for millions of Americans;¹⁸ to enact regressive tax reform;¹⁹ and to pursue legislation designed to

12. I use the term “economic inequality” to refer to what is actually a collection of problems—rising inequality of income and wealth, stagnating wages, high poverty rates, and low social mobility.

13. I do not mean to suggest that economic and political inequality were the only or even the primary reasons for Trump’s victory; a plausible case can be made for a wide variety of causes. See Eric Levitz, *New 2016 Autopsies: It Was the Obama-Trump Voters, in the Rust Belt, With the Economic Anxiety*, N.Y. MAG.: DAILY INTELLIGENCER (May 2, 2017, 5:26 PM), <http://nymag.com/daily/intelligencer/2017/05/it-was-obama-trump-voters-in-the-midwest-with-econ-anxiety.html> [https://perma.cc/S4SC-SRND]. Jamal Greene, writing for this symposium, offers another explanation, not inconsistent with the argument of this Essay. Jamal Greene, *Trump as a Constitutional Failure*, 93 IND. L.J. 93 (2018).

14. See Justin Gest, *The Two Kinds of Trump Voters*, POLITICO MAG. (Feb. 8, 2017), <http://www.politico.com/magazine/story/2017/02/trump-voters-white-working-class-214754> [https://perma.cc/RX8U-AMF7]; John R. MacArthur, Opinion, *Anger at Trade Deals Propelled Donald Trump to Victory*, STAR (Nov. 29, 2016), <https://www.thestar.com/opinion/commentary/2016/11/29/anger-at-trade-deals-propelled-donald-trump-to-victory.html> [https://perma.cc/8RL6-89LJ]; Sargent, *supra* note 1.

15. Stephen Collinson, *How Trump and Sanders Tapped America’s Economic Rage*, CNN (Mar. 9, 2016), <http://edition.cnn.com/2016/03/09/politics/sanders-trump-economy-trade> [https://perma.cc/PS9X-MYQX]. Of course, it is worth noting the irony that Trump, a billionaire with a track record of poor employment practices, positioned himself as the spokesperson for the American worker. See, e.g., Alexandra Berzon, *Donald Trump’s Business Plan Left a Trail of Unpaid Bills*, WALL ST. J. (June 9, 2016, 4:52 PM), <https://www.wsj.com/articles/donald-trumps-business-plan-left-a-trail-of-unpaid-bills-1465504454> [https://perma.cc/BQ37-ARK2].

16. See Sargent, *supra* note 1; Tavernise, *supra* note 1.

17. Mona Chalabi, *Who Are the Three-Quarters of Adult Americans Who Didn’t Vote for Trump?*, GUARDIAN (Jan. 18, 2017, 7:00 AM), <https://www.theguardian.com/us-news/2017/jan/18/american-non-voters-election-donald-trump> [https://perma.cc/66GK-HED7].

18. Robert Pear & Thomas Kaplan, *Senate Rejects Slimmed-Down Obamacare Repeal as McCain Votes No*, N.Y. TIMES (July 27, 2017), <https://www.nytimes.com/2017/07/27/us/politics/obamacare-partial-repeal-senate-republicans-revolt.html> [https://perma.cc/93AK-R265].

19. See H.R. 1, 115th Cong. (2017); A BETTER WAY, TAX (2016), https://abetterway.speaker.gov/_assets/pdf/ABetterWay-Tax-PolicyPaper.pdf [https://perma.cc/WK86-R62B].

weaken unions and employment law.²⁰ With few legislative victories to date, Trump has also engaged in a host of economically regressive executive actions. He has rescinded Obama-era executive orders protecting employees of federal contractors,²¹ supervised the Department of Education's decision to withdraw guidance aimed at reducing predatory student loans,²² ordered review of the Dodd-Frank Act and its consumer banking protections,²³ and proposed a budget that would devastate poor communities and gut social welfare programs.²⁴

But what does any of this have to do with the U.S. Constitution? In the first year of the Trump administration, the energy of constitutional litigators and scholars focused elsewhere.²⁵ And for good reason: Trump's xenophobic and discriminatory immigration orders, his interference with ongoing criminal investigations, and his schemes for personal profit offend our most basic and widely shared constitutional

For a critique, see Reuven S. Avi-Yonah & Kimberly A. Clausing, *Problems with Destination-Based Corporate Taxes and the Ryan Blueprint* (Univ. of Mich. Law & Econ. Research Paper Series, Paper No. 16-029, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2884903 [<https://perma.cc/RDJ4-VWEF>].

20. See H.R.J. Res. 37, 115th Cong. (2017) (enacted) (disapproving the Federal Acquisition Regulatory (FAR) Council regulations implementing the Obama Fair Pay and Safe Workplaces Executive Order); Sean Higgins, *National Right-to-Work Bill Introduced in Congress*, WASH. EXAMINER (Feb. 1, 2017, 2:53 PM), <http://www.washingtonexaminer.com/national-right-to-work-bill-introduced-in-congress/article/2613631> [<https://perma.cc/SBE4-DDBK>]; Charlie May, *Republicans Are Close to Killing Overtime Rules, Allowing "Employers to Cheat Workers" of Pay*, SALON (May 3, 2017, 1:10 PM), <http://www.salon.com/2017/05/03/republicans-are-close-to-killing-overtime-rules-allowing-employers-to-cheat-workers-of-pay> [<https://perma.cc/ZBL4-BS5S?type=image>]; Jena McGregor, *House Republicans Just Voted to Change Overtime Rules for Workers*, WASH. POST (May 2, 2017), <https://www.washingtonpost.com/news/on-leadership/wp/2017/05/02/house-republicans-just-voted-to-change-overtime-rules-for-workers> [<https://perma.cc/L7P2-VC2R>].

21. Exec. Order No. 13,782, 82 Fed. Reg. 15,607 (Mar. 30, 2017).

22. Danielle Douglas-Gabriel, *Trump Administration Rolls Back Protections for People in Default on Student Loans*, WASH. POST (Mar. 17, 2017), <https://www.washingtonpost.com/news/grade-point/wp/2017/03/17/trump-administration-rolls-back-protections-for-people-in-default-on-student-loans> [<https://perma.cc/X56T-LQTE>]; see Susan Dynarski, *The Wrong Way To Fix Student Debt*, N.Y. TIMES: THE UPSHOT (May 6, 2017), <https://www.nytimes.com/2017/05/06/upshot/the-wrong-way-to-fix-student-loans.html> [<https://perma.cc/3FBD-7GBA>].

23. Exec. Order No. 13,772, 82 Fed. Reg. 9965 (Feb. 8, 2017).

24. E.g., Julie Hirschfeld Davis, *Trump's Budget Cuts Deeply into Medicaid and Anti-Poverty Efforts*, N.Y. TIMES (May 22, 2017), <https://www.nytimes.com/2017/05/22/us/politics/trump-budget-cuts.html> [<https://perma.cc/42GC-BFX5>].

25. See, e.g., *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017) (granting petitions for certiorari and granting, in part, applications to stay lower court preliminary injunctions against President Trump's Executive Order banning immigrants from entry); *Blumenthal v. Trump*, No. 1:17-cv-01154-EGS (D.D.C. filed June 14, 2017) (alleging violations of the Constitution's Emoluments Clause); *Citizens for Responsibility & Ethics in Wash. v. Trump*, No. 1:17-cv-00458-GBD (S.D.N.Y. filed Jan. 23, 2017) (same).

principles.²⁶ By contrast, the efforts of the Trump administration and GOP majority to redistribute wealth upwards—including by repealing health benefits, urging corporate tax reform, and rolling back regulations that protect workers, students, and consumers—are generally considered policy choices, not constitutional problems.

Of late, however, a growing body of legal scholarship has turned attention to the constitutional dimensions of economic inequality. Several recent books and articles have argued that growing economic inequality and related political inequality have significant deleterious effects on constitutional governance.²⁷ Other scholarship has sought to revitalize arguments for treating laws that burden the poor with heightened scrutiny.²⁸ This Essay will add to the growing literature by exploring how judge-made constitutional doctrine has permitted and exacerbated the economic inequality that contributed to Trump's rise in two areas: labor and education.

Labor and education are by no means the only areas in which the Supreme Court has fortified inequality. Over the last decades, the Court has issued regressive decisions in a range of areas including campaign finance, voting rights, regulatory takings, commercial speech regulation, access to justice, welfare law, abortion, and many others.²⁹ But because labor and education are at the core of current debates about economic inequality, they provide a useful vantage point for examining the role of courts, and particularly the Supreme Court, in constructing today's political economy.

