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A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality

Michele E. Gilman
University of Baltimore School of Law, mgilman@ubalt.edu

A COURT FOR THE ONE PERCENT: HOW THE SUPREME COURT CONTRIBUTES TO ECONOMIC INEQUALITY

Michele Gilman*

This Article explores the United States Supreme Court's role in furthering economic inequality. The Occupy Wall Street movement in 2011 not only highlighted growing income and wealth inequality in the United States, but also pointed the blame at governmental policies that favor business interests and the wealthy due to their outsized influence on politicians. Numerous economists and political scientists agree with this thesis. However, in focusing ire on the political branches and big business, these critiques have largely overlooked the role of the judiciary in fostering economic inequality. The Court's doctrine touches each of the major causes of economic inequality, which includes systemic failures of our educational system, a frayed social safety net, probusiness policies at the expense of consumers and employees, and the growing influence of money in politics. In each of these areas, the Court's deference to legislative judgments is highly selective and driven by a class-blind view of the law that presumes that market-based results are natural, inevitable, and beneficial. For instance, the Court rejects government attempts to voluntarily desegregate schools, while deferring to laws that create unequal financing for poor school districts. The end result is that poor children receive subpar educations, dooming many of them to the bottom of the economic spectrum. Similarly, the Court overturned Congress's attempt to rein in campaign financing, while upholding state voter identification laws that suppress the votes of the poor. These decisions distort the electoral process in favor of the wealthy. In short, the Court tends to defer to laws that create economic inequality, while striking down legislative attempts to level the playing field. While a popular conception of the Court is that it is designed to protect vulnerable minorities from majoritarian impulse, the Court, instead, is helping to protect a very powerful minority at the expense of the majority. This Article is one step toward understanding how law intertwines with politics and economics to create economic inequality.

 Professor of Law and Director, Civil Advocacy Clinic, Co-Director, Center on Applied Feminism, University of Baltimore School of Law. B.A. 1990, Duke University; J.D. 1993, University of Michigan Law School. Thanks to Wendy Bach, Garrett Epps, Gilda Daniels, Dan Hatcher, Rob Rubinson, and Erika Wilson for their feedback, as well as the participants at the Class Crits V conference at the University of Wisconsin School of Law.

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INTRODUCTION

"You can have democracy in this country, or you can have great wealth concentrated in the hands of a few, but you cannot have both."
Louis Brandeis, Supreme Court Justice[1]

The Occupy Wall Street protests that ignited on September 17, 2011, and flared throughout the fall and winter of 2011 may have flickered out, but Occupy Wall Street (OWS) and its call for greater economic fairness had a lasting impact.[2] With its slogan of "We are the 99%,"[3] OWS changed the national conversation about economic inequality. OWS shined a spotlight on the fact that the top 1% of households currently earns one-fifth of the nation's income,[4] while owning over one-third of the nation's wealth.[5] Meanwhile, incomes for the other 99% are at their lowest point since 1997, and these Americans face less social mobility, rising unemployment, and job insecurity.[6] Simultaneously, poverty rates have increased, and nearly one-third of all Americans have either fallen into poverty or live on earnings that classify them as low income.[7] These sobering facts undermine our

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[1] MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 1 (2012) (quoting Justice Brandeis).

[2] *See* James Miller, *Is Democracy Still in the Streets?*, *in* THE OCCUPY HANDBOOK 173, 174 (Janet Byrne & Robin Wells eds., 2012).

[3] Stephen Gandel, *The Leaders of a Leaderless Movement*, *in* WHAT IS OCCUPY? INSIDE THE GLOBAL MOVEMENT 34, 35 (Time Home Entm't, Inc. ed., 2011).

[4] Emmanuel Saez, *Striking it Richer: The Evolution of Top Incomes in the United States* 3, 8 (Mar. 2, 2012), *available at* http://elsa.berkeley.edu/~saez/saez-UStopincomes-2010.pdf (updated with 2009 and 2010 estimates) (updating the original version of Emmanuel Saez, *Striking it Richer: The Evolution of Top Incomes in the United States*, PATHWAYS MAG., Winter 2008, at 6–7).

[5] *See* Sylvia A. Allgretto, *The State of Working America's Wealth 2011: Through Volatility and Turmoil the Gap Widens* 4 (Econ. Pol'y Inst., Briefing Paper No. 292, 2011), *available at* http://epi.3cdn.net/2a7ccb3e9e618f0bbc_3nm6idnax.pdf; Edward N. Wolff, *Recent Trends in Household Wealth in the United States: Rising Debt and the Middle-Class Squeeze—an Update to 2007*, at 11 (Levy Econ. Inst. of Bard Coll., Working Paper No. 589, 2010), *available at* http://www.levyinstitute.org/pubs/wp_589.pdf.

[6] *See* JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 2–4 (2010) (describing impacts on the middle class); BENJAMIN I. PAGE & LAWRENCE R. JACOBS, CLASS WAR? 6 (2009) (noting that middle and lower income groups have faced wage losses and stagnation, while high-income earners have seen wage hikes); Rajan Reghuram, *Inequality and Intemperate Policy*, *in* THE OCCUPY HANDBOOK, *supra* note 2, at 79, 80.

[7] The official poverty rate in 2011 was 15%. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE IN THE UNITED STATES: 2011, at 13 (2012), *available at* http://www.census.gov/prod/2012pubs/p60-243.pdf. Twenty-eight percent of the population fell into poverty for at least two months between 2009 and 2010, although chronic spells of poverty lasting over twenty-four months were uncommon at 4.8%. *Id.* at 4. One-third of Americans had income below 200% of the

vision of America as a meritocracy, where people get what they deserve through hard work and initiative.

The OWS movement contends that this widening economic gap results from a tainted political system in which the government hands out tax breaks, bail outs, and other financial advantages to banks, business enterprises, and the super rich due to their outsized influence on politicians.[8] OWS echoes prominent economists and political scientists who assert that rising economic inequality is not solely the result of market forces, but also government policies. Yet, in focusing its ire on the political branches and big business, these critiques have largely overlooked the role of the judiciary in upholding laws and legal principles that foster inequality. After all, politicians pass laws, but courts uphold them. Accordingly, this Article examines the role of the Supreme Court in interpreting laws that impact economic inequality.

Economists have identified at least four major factors contributing to the sharp rise in economic inequality since the 1980s, although there is disagreement about the weight and significance of these factors. First, our educational system is not producing students with the skills to succeed in a technologically based economy in which low-skill jobs have been replaced by computers or moved overseas due to globalization.[9] Second, we have a frayed social safety net with limited redistribution to people at the bottom of the economic ladder.[10] Third, our

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poverty threshold, which is considered low income. *Id.* at 17–18. Many of these families are working; "in 2011, more than 7 in 10 low-income families and half of all poor families were working. They simply did not earn enough money to pay for basic living expenses." BRANDON ROBERTS ET AL., LOW-INCOME WORKING FAMILIES: THE GROWING ECONOMIC GAP 3 (2013), *available at* http://www.workingpoorfamilies.org/wp-content/uploads/2013/01/Winter-2012_2013-WPFP-Data-Brief.pdf.

[8] *See* Geoff Colvin, *Are the Bankers to Blame?*, *in* WHAT IS OCCUPY?, *supra* note 3, at 64, 64–65; Nouriel Roubini, *Economic Insecurity and Inequality Breed Political Instability*, *in* THE OCCUPY HANDBOOK, *supra* note 2, at 150, 150–151.