26. See James Hohmann, *The Daily 202: Trump Shows Disdain for Rule of Law with New Attacks on Sessions, Rosenstein, Mueller*, WASH. POST (July 20, 2017), <https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2017/07/20/daily-202-trump-shows-disdain-for-rule-of-law-with-new-attacks-on-sessions-rosenstein-mueller/596ffb2430fb0436795431bd> [https://perma.cc/6R97-ETA3]; Elizabeth B. Wydra, *Opinion, Defend the Constitution Against Trump*, U.S. NEWS (Sept. 20, 2017, 1:30 PM), <https://www.usnews.com/opinion/op-ed/articles/2017-09-20/this-constitution-week-defend-our-founding-charter-against-donald-trump> [https://perma.cc/L7NA-U6KM]; see also *supra* note 25.

27. See, e.g., GANESH SITARAMAN, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC* (2017); Andrias, *supra* note 2; Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669 (2014); Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445 (2016); Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution* (unpublished manuscript on file with the Indiana Law Journal).

28. See, e.g., Bertrall L. Ross II & Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. 323 (2016); Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527 (2015). For the classic argument in favor of heightened protection of the poor, see Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

29. See Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 160 n.72, 191 nn.247–50 (1998) (collecting cases from Berger and Rehnquist courts); Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. TIMES (May 4, 2013), <http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html> [https://perma.cc/LW4P-PYAL] (summarizing literature on pro-corporate decisions of the Roberts Court).

As Parts I and II of this Essay elaborate, the examination yields three observations of relevance to constitutional law more generally: First, judge-made constitutional doctrine, though by no means the primary cause of rising inequality, has played an important role in reinforcing and exacerbating it. Judges have acquiesced to legislatively structured economic inequality, while also restricting the ability of legislatures to remedy it. Second, while economic inequality has become a cause célèbre only in the last few years, much of the constitutional doctrine that has contributed to its flourishing is longstanding. Moreover, for several decades, even the Court's more liberal members have offered only tepid opposition to economically regressive constitutional interpretations, sometimes helping shape them. Third, while much constitutional law relating to the distribution of economic and political power and the non-existence of social welfare rights now seems indisputable, sometimes even quintessentially American, regressive holdings were, in fact, hotly contested and deeply divided. Indeed, the losing side had equally strong, if not stronger, doctrinal arguments.

As discussed in Part III, these descriptive observations, in turn, form the basis for three claims about the future of constitutional law. First, judges matter. Progressives ought not lose sight of the importance of judicial appointments. Although strong arguments counsel against turning to courts as primary agents for social and economic change, courts are critical in constructing the political economy. Second, for those who object to economic inequality, mere resistance to the Trump agenda and efforts to return to the constitutional status quo ante are not enough. In particular, the liberal embrace of judicial minimalism has contributed to the judicial fortification of economic inequality; a fundamental shift is needed. Third, such change is plausible, not utopian. Doctrine that now often seems natural is by no means fixed. Particularly if Americans begin to challenge inequality in the political and social realm, constitutional change in the courts will become not only imperative but also achievable.

I. LABOR

The rise of economic inequality in the United States has numerous causes, but the decline of unions is chief among them. Between 1973 and today, union membership rates fell from about a third of the private sector workforce to about 6% of that workforce.³⁰ Scholars estimate that up to one-third of the increase in income inequality across recent decades is attributable to this decline.³¹ The decline in union strength is also a critical factor in explaining the rise in political inequality.³² Without the benefit of organization, workers have declining influence not only in their workplaces, but also in policy making at the state and federal levels.³³

30. See, e.g., Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 513–514 (2011).

31. See *id.* at 514 (“[D]eunionization explains a fifth of the inequality increase for women and a third for men.”).

32. See, e.g., JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 142 (2010); SCHLOZMAN ET AL., *supra* note 2, at 325–26 (2012).

33. See LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 2, 344 (2nd ed. 2016); GILENS, *supra* note 2, at 79–81, 157–58; HACKER &

The link between law and union decline has long been a subject of scholarly interest. The National Labor Relations Act (NLRA) purports to protect the ability of private sector employees to organize unions, bargain collectively, and engage in concerted action.³⁴ Yet, as many legal scholars have detailed, the statute is largely ineffective in fulfilling its promise.³⁵ Numerous reform proposals have been offered.³⁶

But the statute is not the only problem; constitutional doctrine has reinforced and exacerbated the decline in workers' collective power.³⁷ Consider, for example, the willingness of the Court to permit governmental discrimination against striking workers. Workers' ability to strike—to exercise collective power in support of their economic demands—derives in large part from their ability to sustain themselves without a wage. Yet the Supreme Court in *Lyng v. UAW*³⁸ ruled that Congress could permissibly deny food stamps to strikers because they are strikers, even though it provides the benefits to workers who are impoverished or unemployed for other reasons.³⁹

For more than twenty-five years, this holding has been a fact of labor law, subject to little discussion or debate; states discriminate against strikers with regard to the provision of other benefits as well, and the law is one of many reasons why workers have difficulty sustaining a strike.⁴⁰

Yet the now-orthodox doctrine was far from so when issued. When the Court decided *Lyng*, it did so only by overruling a lower-court opinion that relied on well-

PIERSON, *supra* note 32, at 28–29, 56–61, 127–32; ROSENFELD, *supra* note 3, at 170–81; SCHLOZMAN ET AL., *supra* note 2, at 69–95; Thomas Byrne Edsall, *The Changing Shape of Power: A Realignment in Public Policy*, in *THE RISE AND FALL OF THE NEW DEAL ORDER, 1930–1980*, at 269, 269 (Steve Fraser & Gary Gerstle eds., 1989); Monica Davey, *With Fewer Members, a Diminished Political Role for Wisconsin Unions*, N.Y. TIMES (Feb. 27, 2016), <http://www.nytimes.com/2016/02/28/us/with-fewer-members-a-diminished-political-role-for-wisconsin-unions.html> [<https://perma.cc/YG5G-W8EX>].

34. National Labor Relations Act §§ 1, 7, 29 U.S.C. §§ 151, 157 (2012).

35. See Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 13–36, 40–45 (2016) (collecting literature describing failures of NLRA).

36. *Id.* at 40–45.

37. For examination of how the Supreme Court has narrowly interpreted the NLRA more generally, see JULIUS G. GETMAN, *THE SUPREME COURT ON UNIONS: WHY LABOR LAW IS FAILING AMERICAN WORKERS* (2016); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 265 (1978). For a short essay on how the Court has used constitutional doctrine to constrain labor, see Mark Barenberg, *Constitutional Constraints on Redistribution Through Class Power*, 5 COLUM. J. EUR. L. 313 (1999).

38. 485 U.S. 360 (1988).

39. *Id.* at 362 (upholding 1981 amendment to the Food Stamp Act which provided that “no household shall become eligible to participate in the food stamp program during the time that any member of the household is on strike or shall increase the allotment of food stamps that it was receiving already because the income of the striking member has decreased”).

40. There are numerous other obstacles to successful strikes in the contemporary economy, including the permissibility of permanent replacements; like the doctrine discussed above, this rule was doctrinally created and is not prescribed by the statute. See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938) (opining, in dicta, that an employer could permanently replace employees during an economic strike).

established precedent.⁴¹ Justice Marshall, joined by Justices Brennan and Blackmun, dissented, explaining that the majority's approach contradicted the animus line of equal protection cases.⁴² The Food Stamp Amendment's purpose, Marshall wrote, was to serve as a weapon against unions in labor disputes, a purpose "admittedly irreconcilable with the legitimate goals of the food stamp program. No other purpose can adequately explain the especially harsh treatment reserved for strikers and their families by the 1981 enactment."⁴³ Accordingly, the amendment should have failed even rational basis review.⁴⁴ Had Marshall persuaded one more of his colleagues, the case would have come out the other way (only eight justices heard the case).

That said, even Marshall's compelling dissent offered a relatively weak defense of workers' right to exercise their collective power to obtain a greater share of economic resources. What rendered the law unconstitutional, in Marshall's view, was that Congress was seeking to harm a particular social group, not that Congress was burdening the right of workers to strike.⁴⁵ In contrast, District Judge Oberdorfer's opinion in the lower court, drawing on earlier precedent, contained seeds for a more robust constitutional protection of union rights. Judge Oberdorfer pointed not only to congressional animus to a particular group, but also to the workers' constitutional rights to "express themselves about union matters free of coercion by the government."⁴⁶ Justice Marshall might also have reasoned, as have other judges and justices, that the right to strike is central to liberty, protected by both the Due Process Clause and the Thirteenth Amendment.⁴⁷

The Supreme Court's jurisprudence on labor picketing and secondary boycotts reveals a similar dynamic. Since the late 1940s, the Court has upheld many antipicketing laws that undermine the redistributive power of unions, producing doctrine that now seems uncontested.⁴⁸ But the decisions, when issued, were by no means foreordained, or even well supported, by then-existing precedent. For example, in *International Brotherhood of Teamsters, Local 695 v. Vogt, Inc.*⁴⁹ the Court upheld the state injunction of a peaceful picket of a gravel pit, where the picket signs simply read, "The men on this job are not 100% affiliated with the A.F.L."⁵⁰ The Court reasoned "that picketing, even though 'peaceful,' involved more than just communication of ideas" and the state was therefore entitled to great leeway in restricting

41. *UAW v. Lyng*, 648 F. Supp. 1234, 1239 (D.D.C. 1986), *rev'd*, 485 U.S. 360 (1988).

42. *Lyng*, 485 U.S. at 384–85 (Marshall, J., dissenting).

43. *Id.* at 385.

44. *Id.*

45. *Id.* at 381–82.

46. *Lyng*, 648 F. Supp. at 1239.

47. See *Pollock v. Williams*, 322 U.S. 4 (1944) (setting forth an extensive justification for protecting the inalienable right to quit work under the Thirteenth Amendment); *Cty. Sanitation Dist. No. 2 v. L.A. Cty. Emps.' Ass'n*, 699 P.2d 835, 856 (Cal. 1985) (Bird, C.J., concurring) ("[T]he individual's freedom to withhold personal service is basic to the constitutional concept of 'liberty.'"); James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude,"* 119 *YALE L.J.* 1474 (2010).

48. For a discussion of this trajectory, see James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 *MICH. L. REV.* 518 (2004).

49. 354 U.S. 284 (1957).

50. *Id.* at 285.

it.⁵¹ Three of eight justices objected, pointing out that the Court was stepping away from its prior precedent and allowing a return to the Gilded Era law such that “legislatures are free to decide whether to permit or suppress any particular picket line for any reason other than a blanket policy against all picketing.”⁵²

Beginning in the 1950s, the Court also upheld federal restrictions on secondary boycotts, adopted as part of the 1947 Taft Hartley Act.⁵³ The statutory provisions and the Court’s related doctrine are complicated, to say the least.⁵⁴ For purposes of this discussion, what is important is that the Supreme Court has held that Congress can constitutionally prohibit workers from picketing a business other than their own employer, like a supplier or distributor of the employer’s products, with the aim of pressuring the non-employer business to help the workers’ cause. As the Court wrote in *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*,⁵⁵ although a complete ban against peaceful labor picketing may not be permissible, secondary picketing can be banned because “[s]uch picketing spreads labor discord by coercing a neutral party to join the fray.”⁵⁶

The Court thus allowed states and Congress to extinguish a form of associational and expressive activity that had been extremely effective in helping workers organize on a class-wide basis to achieve substantial wage increases.⁵⁷ In fact, the consequences for unions’ redistributive power are perhaps even more significant today than when the statute was first enacted. Because the U.S. labor market has become increasingly fissured, replete with subcontracting, the prohibition on secondary activity makes it difficult for workers to effect economic pressure on the corporate entity that actually wields power over their jobs.⁵⁸

Though liberal justices dissented from several of the secondary boycott and picketing decisions,⁵⁹ they also played an unfortunate role in bolstering the doctrine. Justice Stevens and Blackmun concurred in *Safeco*, for example,⁶⁰ and in *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Treefruits)*,⁶¹ Justice

51. *Vogt*, 354 U.S. at 289, 294; cf. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (holding state regulation of non-labor picketing is subject to strict constitutional scrutiny).

52. *Vogt*, 354 U.S. at 297 (Douglas, J., dissenting).

53. The Court first upheld the prohibition on secondary boycotts in *International Brotherhood of Electrical Workers v. NLRB*, 341 U.S. 694 (1951). At issue was the constitutionality of NLRA section 8(b)(4)(A), the predecessor of the current section 8(b)(4)(i)(B), enacted in 1959. *Id.*

54. For further explanation and critique, see GETMAN, *supra* note 37, at 90–100; Catherine Fisk & Jessica Rutter, *Labor Protest Under the New First Amendment*, 36 BERKELEY J. EMP. & LAB. L. 277 (2015); Julius Getman, *The National Labor Relations Act: What Went Wrong; Can We Fix It?*, 45 B.C. L. REV. 125 (2003); Katherine V.W. Stone, *Employee Representation in the Boundaryless Workplace*, 77 CHI. KENT L. REV. 773, 798–99 (2002).

55. 447 U.S. 607 (1980).

56. *Id.* at 616.

57. See NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 118 (2002).

58. See Andrias, *supra* note 35, at 23–24, 32, 82.

59. See, e.g., *Safeco*, 447 U.S. at 619 (Brennan, J., dissenting).

60. *Id.* at 616 (Blackmun, J., concurring); *id.* at 618 (Stevens, J., concurring).

61. 377 U.S. 58 (1964).

Brennan, writing for the majority, declined to find the statute unconstitutional.⁶² Instead, he engaged in herculean efforts at constitutional avoidance, narrowing the statute such that it no longer forbids consumer-focused picketing.⁶³ The result, however, was a doctrine in tension with basic tenets of the Court's First Amendment doctrine more generally.⁶⁴ As Justice Black countered:

In short, we have neither a case in which picketing is banned because the picketers are asking others to do something unlawful nor a case in which *all* picketing is, for reasons of public order, banned. Instead, we have a case in which picketing, otherwise lawful, is banned only when the picketers express particular views. The result is an abridgement of the freedom of these picketers to tell a part of the public their side of a labor controversy, a subject the free discussion of which is protected by the First Amendment.⁶⁵

Indeed, earlier precedent provided grounds for striking down the secondary boycott provisions not only because of First Amendment principles in general but also because of the importance of worker association to the freedom of speech in particular. In 1946, Justice Murphy wrote the majority opinion in *Thornhill v. Alabama*,⁶⁶ striking down a state law that criminalized labor picketing.⁶⁷ Murphy emphasized that labor speech in particular must be protected by the Constitution.⁶⁸ He put it this way: “[L]abor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.”⁶⁹ Similarly, in *Hague v. CIO*,⁷⁰ the Court reasoned that the

freedom to disseminate information concerning the provisions of the National Labor Relations Act, to assemble peaceably for discussion of

62. *Id.*

63. *Id.* at 76; *see also* Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) (holding that union's peaceful distribution of handbills at shopping mall's entrances, absent any picketing, did not violate statute).

64. For analysis of the inconsistency between the labor and nonlabor picketing cases, *see* Fisk & Rutter, *supra* note 54, at 300–15; *cf.* Laura Weinrib, *The Right To Work and the Right To Strike*, U. CHI. LEGAL FORUM (Univ. of Chi. Law. Sch., Public Law & Legal Theory Working Paper No. 67, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3028965 [<https://perma.cc/GR4F-VTY5>] (arguing that although the Court's First Amendment analysis of labor picketing is anomalous, the Court understood the treatment of union speech as even-handed in light of its jurisprudence allowing agency fees from union-objectors).

65. *Id.* at 79 (Black, J., concurring) (emphasis in original).

66. 310 U.S. 88 (1940).

67. *Id.* at 102 (“[T]he dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.”).

68. *Id.* at 103.

69. *Id.*

70. 307 U.S. 496 (1939).

the Act, and of the opportunities and advantages offered by it, is a privilege or immunity of a citizen of the United States secured against state abridgement by Section 1 of the Fourteenth Amendment.⁷¹

The point here is not that restrictions on labor speech were an accident of history—of course they were not. Developments in American politics and law over the course of the twentieth century render the Court’s retreat from *Thornhill* and *Hague* unsurprising.⁷² The point is simply that viable alternative doctrinal paths existed.

* * *

In recent months, right-wing state legislators have introduced a host of legislation seeking to impose even greater limitations on protest and labor picketing in particular.⁷³ While the media has depicted these laws as part of the Trump phenomenon, the above discussion suggests the extent to which they represent a continuation rather than a rupture with the past. The Court’s longstanding secondary boycott doctrine, together with the Court’s other case law on labor picketing, sanctions significant limitations on the right to demonstrate and facilitates a dramatic weakening of labor’s bargaining power. At the same time, this doctrine was by no means foreordained by precedent. It was the product of close votes, with compelling arguments pointing the other way.