[9] CONG. BUDGET OFFICE, TRENDS IN THE DISTRIBUTION OF HOUSEHOLD INCOME BETWEEN 1979 AND 2007, at 13 (2011) [hereinafter CBO REPORT]; FRANK LEVY & RICHARD J. MURNANE, THE NEW DIVISION OF LABOR: HOW COMPUTERS ARE CREATING THE NEXT JOB MARKET 1, 1–2 (2004); David H. Autor et al., *Trends in U.S. Wage Inequality: Revising the Revisionists*, 90 REV. OF ECON. & STAT. 300, 310 (2008); *Inequality and Skills*, CHI. BOOTH IGM FORUM (Jan. 25, 2012, 9:13 AM), http://www.igmchicago.org/igm-economic-experts-panel/poll-results?SurveyID=SV_0IAlhdDH2FoRDrm (noting that over 80% of economic experts agreed that technological change was a cause of economic inequality).

[10] *See* Timothy Smeeding, *Public Policy, Economic Inequality and Poverty: The United States in Comparative Perspective*, 86 SOC. SCI. QUART. 955, 969 (2005) (arguing that one reason the United States has greater income inequality than other developed nations is a weaker income support system); *see also* Barbara Ehrenreich & John Ehrenreich, *The Making of the American 99 Percent and the Collapse of the Middle Class*, *in* THE OCCUPY HANDBOOK, *supra* note 2, at 300, 304 (explaining that the middle class is vulnerable to economic dislocation because the welfare safety net is so limited).

public policies favor business interests over consumers and employees.[11] Fourth, these probusiness policies are shaped by the growing influence of money in politics and a corresponding disengagement from the political process by middle- and low-income citizens.[12]

Suffice to say, there are hundreds of Supreme Court decisions that touch upon these political and economic trends, and given the wide array of substantive law that is implicated, not all of the cases follow the same narrative. Nevertheless, in each of these four areas, Court doctrine has reinforced economic inequality. Pulling back and taking a broad view of the Court's rulings in these areas helps identify patterns in the Court's decision making that might otherwise appear isolated. In brief, the Court's deference to legislative judgments is highly selective and driven by a class-blind view of the law. Sometimes, the Court defers to government laws and policies that harm the economic interests of the 99%. Other times, the Court rejects legislative attempts to redistribute societal benefits, while presuming that market-based results are natural, inevitable, and beneficial. Either way, the outcome is bad for economic equality. For instance, the Court rejects government attempts to voluntarily desegregate schools, while deferring to laws that result in unequal financing for rich and poor school districts. The end result is that poor children receive subpar educations, dooming many of them to the bottom of the economic spectrum. Similarly, the Court rejected Congress's attempt to rein in campaign financing, while upholding state voter identification laws that suppress the votes of the poor. These decisions distort the electoral process in favor of the wealthy.

While a popular conception of the Court is that it is designed to protect vulnerable minorities at the hands of majoritarian impulse, the Court, instead, is helping to protect a very powerful minority at the expense of the majority. This Article is one step toward understanding how law intertwines with politics and economics to create economic inequality. Part I describes the rise of economic inequality since the 1970s and identifies the main causes for this divergence, each of which is linked to governmental policies. Part II analyzes how Supreme Court doctrine has reinforced economic inequality in the areas of education, redistribution, corporate law, and the political process. This Part examines the reasoning underlying the Court's doctrine and reveals that the Court ignores the connection between government policies and inequality and defers to market-based outcomes as "natural" and desirable. Part III explores reasons why the Supreme Court maintains its class-blind view of the law in the face of economic reality to the contrary. It explains why the Justices, who are not subject to the corrupting influence of money in politics, nevertheless favor the interests of the 1%. Part III concludes by suggesting ways that progressive lawyers can work to reform law in order to create greater economic equality.

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[11] *See* JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY 34–37 (2012) (discussing how policies are more favorable to business).

[12] *See infra* Parts II.B, II.D.

I. ECONOMIC INEQUALITY AND OWS

A. The Rise of Economic Inequality

We are living in an era of rising income inequality, driven by rapid growth in income among the top 1% of our income distribution.[13] These Americans currently earn one-fifth of the nation's income,[14] or put differently, in one week, the top 1% earn more than the bottom one-fifth earn in a year.[15] Income is superconcentrated at the pinnacle of the scale, where "the top [0.1%] received in a day and a half about what the bottom 90[%] received in a year."[16] Meanwhile, wages for most Americans have stagnated.[17] While the top 1% saw their after-tax household income grow by 275% between 1979 and 2007, the middle of the income distribution had only a 40% increase, and the bottom 20% had an abysmal 18% increase.[18] Even as the country slowly emerges from the 2007 recession and its aftereffects, the top 1% is outpacing everyone else; they have amassed 93% of the income gains between 2009 and 2010.[19] Wealth inequality is even starker.[20] The top 1% own "more than a third of the nation's wealth"[21] or "225 times the wealth of the typical American," a ratio that is double what it was in both 1962 and 1983.[22]

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[13] *See* CBO REPORT, *supra* note 9, at xi (providing statistics to show that income rose much more for households at the higher end of the income scale than those in the middle and lower end of the income scale).

[14] *See* TIMOTHY NOAH, THE GREAT DIVERGENCE 147 (2012); STIGLITZ, *supra* note 11, at 2; *see also* Saez, *supra* note 4, at 3.

[15] *See* STIGLITZ, *supra* note 11, at 4. There are "two core facts" at play, according to James K. Galbraith, "rapidly growing pay in a few small high-paid sectors, and growing employment in a few large but low-paid sectors." James K. Galbraith, INEQUALITY AND INSTABILITY: A STUDY OF THE WORLD ECONOMY JUST BEFORE THE GREAT CRISIS 135 (2012).

[16] STIGLITZ, *supra* note 11, at 4; *see also* HACKER & PIERSON, *supra* note 6, at 3 (noting that the top .1% "received over 20[%] of all after-tax income gains between 1979 and 2005, compared with the 13.5[%] enjoyed by the bottom 60[%] of households").

[17] *See* PAGE & JACOBS, *supra* note 6, at 6 (describing the wages of low- and middle-wage earners as falling or stagnating).

[18] CBO REPORT, *supra* note 9, at ix.

[19] Saez, *supra* note 4, at 1. Income inequality grew between 2010 and 2011, which is the first annual increase since 1993. DENAVAS-WALT, *supra* note 7, at 10.

[20] On the significance of wealth inequality and how it differs from income inequality, see generally James B. Davies, *Wealth and Economic Inequality*, *in* THE OXFORD HANDBOOK OF ECONOMIC INEQUALITY 127, 127–49 (Wiemer Salverda et al. eds., 2009).

[21] STIGLITZ, *supra* note 11, at 2.

[22] *Id.* at 2, 8; *see also* PAGE & JACOBS, *supra* note 6, at 7–9 (describing the gap between the top 1% and the bottom 90%).

In short, the inequality gap has grown since 1975 to levels not seen since the Roaring Twenties.[23] By contrast, during the thirty years that followed World War II, "America grew together,"[24] and income distributions were stable,[25] largely as a result of government policies such as the GI bill, which sent veterans to college, a progressive tax system,[26] and a strong labor movement.[27] Thirty years ago, the top 1% earned 12% of the nation's income.[28] Today, it is 21%.[29]

B. The Causes of Economic Inequality

OWS contends that this rising economic inequality results from government policies that aid the super wealthy and businesses due to the outsized influence of money in the political process.[30] There is ample social science and economic research to support this thesis.[31] Nobel Prize winning economist Joseph Stiglitz argues that inequality is not solely the result of market forces; rather, "government policies have been central to the creation of inequality in the United States."[32] Economist Rebecca Blank concurs, noting that "the political system shapes economic outcomes."[33] Political scientist Larry Bartels similarly states that "politics . . . profoundly shapes economics,"[34] and overlooking this connection "discourages systematic critical scrutiny of" inequality.[35] Political scientists Jacob

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[23] PAGE & JACOBS, *supra* note 6, at 7; *see also* Frank Levy & Peter Temin, *Inequality and Institutions in 20th Century America* 2–3 (Nat'l Bureau of Econ. Research, Working Paper No. 13106, 2007), *available at* http://www.nber.org/papers/w13106.pdf?new_windo w=1 (describing the increase in income inequality from 1980 to 2005).