Other examples of the Court reinforcing inegalitarian distributions of power exist throughout constitutional labor cases, including in the area of organizing rights, where the Court has protected employer rights to campaign against unionization but permitted significant restrictions on the speech rights of union organizers;⁷⁴ and in the area of public sector unionism, where the Court has found no constitutional right to bargain or strike, permitting states to restrict and even ban collective bargaining among public employees.⁷⁵

71. *Id.* at 512 (footnote omitted); see RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 32 (2007).

72. See Weinrib, *supra* note 64.

73. Christopher Ingraham, *Republican Lawmakers Introduce Bills To Curb Protesting in at Least 18 States*, WASH. POST (Feb. 24, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/02/24/republican-lawmakers-introduce-bills-to-curb-protesting-in-at-least-17-states> [https://perma.cc/Q5FV-98P5].

74. See Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495 (1993); Cynthia L. Estlund, *Labor, Property, and Sovereignty After Lechmere*, 46 STAN. L. REV. 305, 349–53 (1994).

75. See, e.g., *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 465 (1979) (per curiam) (“The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.”) (citation omitted); *United Fed’n of Postal Clerks v. Blount*, 325 F. Supp. 879 (D.D.C.) (upholding ban on postal strikes), *aff’d*, 404 U.S. 802 (1971). *But see* *Chas. Wolff Packing Co. v. Court of Indus. Relations of the State of Kan.*, 262 U.S. 522, 540–44 (1923) (overturning key provisions of a broad state anti-strike law); *Cty. Sanitation Dist. No. 2 v. L.A. Cty. Emps.’ Ass’n*, 699 P.2d 835, 854 (Cal. 1985) (Bird, C.J., concurring) (protecting, as a matter of state constitutional

The Court has not only refused to intervene when legislators restrict workers' right to engage in concerted action. Critically, the Court has also invoked the Constitution to disable state and local governments from protecting union rights. For example, at the same time as the Court has found that state laws restricting picketing and other union expression are not preempted, the Court, under the ambit of the Supremacy Clause, has held preempted nearly all state laws that have the effect of protecting workers' right to organize.⁷⁶ Indeed, despite having crafted a market-participant exception to preemption doctrine, the Court has even rejected state efforts to ensure their own spending neutrality on contested labor matters.⁷⁷ Thus, the Court recently struck down a California statute prohibiting grant recipients and private employers receiving substantial state program funds from using such funds "to assist, promote, or deter union organizing."⁷⁸ Notably, the opinion disabling the state law was written by Justice Stevens and joined by Justice Souter as well as the conservative Justices. Only Justices Breyer and Ginsburg dissented.

The Court now appears poised to go further in disabling unions. Most observers expect that within the next year, the Court will constitutionalize a "right-to-work" regime—that is, it will strike down state and local laws that allow public sector employers and their unions to negotiate "fair-share agreements."⁷⁹ These agreements avoid a free-rider problem by requiring all employees covered by a union contract to contribute to the cost of union representation, though not to the cost of political activity; they have been permitted for decades.⁸⁰ Over the last few years, however, the five-justice conservative majority has begun moving to render such agreements unconstitutional. Most recently, in *Harris v. Quinn*,⁸¹ Justice Alito critiqued *Abood v. Detroit Board of Education*,⁸² the long-standing precedent that allows fair-share agreements; he stopped short of reversing it, holding only that such agreements violated the First Amendment when applied to quasi-public sector homecare workers.⁸³ In 2016, in *Friedrichs v. California Teachers Ass'n*,⁸⁴ the Court was expected to extend *Harris*, holding that the Constitution prohibits fair-share agreements of any sort

law, right of public sector workers to strike).

76. See Benjamin I. Sachs, *Despite Preemption: Making Labor Law in Cities and States*, 124 HARV. L. REV. 1153, 1165–68 (2011) (discussing the history and breadth of labor preemption doctrine).

77. *Id.* at 1168, 1213 n.301.

78. *Chamber of Commerce v. Brown*, 554 U.S. 60, 62 (2008) (quoting CAL GOV'T CODE ANN. § 16645–16649 (West. Supp. 2008)).

79. See, e.g., Adam Liptak, *Supreme Court Will Hear Case on Mandatory Fees to Unions*, N.Y. TIMES (Sept. 28, 2017), <https://www.nytimes.com/2017/09/28/us/politics/supreme-court-will-hear-case-on-mandatory-fees-to-unions.html> [<https://perma.cc/WNH4-D24B>].

80. See *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (upholding constitutionality of fair-share agreements in public sector and discussing history and purpose of such agreements); *Janus v. Am. Fed'n of State, Cty. & Mun. Emps.*, Council 31, 851 F.3d 746 (7th Cir. 2017), *petition for cert. granted* (Sept. 28, 2017) (No. 16-1466) (presenting question whether *Abood* should be overruled).

81. 134 S. Ct. 2618 (2014).

82. 431 U.S. 209 (1977).

83. *Harris*, 134 S. Ct. at 2632–44; see also *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277 (2012) (questioning *Abood*).

84. 136 S. Ct. 1083 (2016) (per curiam).

in the public sector.⁸⁵ With Justice Scalia’s death, the Court split 4-4, deciding the case without opinion, affirming the opinion below, and thus letting stand existing doctrine.⁸⁶ Now, however, Justice Gorsuch is widely expected to provide the fifth vote for prohibiting fair-share agreements.⁸⁷

If, as anticipated, the Court imposes, as a matter of constitutional law, a “right-to-work” or “open-shop” regime on all public-sector worksites across the country, irrespective of state and local government preferences, the result will likely be sharply declining resources and diminishing power for an already weakened labor movement. As Justice Kagan pointed out in her dissent in *Harris*, this result is far from compelled; the conservative majority on the Court is reaching for it.⁸⁸ Contrary to principles of *stare decisis*, constitutionalizing a ban on fair-share agreements would reverse long-standing precedent on which governments and unions have relied.⁸⁹ Moreover, as Kagan wrote, constitutionalizing a ban on fair-share agreements would run contrary to other areas of doctrine, setting up the possibility of a “serious anomaly” in the area of public employee speech—“a different legal standard . . . applying exclusively to union fees.”⁹⁰ That is, if the Court’s opinion is taken to its logical conclusion, the expressive interests of workers objecting to payment of union fees would be given greater weight than the expressive interests of public employees in all other contexts; conversely, the managerial rights of the state when acting as employer would be given less weight in this context than in any other.⁹¹

Kagan’s dissent thus expertly points out the extent to which the Court is actively working to disable unions. At the same time, Kagan’s dissent might be critiqued for what it lacks: a robust defense of unions and workers’ collective rights. Invoking *Abood*, Kagan’s dissent rests the government’s interest in fair-share agreements on the need to promote industrial peace and protect managerial prerogative.⁹² Missing from this account is Justice Murphy’s embrace of the role that unions play in advancing public debate or protecting workers’ liberties—or other judicial articulation of the constitutional rights of workers.⁹³

85. See, e.g., Adam Liptak, *Supreme Court Seems Poised To Deal Unions a Major Setback*, N.Y. TIMES (Jan. 11, 2016), <https://www.nytimes.com/2016/01/12/us/politics/at-supreme-court-public-unions-face-possible-major-setback.html> [<https://perma.cc/FK5R-P7HX>].

86. *Friedrichs*, 136 S. Ct. 1083.

87. See Sean Higgins, *Gorsuch Will Tip Supreme Court on Key Labor Issue, Liberals Fear*, WASH. EXAMINER (Apr. 17, 2017, 12:01 AM), <http://www.washingtonexaminer.com/gorsuch-will-tip-supreme-court-on-key-labor-issue-liberals-fear/article/2620340> [<https://perma.cc/BMN3-54MF>]. The Supreme Court will consider the issue in *Janus v. Am. Fed’n of State, Cty. & Mun. Emps., Council 31*, 851 F.3d 746 (7th Cir. 2017), *cert. granted*, 2017 WL 2483128 (U.S. Sept. 28, 2017) (No. 16-1466).

88. *Harris*, 134 S. Ct. at 2645–51 (Kagan, J., dissenting).

89. *Id.* at 2651–53.

90. *Id.* at 2653.

91. *Id.* at 2645–53.

92. *Id.* at 2654–58.