[24] STIGLITZ, *supra* note 11, at 4; *see also* LARRY M. BARTELS, UNEQUAL DEMOCRACY 8–9 (2008) ("the real incomes of working poor families . . . and affluent families . . . both grew by the same 98%" from the late 1940s through the early 1970s).

[25] *See* CBO REPORT, *supra* note 9, at 1 (describing the income concentration following World War II as unchanged).

[26] STIGLITZ, *supra* note 11, at 5.

[27] NOAH, *supra* note 14, at 21.

[28] STIGLITZ, *supra* note 11, at 4.

[29] STIGLITZ, *supra* note 11, at 4; PAGE & JACOBS, *supra* note 6, at 7.

[30] *See* Daron Acemoglu & James A. Robinson, *Against Political Capture: Occupiers, Muckrakers, Progressives*, *in* THE OCCUPY HANDBOOK, *supra* note 2, at 100, 110 (explaining that OWS protesters recognize that the wealthy have control over political agendas and policies); *see also* Jeffrey D. Sachs, *Occupy Global Capitalism*, *in* THE OCCUPY HANDBOOK, *supra* note 2, at 462, 473 (summarizing the demands of the movement).

[31] *See* NOAH, *supra* note 14, at 6–7 (describing the body of academic work studying the rise in income inequality).

[32] STIGLITZ, *supra* note 11, at 6.

[33] REBECCA BLANK, CHANGING INEQUALITY 12 (2011) (Blank is currently the acting Secretary of Commerce.).

[34] BARTELS, *supra* note 24, at 2.

[35] *Id.* at 29–30.

Hacker and Paul Pierson affirm this assessment, stating, "[g]overnment rules make the market, and they powerfully shape how, and in whose interests, it operates."[36]

A major factor driving inequality is the rise of pretax income for the top 1%,[37] due in part to government action and inaction with regard to labor laws, finance, and corporate compensation.[38] As Stiglitz explains, government sets the rules of the game by establishing the playing field for unionization, corporate governance, and competition laws.[39] Union membership, which is correlated nationally and internationally to higher wages for the middle class, is only 12% of the total workforce, compared to 21% in 1979.[40] Furthermore, the middle class is shrinking as better paying jobs disappear. Technology and globalization have reduced the number of moderate and low-skilled jobs, pushing those workers into the low-paying service sector, while creating jobs for highly skilled, educated workers.[41] Yet, America is not producing enough college graduates to keep up with the change, and the government is doing little to hold down college tuitions that make higher education out of reach for many middle-class and lower-income families.[42]

Moreover, the government has not reined in market failures that have led to excessive rent seeking by large corporations.[43] For instance, the federal government failed to regulate derivatives, banks then benefited from a lack of transparency in their sale, and the market was deprived of information and

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[36] HACKER & PIERSON, *supra* note 6, at 44; *see also* DAVID BRADY, RICH DEMOCRACIES, POOR PEOPLE: HOW POLITICS EXPLAIN POVERTY 6 (2009) (a sociologist explains that "the distribution of resources in states and markets is inherently political").

[37] *See* CBO REPORT, *supra* note 9, at 7 (summarizing a study that computed Gini indexes using before-tax, after-tax measure of household cash); NOAH, *supra* note 14, at 113 (noting the "stunning increase in pretax income share for the wealthiest Americans" not as a result of direct government redistribution, but indirect government intervention as a result of "institutions and norms"); PAGE & JACOBS, *supra* note 6, at 5–7 (comparing inequality in "take home pay" as one factor contributing to the remaking of the overall distribution of income).

[38] *See* STIGLITZ, *supra* note 11, at 65 (arguing that strong worker protections could correct an imbalance in economic power).

[39] *Id.* at 57–58.

[40] NOAH, *supra* note 14, at 127 (noting that union membership is now only 7% of the private sector workforce).

[41] *Id.* at 77; STIGLITZ, *supra* note 11, at 54.

[42] *See* NOAH, *supra* note 14, at 89; STIGLITZ, *supra* note 11, at 55–56; Alice Karekezi, *What Caused the Wealth Gap?*, SALON (Oct. 11, 2011, 9:40 AM), http://www.salon.com/2011/10/11/what_caused_the_wealth_gap (Jeffrey Sachs explaining that low social and economic mobility stems from the difficulty of obtaining an advanced degree, and thus a good position in the economy, if one's parents do not have an advanced degree).

[43] *See* STIGLITZ, *supra* note 11, at 34, 39–51 (describing the financial sector as using "its political muscle to make sure that the market failures were *not* corrected"); Levy & Temin, *supra* note 23, at 6 (the impacts of technology and trade "are embedded in a larger institutional story" of post-1980 abandonment of prolabor institutions and deregulation). Stiglitz defines rent-seeking as "getting income not as a reward to creating wealth but by grabbing a larger share of the wealth than would otherwise have been produced without their effort." STIGLITZ, *supra* note 11, at 32; *see also id.* at 39–40.

appropriate regulation.[44] Yet, what the government failed to do on the front end, it cleaned up on the back end. The political branches deregulated the financial industry, the market then collapsed,[45] and the government stepped in to bail out the banks for their own misbehavior. In other words, "[t]he financial world was reaping the benefit of high-risk, largely unregulated trading while offloading its losses onto the government." [46] These "bubble economies," associated with massive gains to people at the top of leading sectors are unstable and "are no longer a plausible way to generate economic growth."[47]

Another high-profile example of corporate rent seeking is exorbitant CEO compensation; in 2010 the ratio of CEO compensation to that of a typical worker was 243 to 1.[48] American CEOs earn two to three times more than their European counterparts. [49] Legislative efforts to rein in executive pay have been weak, impacted by corporate lobbying.[50] Other forms of rent seeking that government has failed to restrain and that have contributed to economic inequality include monopolistic behaviors,[51] predatory lending,[52] government subsidies to business,[53] regulatory capture,[54] and rules that protect companies from foreign competition.[55] Tax policy has also disproportionately benefitted the top 1%.[56] President Reagan pushed the top tax bracket down from 70% to 28%, and it has stayed between 35% and 40% since then.[57] The top 1% is not only earning bigger paychecks, but is also taxed less heavily than they were during the era of economic equality.[58] This economic inequality is neither inevitable nor natural; rather, government policies play a role in generating economic inequality.

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[44] STIGLITZ, *supra* note 11, at 35–36.

[45] *See* LAWRENCE LESSIG, REPUBLIC LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT 67–86 (2011); HACKER & PIERSON, *supra* note 6, at 68–70; NOAH, *supra* note 14, at 160–62.

[46] NOAH, *supra* note 14, at 186.

[47] GALBRAITH, *supra* note 15, at 148–49.

[48] STIGLITZ, *supra* note 11, at 3.

[49] HACKER & PIERSON, *supra* note 6, at 62–63; NOAH, *supra* note 14, at 152.

[50] HACKER & PIERSON, *supra* note 6, at 64–65, 221.

[51] STIGLITZ, *supra* note 11, at 43–47

[52] *Id.* at 36–37.

[53] *Id.* at 40; NOAH, *supra* note 14, at 172 ("Congress was busy extending copyright terms and patent monopolies and turning over public lands to mining and timber companies for below-market fees.").

[54] STIGLITZ, *supra* note 11, at 47–48.

[55] *Id.* at 50.

[56] *See id.* at 71–74 (discussing how tax policies are less restrictive for the top).

[57] NOAH, *supra* note 14, at 110.

[58] *See* HACKER & PIERSON, *supra* note 6, at 48. On January 2, 2013, the President signed into law a tax increase to 39.6% from 35% on earners over $400,000. American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (2013). This law was enacted to avoid the "fiscal cliff" and represents the success of the President's rhetoric about income inequality.

C. The Impacts of Economic Inequality

While conservatives and liberals largely agree that income inequality is on the rise,[59] they disagree over whether this is a bad thing. Liberals recognize that some level of economic inequality is an integral part of capitalism but contend that current levels of inequality—significantly higher than in other advanced, industrialized, democratic nations—are too extreme.[60] By contrast, for conservatives, inequality is a necessary motivator for citizens to work hard, innovate, and create wealth.[61] Yet, we are at the point at which the level of inequality is more than what is needed to maximize output.[62] For most middle-income and low-wage jobs in our economy, effort and skill do not matter; workers are instead motivated by fear of losing their jobs and becoming destitute.[63]

In fact, higher American worker productivity has not led to wage gains for the middle class; only the top 10% saw their incomes benefit from increases in worker productivity.[64] It does not appear that the megarich need additional pay as

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[59] PAGE & JACOBS, *supra* note 6, at 9–10 ("The basic facts about economic inequality are rock solid. The statistics have been meticulously gathered and analyzed by nonpartisan economists, respected government agencies, and independent bodies that work closely with Wall Street firms and private bankers and investors."); *see also* NOAH, *supra* note 14, at 7 (remarking on the consensus among experts).

[60] *See* HACKER & PIERSON, *supra* note 6, at 38–40 (demonstrating that the United States is now the most unequal nation of the advanced industrial countries in terms of the level and increase of inequality); NOAH, *supra* note 14, at 3–4, 164–66 (finding that the United States' income distribution places it twenty-seventh of thirty OECD nations); Timothy M. Smeeding, *Public Policy, Economic Inequality, and Poverty: The United States in Comparative Perspective*, 86 SOC. SCI. Q. 955, 956 (2005) (determining that "the United States has the highest overall level of inequality of any rich OECD nation in the mid-1990s"). On comparative income inequality in developed nations, see generally Andrea Brandolini & Timothy M. Smeeding, *Income Inequality in Richer and OECD Countries*, *in* THE OXFORD HANDBOOK OF ECONOMIC INEQUALITY, *supra* note 20, at 71.

[61] *See* NOAH, *supra* note 14, at 165–68 (summarizing the views of economists who endorse this view); STIGLITZ, *supra* note 11, at 106–17 (arguing that the conservatives believe that inequality motivates people to be more productive and efficient for a better outcome); Richard B. Freeman, *(Some) Inequality is Good for You*, *in* THE NEW GILDED AGE: THE CRITICAL INEQUALITY DEBATES OF OUR TIME 63, 64–68 (David B. Grusky & Tamar Kricheli-Katz eds., 2012) (including a list of economists' arguments supporting income inequality).

[62] *See* Freeman, *supra* note 61, at 82 (arguing that "many of the ways in which top earners make their money in response to incentives are counterproductive").

[63] *See* NOAH, *supra* note 14, at 166–67 (arguing that the middle- or low-income workers are not motivated by goods acquired through skill and effort); STIGLITZ, *supra* note 11, at 102–03 (discussing the anxieties faced by the middle of the population).

[64] NOAH, *supra* note 14, at 176; *see also* BARTELS, *supra* note 24, at 17–18 (citing economists' concept of the "unprecedented dichotomy" between worker output and income growth as evidence of fairness problems in recent development in United States income distribution); Levy & Temin, *supra* note 23, at 2 (holding that between 1980 and 2005,

motivation to work hard, and moreover, many executive payment methods are economically inefficient, such as stock options that raise executive pay regardless of performance.[65] For instance, while amassing huge fortunes prior to the 2008 economic downturn (largely in the financial industry and as corporate executives), the top .1% arguably was not contributing to society's bottom line through technological, scientific, or other innovations that improve life for others.[66] Rather, in the realm of finance, "it was not contribution to society that determined relative pay, but something else: bankers received large rewards, though their contribution to society—and even to their firms—had been *negative*."[67] In short, inequality is not providing the right kind of incentives, and it is skewing the market towards the top.

Economic inequality injures the economy through "lower productivity, lower efficiency, lower growth, [and] more instability,"[68] as the top 1% gain a larger slice of the pie without increasing the size of the pie. By contrast, across nations, economic equality is associated with longer and more sustained growth.[69] Income inequality played a role in the 2008 collapse of the market, as middle-class Americans relied on debt to stay afloat.[70] Large gaps between the rich and the poor are also associated with a wide array of social dysfunctions, such as higher rates of infant mortality and crime, less educational attainment, and lower life

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business sector productivity increased by 67.4%, yet median weekly earnings of full-time workers rose only 14%).

[65] *See* Freeman, *supra* note 61, at 82–83 ("[M]any of the ways in which top earners make their money in response to incentives are counterproductive . . . .").

[66] *See* STIGLITZ, *supra* note 11, at xiv–xv (arguing that the wealth of the elite and wealthy seemed to arise out of their ability to take advantage of others).

[67] STIGLITZ, *supra* note 11, at xv; *see also* John Cassidy, *What Good is Wall Street? in* THE OCCUPY HANDBOOK, *supra* note 2, at 54, 72 (reviewing studies showing that "people in the financial sector are overpaid").

[68] STIGLITZ, *supra* note 11, at 117.

[69] *See* DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY 302–34 (2012); BARTELS, *supra* note 24, at 14 ("[E]conomists who have studied the relationship between inequality and economic growth have found little evidence that large disparities in income and wealth promote growth."); Daron Acemoglu & James A. Robinson, *Against Political Capture: Occupiers, Muckrakers, Progressives, in* THE OCCUPY HANDBOOK, *supra* note 2, at 100, 107 ("Countries that have succeeded in creating egalitarian, economically dynamic societies have done so because they have forged inclusive political institutions."); Andrew G. Berg & Jonathan D. Ostry, *Equality and Efficiency: Is There a Trade-off Between the Two or Do They Go Hand in Hand?*, FIN. & DEV., Sept. 2011, at 13–14; Jonas Pontusson, *Inequality and Economic Growth in Comparative Perspective, in* THE NEW GILDED AGE: THE CRITICAL INEQUALITY DEBATES OF OUR TIME, *supra* note 61, at 88, 96.

[70] *See* NOAH, *supra* note 14, at 168–70 (citing scholars who support this point of view); Berg & Ostry, *supra* note 69, at 13 (explaining how inequality played a role in the United States financial crisis).

expectancy.[71] In turn, these social ills result in lost productivity and increased costs "associated with containing the violence, healing the sick, and fixing the dysfunction."[72] In addition, inequality undermines America's self-identity and moral purpose, which are based on ideals of fair play and equal opportunity for all.[73] Inequality leads to attacks on immigration and resistance to international trade, both of which might otherwise alleviate some inequality.[74] Meanwhile, the wealthy become more isolated in gated communities and less willing to spend money on common needs, while public investments drop in things such as infrastructure, basic research, and education.[75] These underinvestments lead to greater inequality, creating a downward spiral, as faith in government erodes.