93. See *supra* notes 46–47, 67–70 and accompanying text; cf. *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 800, 812–13 (1961) (Frankfurter, J., dissenting) (“[W]hat is loosely called political activity of American trade unions . . . [is] activity indissolubly relating to the immediate economic and social concerns that are the *raison d’être* of unions.”) (italics in

II. EDUCATION

While education as a field is almost entirely distinct from labor, courts have played a similar role in fortifying inequality here. The American education system today is characterized by an extraordinary degree of inequity on the basis of wealth.⁹⁴ In recent years, the achievement gap between more and less affluent children has grown wider, as has the gap in resources allocated.⁹⁵ One component of the problem is the absence of affordable, quality preschool and daycare.⁹⁶ Another is the great disparity in educational resources in elementary and secondary public schooling, where a system of funding by local property taxes results in schools in poor neighborhoods receiving a fraction of what schools in affluent neighborhoods receive.⁹⁷ Considerable interstate variation exists as well.⁹⁸ Meanwhile, American higher education is increasingly populated by elites. At many of the best-ranked colleges in America, more students come from the top 1% of the income scale than from the entire bottom 60%.⁹⁹ Less than 0.5% of children from the bottom fifth of American

original).

94. See, e.g., BRUCE BRADBURY, MILES CORAK, JANE WALDFOGEL & ELIZABETH WASHBROOK, *TOO MANY CHILDREN LEFT BEHIND: THE U.S. ACHIEVEMENT GAP IN COMPARATIVE PERSPECTIVE* 64–66 (2015).

95. Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor*, COMMUNITY INV., Summer 2012, at 19, 19, http://www.frbsf.org/community-development/files/CI_Summer2012_Reardon.pdf [<https://perma.cc/S6NW-UPEX>] (“The achievement gap between children from high- and low-income families is roughly 40 percent larger among children born in 2001 than among those born twenty-five years earlier.”).

96. See ROBERT D. PUTNAM, *OUR KIDS: THE AMERICAN DREAM IN CRISIS* 248–51 (2015).

97. In Pennsylvania, for example, per-student public expenditures in low poverty districts are nearly 50 percent higher than in high-poverty districts; in Illinois, affluent Chicago suburban districts have three times more to spend per pupil than poor urban districts. See Cory Turner, Reema Khrais, Tim Lloyd, Alexandra Olgin, Laura Isensee, Becky Vevea & Dan Carsen, *Why America’s Schools Have a Money Problem*, NPR: SCHOOL MONEY (Apr. 18, 2016, 5:00 AM ET), <http://www.npr.org/2016/04/18/474256366/why-americas-schools-have-a-money-problem> [<https://perma.cc/MB79-UBVX>]; see also EDUC. WEEK RESEARCH CTR., *SCHOOL FINANCE* (2016), <http://www.edweek.org/media/school-finance-education-week-quality-counts-2016.pdf> [<https://perma.cc/PY3C-8N9N>]; Alana Semuels, *Good School, Rich School; Bad School, Poor School*, ATLANTIC (Aug. 25, 2016), <https://www.theatlantic.com/business/archive/2016/08/property-taxes-and-unequal-schools/497333> [<https://perma.cc/S8WN-U8PC>]. These figures do not reflect the extent to which wealthy districts raise additional money through private donations.

98. On average, New York, Alaska, and Wyoming each spent more than \$17,000 per student in 2013, while California, Oklahoma, and Nevada spent roughly half that. See Turner et al., *supra* note 97.

99. Gregor Aisch, Larry Buchanan, Amanda Cox & Kevin Quealy, *Some Colleges Have More Students from the Top 1 Percent than the Bottom 60. Find Yours.*, N.Y. TIMES: THE UPSHOT (Jan. 18, 2017), <https://www.nytimes.com/interactive/2017/01/18/upshot/some-colleges-have-more-students-from-the-top-1-percent-than-the-bottom-60.html> [<https://perma.cc/37Z8-7L46>]; see also Raj Chetty, John N. Friedman, Emmanuel Saez, Nicholas Turner & Danny Yagan, *Mobility Report Cards: The Role of Colleges in Intergenerational Mobility* 1 (Nat’l Bureau of Econ. Research, Working Paper No. 23618, 2017), http://www.equality-of-opportunity.org/papers/coll_mrc_paper.pdf [<https://perma.cc/F3J5-A9UU>].

families attend an elite college, while less than half attend any college at all.¹⁰⁰ Those low-income students who do make it to college are saddled by increasing amounts of debt.¹⁰¹

Some scholars argue that inequality in education is a primary driver of economic inequality.¹⁰² Others believe the inverse: that rising economic inequality has fueled educational inequality.¹⁰³ But whichever way the causal arrow runs, educational inequality results in diminished social mobility and limited opportunity for Americans at the bottom, and increasingly for those in the shrinking middle as well.¹⁰⁴

As with labor, constitutional doctrine has reinforced and exacerbated inequality in education. Most famously, in *San Antonio Independent School District v. Rodriguez*,¹⁰⁵ the Court rejected a constitutional challenge by poor students in Texas to a school-funding scheme that resulted in significant disparities between schools in poor and wealthy neighborhoods.¹⁰⁶ Writing for the majority, Justice Powell reasoned that the statute did not expressly categorize on the basis of wealth, nor, in his view, did the property-tax regime effectively discriminate against a definable group.¹⁰⁷ After all, Powell explained, some poor students lived in property-rich school districts.¹⁰⁸ And although Justice Powell left open the possibility that a hypothetical state's complete denial of a basic, minimal education might violate the Constitution, he rejected the argument that the Constitution provided a fundamental

100. Aisch et al., *supra* note 99.

101. Tens of millions of Americans together owe more than a trillion dollars in student debt. Dynarski, *supra* note 22.

102. E.g., CLAUDIA GOLDIN & LAWRENCE F. KATZ, *THE RACE BETWEEN EDUCATION AND TECHNOLOGY* 3–6 (2008); Daniel Markovits, Professor, Yale Law Sch., Yale Law School Commencement Address, May 2015: A New Aristocracy (May 18, 2015) (transcript available at <https://law.yale.edu/system/files/area/departments/studentaffairs/document/markovitscommencementrev.pdf> [<https://perma.cc/W783-L95L>]).

103. See PUTNAM, *supra* note 96, at 230–34; Jonathan Rothwell, *Is Income Inequality Really Unrelated to Education?*, BROOKINGS: THE AVENUE (Mar. 3, 2015), <https://www.brookings.edu/blog/the-avenue/2015/03/03/is-income-inequality-really-unrelated-to-education> [<https://perma.cc/U4Q2-EXKM>] (arguing that without structural market changes, better education is unlikely to significantly reduce inequality).

104. See Chetty et al., *supra* note 99; Lawrence F. Katz & Alan B. Krueger, *Documenting Decline in U.S. Economic Mobility*, SCIENCE (Apr. 24, 2017), <http://science.sciencemag.org/content/early/2017/04/21/science.aan3264.full> [<https://perma.cc/W3M8-6CNQ>]; Claude S. Fischer, *Inequality Is About Access to Public Goods, Not Income*, BOS. REV. (Apr. 24, 2017), <http://bostonreview.net/class-inequality/claude-s-fischer-inequality-about-access-public-goods-not-income> [<https://perma.cc/E2FA-A5LS>]; Eduardo Porter, *Education Gap Between Rich and Poor Is Growing Wider*, N.Y. TIMES (Sept. 22, 2015), <https://www.nytimes.com/2015/09/23/business/economy/education-gap-between-rich-and-poor-is-growing-wider.html> [<https://perma.cc/GT4J-SN9Y>].

105. 411 U.S. 1 (1973).

106. *Id.*

107. *Id.* at 19–28.

108. *Id.* at 23.

right to education.¹⁰⁹

Since *Rodriguez*, the received wisdom has been that the judicially enforced U.S. Constitution does not have anything to say about funding disparities in public school, nor does it provide guarantees of welfare rights or require heightened scrutiny for laws that burden the poor, including poor children.¹¹⁰ Firmly part of constitutional orthodoxy, these principles are generally accepted even by the Court's most liberal Justices, and conceded by many liberal scholars.¹¹¹ That said, it is hard not to conclude that *Rodriguez*'s dissenters, and the Texas school children, had strong doctrinal arguments on their side. As Justice White pointed out in dissent, the Texas scheme lacked rational basis.¹¹² The state argued that its funding scheme was justified by an interest in local control, but, in fact, the Texas system utterly failed to advance that interest.¹¹³ Equalizing funding through the property tax, which was the primary revenue-raising mechanism extended to school districts, was practically and legally unavailable to poor districts.¹¹⁴ Justice Brennan agreed that the statute could not pass even rational basis review, but he wrote separately to emphasize that strict scrutiny should have applied.¹¹⁵ After all, he opined, "education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment."¹¹⁶

Justice Marshall offered the most full-throated indictment of the majority opinion—one that encapsulates several of the observations of this Essay. The Court, he made clear, was playing an active role in reinforcing inequality: it was assenting to a state's decision to "vary the quality of education which it offers its children in accordance with the amount of taxable wealth located in the school districts within which they reside;" it was "acquiesc[ing] in a system which deprives children in their earliest years of the chance to reach their full potential as citizens."¹¹⁷ Moreover, Justice Marshall wrote, the majority's decision was by no means required by

109. *See id.* at 30–39.