Given the downsides of inequality, why have the legislative and executive branches enacted policies that favor the interests of business and the wealthy over the average American? There are multiple explanations, most of which converge on growing political polarization and the role of money in politics. The rise of political polarization and partisanship tracks the rise of income inequality.[76] Republicans favor policies that foster inequality, and they have not only held control through much of this time period, but their dominance has also pushed Democrats rightward.[77] Nevertheless, the top 1% have done staggeringly well through both Republican and Democratic administrations, and neither party is immune to the need to raise money to obtain and stay in power.[78] Moreover, studies show that politicians of both parties are most responsive to affluent voters and ignore the opinions of citizens at the bottom of the income ladder.[79] Through lobbying and campaign contributions, business interests and wealthy individuals

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[71] *See* RICHARD WILKINSON & KATE PICKETT, THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONGER 81, 108–13, 134–37 (2009); Richard H. McAdams, *Economic Costs of Inequality*, 2010 U. CHI. LEGAL F. 23, 37 (2010) ("In sum, though the empirical connection between inequality and crime is not fully resolved and requires more study, there is significant evidence that it is real and substantial.").

[72] Michael Shank, *Tax Loophole Users, Companies with Negative Tax Rates, Exacerbating US Income Inequality*, HUFFINGTON POST (Nov. 16, 2011, 3:41 PM), http://www.huffingtonpost.com/michael-shank/income-inequality-tax-loopholes_b_1092309.html.

[73] STIGLITZ, *supra* note 11, at 117; *see also* PAGE & JACOBS, *supra* note 6, at 46; BLANK, *supra* note 33, at 5–6 (addressing the noneconomic impacts of inequality, such as decreases in voting rate and self-reported happiness).

[74] PAGE & JACOBS, *supra* note 6, at 45–46.

[75] BARTELS, *supra* note 24, at 14; STIGLITZ, *supra* note 11, at 93, 289; Greg J. Duncan & Richard J. Murnane, *Introduction: The American Dream, Then and Now*, *in* WHITHER OPPORTUNITY?: RISING INEQUALITY, SCHOOLS, AND CHILDREN'S LIFE CHANCES 3, 3, 7–8 (Greg J. Duncan & Richard J. Murnane eds., 2011) [hereinafter WHITHER OPPORTUNITY?]; John Ferejohn, *Rising Inequality and American Politics*, *in* THE NEW GILDED AGE: THE CRITICAL INEQUALITY DEBATES OF OUR TIME, *supra* note 61, at 115, 130.

[76] *See* Ferejohn, *supra* note 75, at 115, 124–25.

[77] *See id.* at 126–29.

[78] *See* HACKER & PIERSON, *supra* note 6, at 163–93 (describing the Democrats' drift rightward as the party started courting business to raise money).

[79] BARTELS, *supra* note 24, at 5.

have been able to secure the policies described above, such as unlimited corporate compensation, government subsidies, and deregulation. Yet, when such policies and practices that contribute to economic inequality are challenged in the courts, the Supreme Court generally upholds them. Accordingly, the next Part places the Supreme Court within this narrative of the government's role in creating and maintaining economic inequality. The judiciary is the missing piece of the inequality puzzle.

II. THE SUPREME COURT AND ECONOMIC INEQUALITY

The major causes of economic inequality all intersect with law and, specifically, with Supreme Court doctrine. This Part traces how the Supreme Court has contributed to economic inequality by denying social or economic rights for people at the bottom of the income scale; favoring the interests of business over consumers and employees; refusing to recognize a constitutional right to education; and allowing money to drive the electoral system.

A. Redistribution and the Social Safety Net

The Court adheres to three core principles when it directly confronts issues of class. First, the Constitution does not create or guarantee social or economic rights.[80] Second, the poor are not a suspect class, and thus, discrimination on the basis of wealth does not warrant heightened review.[81] Third, laws that impact the poor are a type of economic legislation subject to rational basis review.[82] As a result of these interlocking principles, poor people generally must secure any governmental assistance through the political process, yet they often fare badly in the legislative realm due to their lack of political influence and a societal distaste for and distrust of the poor. "The more generous a welfare state, the more people are protected from the economic insecurity and instability of markets."[83] Unfortunately for the poor in America, our welfare state is less egalitarian than in other developed nations.[84] As political scientists have shown, Congress is entirely unresponsive to the political preferences of the poor. As a result of the recent

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[80] *See* DeShaney v. Winnebego Cnty. Dep't of Soc. Servs., 489 U.S. 189, 196 (1989) (holding that there is no constitutional duty to protect children from their abusive parents after receiving reports of possible abuse).

[81] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18–37 (1973) (holding that invoking strict scrutiny is inappropriate in a class action involving poor families).

[82] *See, e.g.*, Harris v. McRae, 448 U.S. 297, 322–25 (1980); Maher v. Roe, 432 U.S. 464, 470–72 (1977); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18–37 (1973); Lindsey v. Normet, 405 U.S. 56, 74 (1972); Dandridge v. Williams, 397 U.S. 471, 487 (1970).

[83] BRADY, *supra* note 36, at 166. The author continues, "The generosity of the welfare state is the dominant cause of how much poverty exists in affluent Western democracies." *Id.* And, of course, the scope and scale of the welfare state is a matter of politics.

[84] *Id.*

recession, many formerly middle-class people are falling into poverty, and the poverty rate is about to surpass rates not seen since the 1960s.[85] The OWS movement argues that poverty is not inevitable; it cannot be blamed solely on personal failings; and it results from structural features of the economy that are reinforced or ignored by government policies. However, in the ideology of the Supreme Court, government is not responsible for creating poverty and, thus, bears no obligation to solve it.[86]

1. The Constitution Does Not Create Social and Economic Rights

The core principle of the Court's class doctrine is that the Constitution does not ensure any minimum level of entitlement or standard of living. No one is constitutionally entitled to food, housing, medical care, or education.[87] As the Court has stated, "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."[88] In this view, the Constitution creates negative, rather than positive, rights, meaning that the Constitution protects against government interference of rights, but it does not create any affirmative obligations on the part of government.[89] Consistent with these principles, the Court ruled in *DeShaney v. Winnebego County Department of Social Services*[90] that the Constitution is not implicated when the state Department of Social Services turns a child over to an abusive father after repeated warnings of abuse, and the child is injured as a result.[91] Nor is the Constitution violated, according to *Town of Castle Rock v. Gonzales*,[92] when a police department fails to enforce a domestic violence protective order, thus leading to the murder of a woman's three children by her

[85] *See, e.g.*, Hope Yen, *4 in 5 in USA Face Near-Poverty, No Work*, USA TODAY, Sept. 17, 2013, http://www.usatoday.com/story/money/business/2013/07/28/americans-poverty-no-work/2594203/ (reporting on an Associated Press survey data that "[t]he risks of poverty . . . have been increasing in recent decades . . . coinciding with widening income inequality.").

[86] *See, e.g.*, Harris v. McRae, 448 U.S. 297, 316 (1980) (stating that the government does not create indigency); Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 LAW & CONTEMP. PROBS. 109, 110–13 (2009) (describing the Court's unwillingness to compel the government to improve the difficulties their actions create for the poor).

[87] *Lindsay*, 405 U.S. at 74 ("We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill.").

[88] DeShaney v. Winnebego Cnty. Dep't of Soc. Servs., 489 U.S. 189, 196 (1989).

[89] *See generally* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990) (scrutinizing the "negative liberties" of the Constitution and the discussion of the undesirable consequences of such an approach in decision law).