110. *See* William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 *FORDHAM L. REV.* 1821, 1824–25 (2001) (describing consensus that constitutional welfare rights are off-the-table); *see also* *United States v. Kras*, 409 U.S. 434 (1973) (upholding filing fee for bankruptcy petitions); *Dandridge v. Williams*, 397 U.S. 471, 485–87 (1970) (holding that state welfare determinations receive only minimal scrutiny and declining to determine whether state had adequately accounted for needs of children in large family).

111. *See, e.g.*, Goodwin Liu, *Education, Equality, and National Citizenship*, 116 *YALE L.J.* 330, 334–35 (2006) (arguing that *Congress* has an obligation under the Citizenship Clause to ensure a meaningful floor of educational opportunity throughout the nation); Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States, Address at the University of Michigan: The Tanner Lectures in Human Values (Feb. 6, 2015). For further critique of liberal scholarship on these points, *see* JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE SHAPING OF AMERICA'S CONSTITUTIONAL RIGHTS* (forthcoming 2018) (manuscript at 180) (unpublished manuscript on file with the Indiana Law Journal).

112. *Rodriguez*, 411 U.S. at 67–68 (White, J., dissenting).

113. *Id.* at 68.

114. *Id.* at 68–69.

115. *Id.* at 62–63 (Brennan, J., dissenting).

116. *Id.* at 63.

117. *Id.* at 70–71 (Marshall, J., dissenting).

precedent.¹¹⁸ Rather, the opinion represented “an abrupt departure from the mainstream of recent state and federal court decisions concerning the unconstitutionality of state educational financing schemes dependent upon taxable local wealth” and “a retreat from our historic commitment to equality of educational opportunity.”¹¹⁹ And, he offered a powerful retort to the argument, advanced recently even by liberals, that courts were inappropriate venues for addressing economic inequality:

Nor can I accept the notion that it is sufficient to remit these appellees to the vagaries of the political process which, contrary to the majority's suggestion, has proved singularly unsuited to the task of providing a remedy for this discrimination. I, for one, am unsatisfied with the hope of an ultimate “political” solution sometime in the indefinite future while, in the meantime, countless children unjustifiably receive inferior educations that “may affect their hearts and minds in a way unlikely ever to be undone.”¹²⁰

In the years since *Rodriguez*, school children's constitutional arguments have not gone away. Rather, they have been taken up in state courts, with some modest success. Several state supreme courts, including eventually Texas's, have found that the failure to provide an adequate, basic education violates state constitutional guarantees; others have found that unequal funding violates state equal protection principles.¹²¹ Recent studies suggest that such litigation has been at least marginally effective in remedying disparities and improving conditions.¹²² Indeed, the state constitutional law path may even have produced better doctrine, or at least more experimentation, than would have resulted had the Court reached the opposite conclusion in *Rodriguez*. But the absence of federal constitutional rights came at a cost—particularly for poor students in jurisdictions where state courts refused to recognize a right to equal or adequate education.¹²³

Rodriguez represents a decision by the Court to assent to systems characterized by egregious inequality and deprivation, in the name of deferring to the political process. But what if the federal political process were to try to deliver on redistributive goals in the area of education? For example, in recent months, public attention has focused on the vast numbers of working-class students who are saddled

118. *Id.*

119. *Id.*

120. *Id.* at 71–72 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954)).

121. For a discussion of the state litigation, see Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”*: *From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995); DRIVER, *supra* note 111, at 186.

122. *E.g.*, Zachary Liscow, *Are Court Orders Sticky? Evidence from School Finance Litigation* 29–31 (Yale Law & Econ., Research Paper No. 574, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2953104 [<https://perma.cc/VD6U-H7LL>].

123. *See, e.g.*, *LM v. State*, 862 N.W.2d 246 (Mich. Ct. App. 2014) (rejecting claim that inadequate and deficient instruction violated state constitution); Jeffrey S. Sutton, *San Antonio Independent School District v. Rodriguez and Its Aftermath*, 94 VA. L. REV. 1963 (2008); *cf.* Liu, *supra* note 111, at 397–98 (describing inadequacy of education in certain states).

with extraordinary amounts of college tuition debt.¹²⁴ Long considered a political impossibility, calls for free college tuition have been gaining popular support and some legislative backing.¹²⁵ To be sure, no federal bill could be enacted anytime soon. But what if the politics were to change sufficiently to enable Congress to enact a new tuition spending program—a program designed to encourage states to provide free tuition at public community colleges, for example?¹²⁶

Here, as well, the specter of regressive constitutional doctrine would loom large. Consider the Court's recent opinion in the Affordable Care Act case, *National Federation of Independent Business v. Sebelius (NFIB)*,¹²⁷ where the Court held that a congressional spending program unconstitutionally coerced the states.¹²⁸ Justices Scalia, Thomas, Kennedy, and Alito went so far as to assert that any sufficiently large cooperative spending program could be coercive.¹²⁹ If the federal government offers a substantial sum of money, making it politically, if not practically, impossible for the states to say “no,” the federal government would be violating principles of federalism.¹³⁰

The controlling plurality opinion, authored by Chief Justice Roberts, was narrower. It held only that Congress cannot tie a large new spending program to an entrenched program if doing so effectively denies states a choice about whether to abandon the entrenched program.¹³¹ As such, the tuition bill that some Democrats

124. See *supra* note 101 and accompanying text.

125. Katie Lobosco, *Bernie Sanders Still Wants Tuition-Free College*, CNN: MONEY (Apr. 4, 2017, 1:53 PM ET), <http://money.cnn.com/2017/04/04/pf/college/bernie-sanders-tuition-free-college> [<https://perma.cc/NUA3-YGGP>] (describing a federal bill co-sponsored by Sanders, Warren, and three others, and several state plans).

126. Congress has already passed a wide range of federal education laws using its spending power, including the Elementary and Secondary Education Act (ESEA) (currently reauthorized as No Child Left Behind) and the Individuals with Disabilities Education Act. Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 581–82 (2013).

127. 132 S. Ct. 2566 (2012).

128. *Id.* at 2607–08 (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.); see also *id.* at 2666–68 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting). In *NFIB*, seven Justices concluded, in two separate opinions, that Congress impermissibly coerced the states when it required any state that wished to continue participating in the existing Medicaid program to expand coverage to residents with an income below 133% of the federal poverty level. *Id.* at 2607–08.

129. See *id.* at 2661–63 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

130. See *id.*

131. *Id.* at 2607 (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.). For a detailed analysis of the differences between the joint dissent and the controlling plurality and for an elaboration of this reading of the plurality opinion, see Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861, 864 (2013). For an explanation of why *existing* spending programs are not likely to be found coercive under the plurality opinion, see Pasachoff, *supra* note 126. But see Rick Hills, *Fair-Weather Friends of Federalism (and Nationalism) in King v. Burwell? The Dilemma of Supporting Principles That Hurt One's Cause*, PRAWFSBLAWG (Mar. 7, 2015, 9:40 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2015/03/fair-weather-friends-of-federalism-and-nationalism-in-king-v-burwell.html> [<https://perma.cc/74VB-XPNN>] (deriving from *NFIB* a broad anticoercion principle that would protect states against both conditional spending and

have sponsored would likely survive under the plurality opinion: the proposed bill would create a new spending program, without leveraging an existing one. Nonetheless, as Justice Ginsburg pointed out in dissent, even this narrower rule is “unsettling.”¹³² As a formal matter, it restrains Congress’s ability to assist the needy, treating earlier congressional decisions as binding on future Congresses.¹³³ Perhaps most “unsettling” is that Justices Breyer and Kagan signed on to this unprecedented restriction on Congress’s power to spend for the general welfare.¹³⁴

III. A JUST DOCTRINE, WITHOUT UTOPIANISM

A significant body of scholarship by constitutional law scholars, including myself, emphasizes the extent to which courts are unlikely leaders of progressive social change, particularly in the absence of well-organized social movements.¹³⁵ As the above sketch indicates, when it comes to redistribution of economic resources and political power, court skeptics can find ample support for their position. In constitutional cases involving labor and education, the Supreme Court has fortified legislation that perpetuates inequality while disabling, or threatening to disable, legislatures from redistributing economic resources and power.¹³⁶ Against this backdrop, and particularly given the current Court’s makeup, relying on litigation as the primary

conditional regulatory preemption).