[90] 489 U.S. 189 (1989).

[91] *Id.* at 197–200.

[92] 545 U.S. 748 (2005).

estranged husband.[93] Notably, both children in the child welfare system and domestic violence victims are disproportionately poor.[94] In these cases, the Court views the provision of government services as a privilege, in which citizens must take what they can get.

This narrative of the negative Constitution is widely accepted, but it is neither natural nor inevitable.[95] To begin with, the idea that the Constitution does not create affirmative rights is not textually accurate. There are many provisions of the Constitution that secure affirmative rights, such as the right to a trial by jury or the right to equal protection, which requires the "federal government to protect its citizens in the face of the states' failure to do so."[96] Moreover, the action versus inaction dichotomy is a false one.[97] As the *DeShaney* and *Gonzeles* cases show, government can harm as much by inaction as by action, and this distinction "does not take into account government's pervasive influence through regulatory action and inaction, its displacement of private remedies, and indeed, its monopoly over some avenues of relief."[98] While property and contract may look at first blush like private market rights, in reality, the government creates and protects those rights

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[93] *Id.* at 768.

[94] For a discussion of domestic violence victims, see Deborah M. Weissman, *The Personal is Political—and Economic: Rethinking Domestic Violence*, 2007 BYU L. REV. 387, 415–17 ("[t]he consequences of deindustrialization . . . are . . . associated with increased domestic violence."). For further discussion of socioeconomic status of children in the child welfare system, see Cynthia R. Mabry, *Second Chances: Insuring that Poor Families Remain Intact by Minimizing Socioeconomic Ramifications of Poverty*, 102 W. VA. L. REV. 607, 618–19 (2000) (arguing that cuts in federal benefits to support poor families has an impact on the number of children adjudged neglected); Dorothy Roberts, *The Ethics of Punishing Indigent Parents*, *in* FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF CRIMINAL LAW 161, 163–64 (William C. Heffernan & John Kleinig eds., 2000) (considering the associations between poverty and child maltreatment); Kristen Shook Slack et al., *Understanding the Risks of Child Neglect: An Exploration of Poverty and Parenting Characteristics*, 9 CHILD MALTREATMENT 395, 396–97 (2004) (analyzing different aspects of poverty and child neglect); *see generally* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002) (contending that child welfare policies address the disproportionate number of black children in the United States foster system by punishing their parents instead of tackling poverty's roots).

[95] *DeShaney*, 489 U.S. at 212–13 (Blackmun, J., dissenting) ("[T]he question presented by this case is an open one, and our Fourteenth Amendment precedents may be read more broadly or narrowly depending upon how one chooses to read them. Faced with the choice, I would adopt a 'sympathetic' reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging.").

[96] Bandes, *supra* note 89, at 2313; *see also* Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 6–7 (2005) (considering various amendments that require an obligation on government).

[97] *See* Bandes, *supra* note 89, at 2280 (arguing that the difference between action and inaction is superficial because to "act" is hard to define).

[98] *Id.* at 2283 (footnote omitted).

by providing enforcement mechanisms.[99] Thus, a governmental decision not to act equals ratification of political choices.

Unlike the United States, the constitutions of many other countries guarantee social and economic rights.[100] While critics charge that such rights are impossible and inappropriate for the judiciary to enforce,[101] there are examples where courts have held such rights justiciable. For instance, in South Africa, the country's highest court ruled that the government is obliged to take reasonable measures within its available resources to achieve progressive realization of the right to housing.[102] This decision preserved an important role for the judiciary in protecting vulnerable populations, while respecting the policymaking role of the political branches.

Our own history reveals a greater commitment to social and economic rights than prevailing doctrine admits.[103] In the 1960s and 1970s, in particular, there was a vibrant welfare rights movement and a receptive Court that appeared poised to recognize social and economic rights.[104] The groundwork was laid in a series of cases in which the Court ruled that indigence would not limit access to judicial or electoral processes, which are fundamental aspects of citizenship.[105] The Court has also ruled that states cannot limit welfare benefits to new residents without violating a constitutional right to travel, and it reaffirmed this principle postwelfare reform.[106] While these right-to-travel cases are a rare win for the poor, it is notable

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[99] Sunstein, *supra* note 96, at 6; *see also* Bandes, *supra* note 88, at 2239.

[100] David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L.J. 189, 193–96 (2012); Sunstein, *supra* note 96, at 15–16.

[101] *See, e.g.*, Sunstein, *supra* note 96, at 15–16 (arguing that social rights would be unenforceable); Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEXAS L. REV. 1895, 1895–97 (2004) (summarizing the argument that social welfare rights are unenforceable).

[102] Gov't of the Republic of S. Afr. v. Grootboom 2000 (11) BCLR 1169 (CC), at 19 para. 21 (S. Afr.).

[103] *See* William E. Forbath, *Constitutional Welfare Rights: A History, Critique, and Reconstruction*, 69 FORDHAM L. REV. 1821, 1827–35 (2001) (summarizing the "social citizenship tradition" in America).

[104] *See id.* at 1858–67 (describing the goal to eliminate the categorical nature of the welfare system in the 1960s and 1970s); Sunstein, *supra* note 96, at 20–21 (providing examples of cases decided by the Supreme Court that recognize social and economic rights).

[105] *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663, 666 (1966) (holding that the state must provide the vote free of charge); Douglas v. California, 372 U.S. 353 (1963) (holding that the state must provide counsel to poor people on their first appeal of a criminal conviction); Griffin v. Illinois, 351 U.S. 12 (1956) (holding that the state must provide trial transcripts to poor people appealing their criminal convictions); *see also* M.L.B. v. S.L.J., 519 U.S. 102 (1996) (holding that the state may not condition appeals from trial court decrees terminating parental rights on the affected parent's ability to pay record preparation fees).

[106] Shapiro v. Thompson, 394 U.S. 618 (1969); *see also* Saenz v. Roe, 526 U.S. 489 (1999) (affirming this right in the 1990s).

that these cases are premised on a view of welfare as a market that should remain unfettered so that the poor can strike their best deal for survival.

The highwater mark of constitutional protection for the poor came in the case of *Goldberg v. Kelly*,[107] in which the Court held that welfare benefits were a form of property entitled to due process protections.[108] Justice Brennan addressed the importance of welfare benefits, stating, "[w]elfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community."[109] Yet, the promise of due process often fails claimants who usually lack lawyers to argue appeals, struggle to get to hearings, and cannot take off work to fight for their benefits. Nevertheless, the *Goldberg* opinion was vitally important in recognizing that public assistance "is not mere charity," but a means for furthering democratic norms.[110] However, the momentum built by these welfare rights cases came to a screeching halt when President Nixon appointed four conservative Justices in 1970.[111]

2. The Poor are Not a Suspect Class

After 1970, the Court solidified its position that the poor are not a suspect class under the Equal Protection Clause, and thus, legislation that discriminates on the basis of wealth is reviewed under a lenient rational basis standard. A suspect class is a group of people who have an immutable trait, who suffer from a history of prejudice and stereotyping, and who lack a political voice.[112] The Court has long recognized that race, national origin, alienage, and gender are suspect classes, and as a result, legislation that draws lines on these bases is assessed under a heightened level of scrutiny.[113] By contrast, without ever fully explaining why, the

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[107] 397 U.S. 254 (1970).

[108] *Id.* at 262.

[109] *Id.* at 265.

[110] *Id.*

[111] *See* Sunstein, *supra* note 96, at 20–22. "[I]t does not seem to me too speculative to suggest that if Humphrey had been elected, social and economic rights, American-style would have become a part of American constitutional understandings." *Id.* at 22.

[112] This framework was set forth in the famous footnote 4 of U.S. v. Carolene Products, 304 U.S. 144, 152 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."); *see also* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 438–47 (1985) (analyzing these factors with regard to the disabled); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313–14 (1976) (analyzing these factors with regard to the elderly); Frontiero v. Richardson, 411 U.S. 677, 684–87 (1973) (applying these factors with regard to women).

[113] Race and national origin classifications receive strict scrutiny. *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986). Gender classifications are subject to intermediate scrutiny, see Craig v. Boren, 429 U.S. 190, 197 (1976), as are those regarding nonmarital children, see Clark v. Jeter, 486 U.S. 456, 461 (1988).

Court has regularly assumed that the poor do not meet the test for a suspect class,[114] and it hammered home that point in its abortion funding cases.[115]

In *Harris v. McRae*,[116] the Court upheld Congress's denial of Medicaid coverage for medically necessary abortions; the restriction was challenged as violating equal protection because Medicaid covered other medically necessary procedures.[117] The Court stated, "this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis,"[118] explaining that "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category."[119] In the Court's view, an indigent woman has the same range of options as if Congress had chosen not to provide health care coverage at all.[120] In dissent, Justice Brennan remarked that the government's antiabortion policy may have resulted from majoritarian processes, but it was not foisted on rich and poor alike. Rather, "it imposes that viewpoint only upon that segment of our society which, because of its position of political powerlessness, is least able to defend its privacy rights from the encroachments of state-mandated morality."[121]

The majority's assertion that government plays no role in creating indigency is simply wrong, especially in light of the state's role in tolerating gender discrimination in the labor market, which depresses women's wages.[122] The irony of the decision is the Court's "failure to see that the inaccessibility of free abortions, combined with a legal system which does not require employers to grant maternity leaves, child-care leaves, or a flexible work schedule, creates the very indigency which prevents women from exercising the choice to have an

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[114] Julie Nice argues that this is still an open question, as the Supreme Court has never explained why the poor are not a suspect class. Julie Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, and Dialogic Default*, 35 FORDHAM URB. L.J. 629, 647 (2008).

[115] Bridgette Baldwin, *In Supreme Judgment of the Poor: The Role of the United States Supreme Court in Welfare Law and Policy*, 23 WIS. J. OF L. GEND. & SOC'Y 1, 3 (2008) ("While the historical arch from the Civil Rights Era to the present normally presents a story of expanded liberties and freedoms to the socially disenfranchised, the lens of the Supreme Court welfare decisions narrates a much different story.").

[116] 448 U.S. 297 (1980).

[117] *Id.* at 326.

[118] *Id.* at 323 (quoting Maher v. Roe, 432 U.S. 464, 470–71 (1977) (holding that the Equal Protection Clause does not require a state participating in the Medicaid program to pay the expenses incident to nontherapeutic abortions for indigent women even if it pays expenses incident to childbirth)).

[119] *Id.* at 316.

[120] *Id.* at 317–18.

[121] *Id.* at 332 (Brennan, J., dissenting).

[122] *See* Judith Olans Brown et al., *The Failure of Gender Equality: An Essay in Constitutional Dissonance*, 36 BUFF. L. REV. 573, 630 (1987).

abortion."[123] As a result of *McRae*, poor women may forgo necessities, such as food and rent, to pay for abortions or turn to illegal and unsafe methods of abortion.[124] A scramble for funds often leads to a delayed abortion, which in turn, costs more and has higher health risks.[125]

Even if we accept the Court's test for identifying a suspect class (i.e., possessing an immutable trait, a history of prejudice and stereotyping, and lack of political voice), we know far more today about poverty than we did in the 1970s, and this research suggests that the poor share many of the criteria of a suspect class. For instance, while poverty is certainly not immutable, intergenerational mobility is far more limited than our meritocratic myth assumes, as well as lower than in other countries. "Four out of 10 children whose family is in the bottom fifth [incomes up to about $25,000] will end up there as adults. Only 6[%] of them will rise to the top fifth [incomes over $100,000]."[126] In short, who your parents are largely determines what you will earn in the future.[127] At the same time, our

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[123] *Id.*; *see also* Rhonda Copelon, *Losing the Negative Right of Privacy: Building Sexual and Reproductive Freedom*, 18 N.Y.U. REV. L. & SOC. CHANGE 15, 47 (1990–1991) (ignoring the state's role in perpetuating poverty "permits the state to escape responsibility for the tragic conditions of people's lives and allows it to blame the poor, who are largely women, for their hardship").

[124] Abortions can cost between $450 in the first trimester to $1,500 and more later in the pregnancy. *See* Magda Schaler-Haynes et al., *Abortion Coverage and Health Reform: Restrictions and Options for Exchange-Based Insurance Markets*, 15 U. PA. J. L. & SOC. CHANGE 323, 330 (2012) (discussing the approximate prices of an abortion).

[125] *Id.* at 229 ("Women who delay abortions into the second trimester of pregnancy are disproportionately people of color and more likely to be lower-income than those who obtain abortions in the first trimester."); *see also* Janet L. Dolgin & Katherine R. Dieterick, *The "Other" Within: Health Care Reform, Class, and the Politics of Reproduction*, 35 SEATTLE U. L. REV. 377, 395 n.128 (2011–2012) ("In 2001 an abortion obtained at ten weeks gestation cost $370 on average, by fourteen weeks the cost was $650, and by twenty weeks it was $1,042) (citing Heather D. Boonstra, *The Heart of the Matter: Public Funding of Abortion for Poor Women in the United States*, 10 GUTTMACHER POL'Y REV. 12, 15 (2007)).

[126] Eduardo Porter, *Inequality Undermines Democracy*, N.Y. TIMES (Mar. 20, 2012), http://www.nytimes.com/2012/03/21/business/economy/tolerance-for-income-gap-may-be-ebbing-economic-scene.html?_r=0; *see also* NOAH, *supra* note 14, at 29 ("Only 6[%] of Americans born at the bottom of the heap . . . ever make it in adulthood to the top."); STIGLITZ, *supra* note 11, at 18–19 (arguing that the chance of moving up in America is small). Due to the consequences of rising inequality, the "birth lottery" has a higher impact on mobility today than in past years. *See generally* Raj Chetty et al., *Is the United States Still a Land of Opportunity?: Trends in Intergenerational Mobility Over 25 Years* (Nat'l Bureau of Econ. Research, Working Paper No. 19844, 2014), *available at* http://obs.rc.fas.harvard.edu/chetty/mobility_geo.pdf.

[127] BARTELS, *supra* note 24, at 16 ("[T]he proportion of families in the top quintile of the income distribution who remained there a decade later also increased, while the proportion of families falling from the top quintile into the bottom quintile, or from the top two quintiles into the bottom two quintiles, declined."); JOHN ICELAND, POVERTY IN AMERICA 3, 51 (2003); NOAH, *supra* note 14, at 29; *see also* Justin Wolfers, *Is Higher*

societal notions of race and gender are becoming more fluid and less categorical, as we recognize differing modes of self-identity and a larger spectrum of variation. For these reasons, immutability seems a weak peg on which to hang constitutional doctrine.