132. *NFIB*, 132 S. Ct. at 2634 (Ginsburg, J., dissenting in part).

133. *See id.* at 2634–35 (“[I]f States choose not to comply, Congress has not threatened to withhold funds earmarked for any other program. Nor does the [statute] use [] funding to induce States to take action Congress itself could not undertake.”).

134. *See id.* at 2630 (emphasizing that the Court was striking down a spending measure as too coercive “*for the first time ever*”) (emphasis in original).

135. This argument takes different forms. On one account, the Supreme Court has, in practice followed majoritarian preferences. *See, e.g.*, BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009); JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* (2006); CASS R. SUNSTEIN, *A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN’T MEAN WHAT IT MEANT BEFORE* (2009). For a critique of the scholarship depicting the Court as a majoritarian institution, without recognizing popular contest, see Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755 (2011). A variation of this argument is that the Court follows the majority preferences of the elite. *See* Michael J. Klarman, *What’s So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 161 (1998). Other scholars persuasively explore the complicated dialectical relationship among the Court, social movements, and the broader political culture. *See, e.g.*, Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1527–28 (2005); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA* [hereinafter Siegel, *Constitutional Culture*], 94 CALIF. L. REV. 1323, 1323 (2006); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective* [hereinafter Siegel, *Text in Contest*], 150 U. PA. L. REV. 297, 312–13 (2001). For an overview of the literature on constitutional change, courts, and social movements, see Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877, 877–78 (2013). For an account of court hostility to labor’s constitutional claims see Kate Andrias, *Building Labor’s Constitution*, 94 TEX. L. REV. 1591, 1607–14 (2016).

136. *See supra* Parts I & II.

method for opposing economic inequality makes little tactical sense. Moreover, there are normative reasons why those who oppose inequality should favor social movement building and political organizing over an excessive focus on litigation.¹³⁷

But the claim that progressives ought to focus on political organizing does not tell us anything about what judges *ought* to do when confronted with cases. Nor does the recognition that the Court has, in practice, frequently favored elite interests deprive particular judges of agency. Indeed, while some justices have made choices to reinforce economic inequality and to constrain the ability of political actors to remedy it, others have resisted, often with strong arguments from precedent, text, and history on their side.¹³⁸

Unfortunately, in recent decades, even liberal justices have offered only tepid opposition to economically regressive doctrine, frequently accepting it as part of legal orthodoxy.¹³⁹ Liberal constitutional theory has, to great extent, encouraged this approach.¹⁴⁰ Prominent scholars have cautioned judges to interpret the Constitution “minimally” so as to avoid contentious value choices.¹⁴¹ Some who urge judicial minimalism are motivated by a worry about political backlash.¹⁴² Others are skeptical about judicial capacity and expertise.¹⁴³ Still others fear over-empowering courts—because of either a normative commitment to the supremacy of democratic institutions or a worry that courts will always favor elite interests.¹⁴⁴

These concerns are not entirely without merit, as I have previously acknowledged,

137. See Andrias, *supra* note 135, at 1614–15 (noting the irony of relying on elite, non-democratic institutions to achieve a more egalitarian distribution of power and resources). For a robust defense of popular constitutionalism, see, for example, LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

138. See *supra* notes 42–44, 114–120 and accompanying text.

139. See *supra* notes 59–63, 93, 111, 135 and accompanying text.

140. For thorough examination and powerful critique of liberal wariness of court-derived rights, see Driver, *supra* note 135 (challenging dominant scholarly view that Supreme Court Justices consistently interpret the Constitution in accordance with the prevailing sentiments of the times, as well as the related normative implication regarding the Court’s ability to clash with majority preferences); Justin Driver, *Reactionary Rhetoric and Liberal Legal Academia*, 123 *YALE L.J.* 2616 (2014) (showing how left-leaning legal scholars have challenged rights-protective opinions on the ground that they have had perverse effects, ended up being futile, or jeopardized some larger achievement); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 *HARV. C.R.-C.L. L. REV.* 373 (2007) (showing fallacy of claims about Court-derived backlash in the context of abortion rights).

141. See, e.g., CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 4–5 (1999); William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 *YALE L.J.* 1279, 1326 (2005); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 *HARV. L. REV.* 4, 33 (1996).

142. E.g., Eskridge, *supra* note 141; see also Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 *J. AM. HIST.* 81, 82 (1994).

143. E.g., Sunstein, *supra* note 141; see also Post & Siegel, *supra* note 140, at 401–06 (explicating Sunstein’s claims).

144. See Frank B. Cross, *The Error of Positive Rights*, 48 *UCLA L. REV.* 857, 862–63 (2001) (invoking all of these arguments and others against social welfare rights).

and as the history of regressive court decisions suggests.¹⁴⁵ But the doctrine also underlines a fundamental weakness with the commitment to judicial minimalism. The reigning approach has encouraged liberal justices, wary of judicial activism, to acquiesce to legislation and common law rules that promote inequality. Meanwhile, even in dissent, and even when colleagues have disabled legislators' ability to remediate inequality, liberal justices have frequently failed to develop robust accounts of countervailing substantive constitutional rights.¹⁴⁶

Thus, for those who object to rising economic inequality, resistance to the Trump agenda and efforts to return to constitutional status quo ante are insufficient. Fundamental constitutional rethinking on issues of economic inequality is necessary—in the areas of labor, education, and beyond. Professor Mark Tushnet's argument against “defensive crouch liberalism,” offered previously and again in this symposium, is perhaps nowhere more apposite than here.¹⁴⁷

Professor Tushnet urges a “utopian” approach to constitutional theory, including in the area of social welfare rights.¹⁴⁸ As he points out, claims about social welfare rights are unlikely to prevail before the current Supreme Court.¹⁴⁹ The same is true for labor rights and educational equity and adequacy claims. More long-term constitutional thinking is necessary. But “utopian”—that is, “impossibly ideal,”¹⁵⁰ or “imaginary and indefinitely remote”¹⁵¹—may be a misframing of the constitutional theory needed.¹⁵² Utopianism, in history, has often had a dark underbelly, with the promise of a better world invoked to excuse sordid acts of tyranny.¹⁵³ A term that

145. Andrias, *supra* note 135, at 1607–17.

146. *See supra* notes 46–47, 93 and accompanying text. For extended critique of judicial minimalism as it applies to other areas of law, see Driver, *supra* note 140; Post & Siegel, *supra* note 140.

147. *See* Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKINIZATION (May 6, 2016, 1:15 PM), <https://balkin.blogspot.fr/2016/05/abandoning-defensive-crouch-liberal.html> [<https://perma.cc/8UCD-7MBX>] (describing “[d]efensive-crouch constitutionalism, with every liberal position asserted nervously, its proponents looking over their shoulders for retaliation by conservatives (in its elevated forms, fear of a backlash against aggressively liberal positions)”).

148. Mark Tushnet, *Utopian Thinking for Progressive Constitutionalists*, AM. CONST. SOC'Y: ACSBLOG (Apr. 6, 2017), <https://www.acslaw.org/acsblog/utopian-thinking-for-progressive-constitutionalists> [<https://perma.cc/QP9Q-XUPU>].

149. *Id.*; *see also* Mark Tushnet, *Utopian Thinking for Progressive Constitutionalists*, 93 IND. L.J. 235 (2018).

150. *Utopian*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/utopian> [<https://perma.cc/FVL7-DZSW>].

151. *Utopia*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/utopia> [<https://perma.cc/5V5E-2ZWM>].

152. Professor Tushnet, in the published version of his Essay, notes that he is using the term “utopian” to refer to a “realistic” and “achievable” progressive constitutionalism. In that sense, I have little disagreement with the substance of his argument; we both urge an achievable progressive constitutionalism. The concern, however, is that in common usage “utopian” carries a different meaning.

153. Akash Kapur, *The Return of the Utopians*, NEW YORKER (Oct. 3, 2016), <http://www.newyorker.com/magazine/2016/10/03/the-return-of-the-utopians>

carries such ugly connotations ought to give us pause. Moreover, a more just and egalitarian constitutional law doctrine is not actually utopian. As the preceding discussion highlights, the doctrine that has helped fortify inequality in the areas of labor and education is the product of close votes. Contrary outcomes are easy to imagine; they are neither impossible nor remote.

The point may be semantic, but it is nonetheless consequential. To the extent scholars refer to redistributive claims as utopian, they risk understating the doctrinal, textual, and historical support for a progressive constitutional vision.¹⁵⁴ The frame of utopianism implies that the past and present must be erased, rather than built upon. (Relatedly, utopianism's departure from reality might also lead advocates to undervalue important countervailing concerns, not unlike errors of utopians past.) More concretely, the frame of utopianism risks discouraging legislators and social movements opposing inequality from making constitutional claims in the public arena. After all, why make arguments that seem impossible?¹⁵⁵ Finally, and perhaps most troubling, a frame of utopianism risks letting judges off the hook for their choices, by suggesting that alternatives are unsupported, impracticable, or impossibly ideal.

In fact, a more just and egalitarian constitutional doctrine can still find significant doctrinal toeholds (as well as historical and textual grounding).¹⁵⁶ Return, again, to the case of labor picketing. Recent First Amendment jurisprudence in contexts other than labor emphasizes the importance of strict scrutiny for content-based regulation.¹⁵⁷ This new case law strengthens the claim that the secondary boycott doctrine is wrongly decided. A local union in California has taken up this point, arguing before the NLRB that section 8(b)(4)(i) of the NLRA is unconstitutional.¹⁵⁸ Meanwhile, Justice Murphy's full-throated endorsement of workers' role in the public debate,

[<https://perma.cc/TFT7-MQXD>] (describing the history of utopianism, its latent terror and repression, and association with dystopia, as well as the recent turn back toward utopian argumentation).

154. I have focused on doctrinal arguments in this Essay. Substantial work examines the historical and textual bases for a more egalitarian Constitution. For work on the Thirteenth Amendment, see, for example, James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude,"* 119 YALE L.J. 1474 (2010); James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 943 (1997); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 438, 472–74 (1989). On the Guarantee Clause and republicanism, see, for example, Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623 (1988).

155. Cf. Andrias, *supra* note 135, at 1607–17 (discussing reasons why the labor movement may not invoke the Constitution).

156. On the importance of doctrinal toeholds given the evolving nature of the Constitution, see DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

157. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2224 (2015) (emphasizing that strict scrutiny applies to content-based restrictions); see also Fisk & Rutter, *supra* note 54 (questioning the NLRA's labor picketing restrictions in light of the Supreme Court's recent First Amendment jurisprudence).

158. Brief of Respondent, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing Iron Workers, Local 229, 2017 WL 1787637 (N.L.R.B. May 4, 2017) (No. 21-CC-183510), <http://src.bna.com/oAH> [<https://perma.cc/C72X-HMF7>].

offered in *Thornhill*, remains good law, as do other endorsements of workers' constitutional rights to liberty, equality, association, and freedom.¹⁵⁹ A doctrine that not only applies existing First Amendment precedent but also begins to flesh out an affirmative theory of constitutional labor rights is thus both imaginable and nonremote.

Consider also a recent case from Detroit, Michigan. In the fall of 2016, school children in Detroit sued the state for denying them literacy.¹⁶⁰ As their complaint details, their schools are decrepit, unsafe, filled with rodents, and lacking both teachers and basic supplies.¹⁶¹ At one Detroit school, less than 5% of third graders scored "proficient" on Michigan's English assessment test.¹⁶² As a result, the students are denied a basic, minimal education in violation of the Fourteenth Amendment. Though a long shot before the current Supreme Court, the students' arguments find ample support in doctrine. Despite *Rodriguez*, numerous Supreme Court cases make clear the fundamental importance of public education,¹⁶³ while others, including recent opinions, hold that heightened or strict scrutiny applies when a fundamental interest is denied or burdened by the state on an unequal basis.¹⁶⁴

That is not to say that these arguments will prevail in the near term. A doctrine that permits, and even requires, provision of education or other social welfare goods or protection of union rights will likely require new social movements and new appointees to the Supreme Court. (Notably, the Detroit complaint was filed when many observers believed President Obama's appointee, Judge Merrick Garland, would be confirmed to the Supreme Court.) But new social struggles and new justices can produce new outcomes.¹⁶⁵

Indeed, there are a few reasons to be hopeful. In opposing Trump's nominees and legislative agenda, groups of citizens have coalesced around support for a right to quality public education—one not privatized for profit motive or limited to certain residents.¹⁶⁶ They have spoken out in support of health care for the needy and perhaps

159. See *supra* notes 67–69 and accompanying text.

160. Complaint, Gary B. v. Snyder, No. 16-CV-13292 (E.D. Mich. Sept. 13, 2016).

161. *Id.* at 8–9, 84–85, 98.

162. *Id.* at 5.

163. *E.g.*, Plyler v. Doe, 457 U.S. 202, 221 (1982); Brown v. Bd. of Educ., 347 U.S. 483, 492–93 (1954).

164. Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015); M.L.B. v. S.L.J., 519 U.S. 102, 107, 115 (1996); Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966).

165. See Siegel, *Text in Contest*, *supra* note 135, at 312–13 (2001) (demonstrating that "[c]laims on the text of the Constitution made by mobilized groups of Americans outside the courthouse helped bring into being the understandings that judges then read into the text of the Constitution").

166. See, e.g., *Will More States Offer Free College? Poll Finds Plurality Agrees with Free Tuition*, AOL (Apr. 12, 2017, 6:38 PM), <https://www.aol.com/article/news/2017/04/12/will-states-offer-free-college-poll-finds-plurality-agrees-tuition/22037540> [<https://perma.cc/2ANA-T3VQ>]; Alia Wong, *Education Secretary Betsy DeVos Has Already Affected Public Education*, ATLANTIC (Feb. 7, 2017), <https://www.theatlantic.com/education/archive/2017/02/the-sensation-known-as-betsy-devos/515907> [<https://perma.cc/K56V-R5AM?type=image>].

for all.¹⁶⁷ And they have rallied behind a more robust conception of workers' rights.¹⁶⁸ Meanwhile, a few judges and Justices are beginning to draw attention to how the law fortifies inequality, to take up constitutional claims against economic inequality, and to flesh out substantive constitutional arguments in support of a more egalitarian distribution of power and resources.¹⁶⁹ In short, a constitutional vision that diminishes, rather than fortifies, economic inequality may be hard to achieve, but it is neither unimaginable nor impossibly ideal.

167. See Mark Joseph Stern & Perry Grossman, *Americans Now View Health Care as a Right. Republicans Can't Change That.*, SLATE: OUTWARD (May 5, 2017, 6:45 PM), http://www.slate.com/blogs/outward/2017/05/05/americans_now_view_health_care_as_a_right_republicans_can_t_change_that.html [<https://perma.cc/QA7U-3NVE>].

168. See Alan Rappeport, *Democrats Set Sights on Blocking Trump's Labor Secretary Pick*, N.Y. TIMES (Feb. 14, 2017), <https://www.nytimes.com/2017/02/14/us/politics/andrew-puzder-labor-secretary.html> [<https://perma.cc/6JNV-L3N9>].

169. See *ODonnell v. Harris Cty.*, No. H-16-1414, 2017 WL 1735456, at *3 (S.D. Tex. Apr. 28, 2017) (“[U]nder federal and state law, secured money bail may serve to detain indigent misdemeanor arrestees only in the narrowest of cases, and only when, in those cases, due process safeguards the rights of the indigent accused.”) *appeal filed* (5th Cir. May 10, 2017); *Walker v. City of Calhoun*, No. 4:15-CV-0170-HLM, 2016 WL 361612, at *11 (N.D. Ga. Jan. 28, 2016) (“The Equal Protection Clause of the Fourteenth Amendment generally prohibits ‘punishing a person for his poverty.’ This principle has special implications as it relates to depriving a person of his liberty. Attempting to incarcerate or to continue incarceration of an individual because of the individual’s inability to pay a fine or fee is impermissible.”) (citation omitted), *vacated*, 682 F. App’x 721 (11th Cir. Mar. 9, 2017); *Jones v. City of Clanton*, No. 2:15cv34-MHT, 2015 WL 5387219, at *3 (M.D. Ala. Sept. 14, 2015) (“Justice that is blind to poverty and indiscriminately forces defendants to pay for their physical liberty is no justice at all.”); see also Kate Andrias, Response, *Confronting Power in Public Law*, 130 HARV. L. REV. F. 1, 3–6 (2016) (describing recent Sotomayor and Kagan dissents); cf. *Rivera v. Orange Cty. Prob. Dep’t*, 832 F.3d 1103, 1109 (9th Cir. 2016) (interpreting Bankruptcy Code in light of its “principal purpose . . . to grant a fresh start to the honest but unfortunate debtor”) (quoting *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007)).