As to the second factor, the poor suffer from a history of prejudice and stereotyping that is compounded by racial and gender biases. As poverty scholars have explained, the poor have historically been categorized as either deserving, meaning they cannot be blamed for their poverty, such as children, widows, and the disabled, or undeserving, meaning they should be self-sufficient, such as able-bodied adults.[128] Public support is more generous for the former, stingy and stigmatizing for the latter. This demarcation was put in stark relief when welfare was reformed in 1996 from an open-ended entitlement program based on means-tested criteria. The theoretical foundation of the current welfare program, called Temporary Assistance to Needy Families ("TANF"), is that individual choices cause poverty, in particular, the individual choices of African American residents of inner-city neighborhoods marked by concentrated poverty. Although African-Americans only account for one-quarter of the poverty population,[129] and although few welfare recipients have lifelong dependency on welfare, the dialogue and debate surrounding welfare reform centered on a culture of pathology among inner-city African Americans.[130] The media and politicians picked up on these cultural explanations for poverty, and began demonizing the welfare queen, a term popularized by President Reagan, which referred to a "woman of color who manipulates and exploits the welfare system, scorns lasting or legalized relationships with men, and has a series of children out of wedlock in order to

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Income Inequality Associated with Lower Intergenerational Mobility?, FREAKONOMICS: THE HIDDEN SIDE OF EVERYTHING (Jan. 19, 2012, 10:28 AM), http://www.freakonomics.com/2012/01/19/is-higher-income-inequality-associated-with-lower-intergenerational-mobility/ ("It's striking just how closely related inequality and [intergenerational] mobility are.").

[128] *See generally* MICHAEL B. KATZ, THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE 8 (1989) (discussing the "undeserving poor"); Joel F. Handler, *"Constructing the Political Spectacle": The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 BROOK. L. REV. 899, 906 (1990) ("[T]he heart of poverty policy centers on the question of who is excused from work. Those who are excused are the 'deserving poor'; those who must work are the 'undeserving.' Ultimately, this is a moral distinction."); Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1505 (1991) ("[This] distinction created a line running through the poor, putting the aged, infant, and disabled on one side of the line, and the able-bodied on the other side.").

[129] JOHN ICELAND, POVERTY IN AMERICA 3 (2003). African-Americans do, however, suffer a poverty rate almost twice that of the national poverty rate. *Id.* at 81.

[130] For a conservative attack on welfare, see LAWRENCE MEAD, BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP 104 (1986) (arguing work should be a condition of welfare) and CHARLES MURRAY, LOSING GROUND (1984) (asserting welfare should be abolished).

continue her welfare eligibility."[131] The welfare queen became a frequent target during the racially tinged debates over welfare reform in the 1990s.[132] During the debates on welfare reform, congresspersons referred to poor mothers on welfare as "breeding mules," "alligators," and "monkeys."[133] In the end, TANF imposed work requirements on welfare mothers, limited lifetime receipt of welfare benefits to five years, and permitted states to require welfare recipients to conform to various behavioral mandates and to promote marriage as a solution to poverty. TANF has pushed millions off of welfare, but the vast majority of former welfare recipients remain poor, either because they are working in low-wage jobs or have disengaged from the social welfare system entirely.[134]

As the TANF history reveals, the poor lack a meaningful political voice, which goes to the third step of the suspect class test. A study by Martin Gilens showed a statistical correlation between the views of higher income Americans and policy outcomes.[135] While legislation reflects the preferences of higher income Americans, the preferences of the poor are completely ignored, and even the preferences of median Americans have no impact when their preferences diverge from the wealthy.[136] Why do the wealthy fare better? Gilens hypothesizes that "the most obvious source of influence over politics that distinguishes high-income Americans is money and the willingness to donate to parties, candidates, and

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[131] Nina Perales, *A "Tangle of Pathology": Racial Myth and the New Jersey Family Development Act*, *in* MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD 250, 257–61 (Martha Albertson Fineman & Isabel Karpin eds., 1995); *see also* Joel Handler, *Ending Welfare as We Know It—Wrong for Welfare, Wrong for Poverty*, 2 GEO. J. ON FIGHTING POVERTY 3, 7 (1994) ("The image, often unspoken, is the ghetto 'underclass': unmarried, young black women with several children, who are long-term dependents of the welfare system. . . .").

[132] *See, e.g.*, Louis Kushnik, *Responding to Urban Crisis: Functions of White Racism*, *in* A NEW INTRODUCTION TO POVERTY: THE ROLE OF RACE, POWER, AND POLITICS 160 (Louis Kushnick and James Jennings eds., 1999); Valerie Polakow, *The Shredded Net: The End of Welfare as We Knew It*, *in* A NEW INTRODUCTION TO POVERTY: THE ROLE OF RACE, POWER, AND POLITICS 167, 170. For a detailed description of the racist underpinnings of the welfare system, see generally JILL QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY (1994).

[133] For instance, House Ways and Means Chairman, Representative Clay Shaw, Jr., said, "It may be like hitting a mule with a two-by-four, but you've got to get their attention." Kushnik, *supra* note 132, at 160; Polakow, *supra* note 132, at 170.

[134] Michele Gilman, *The Welfare Queen Returns*, 22 AM. U.J. GENDER SOC. POL'Y. & L. 101, 102 (forthcoming 2014); *see also* SHEILA R. ZEDLEWSKI, URBAN INST., WELFARE REFORM: WHAT HAVE WE LEARNED IN FIFTEEN YEARS? 6 (2012), *available at* http://www.urban.org/UploadedPDF/412539-Welfare-Reform-What-Have-We-Learned-in-Fifteen-Years.pdf (describing the difficulties that current and former TANF recipients have maintaining consistently earning wages).

[135] Martin Gilens, *Inequality and Democratic Responsiveness*, 69 PUB. OPINION Q. 778, 786, 792 (2005).

[136] *Id.* at 788.

interest organizations."[137] Similarly, Larry Bartels's influential analysis of the voting patterns of United States senators found that they were responsive to the ideological views of middle- and high-income constituents, but the views of "low income constituents had *no* discernible impact" on their voting behavior, regardless of the Senators' party affiliation.[138] The poor's lack of influence is not due to lower voter turnout (60% for the poor versus 80% for high-income respondents) or lesser political knowledge or contacts.[139] Rather, "the data are consistent with the hypothesis that senators represented their campaign contributors to the exclusion of other constituents."[140]

At the same time, corporations and wealthy Americans have no limits on what they can spend on political campaigns, and they can afford expensive lobbyists to push for their interests. Professor Stephen Loffredo states that the Court has remained resolutely noninterventionist with regard to legislation impacting the poor by reflexively raising its fear of the "*Lochner* bogey" and "any backsliding toward the anti-democratic judicial adventurism of that era."[141] The result is that "[c]orporations and wealthy individuals may wield disproportionate power at the expense of the less affluent, but so long as the richest CEO and the most destitute homeless woman each cast only a single ballot, this version of democratic equality is satisfied."[142] In short, the assumption that the poor have equal access to the political process is incorrect; rather, the Court "has handed the elected branches a carte blanche to deal with a politically dispossessed minority."[143] By refusing to see the overlaps between recognized suspect classes and the poor, both in theory and in fact,[144] the Supreme Court plays a role in entrenching inequality.

3. Class-based Distinctions Are Subject to Rational Basis Review

The third tenet is that legislation that discriminates on class grounds is subject to rational basis review. Unlike strict scrutiny, this level of review "requires only that the State's system be shown to bear some rational relationship to legitimate state purposes."[145] It is hard to imagine a wealth classification that would not meet

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[137] *Id.* at 793.

[138] BARTELS, *supra* note 24, at 260.

[139] *Id.* at 279–80.

[140] *Id.* at 280.

[141] Stephen Loffredo, *Poverty, Democracy, and Constitutional Law*, 141 U. PA. L. REV. 1277, 1290–91 (1993).

[142] *Id.* at 1359.

[143] *Id.* at 1284. The Supreme Court does not consider the poor a suspect class for constitutional purposes and often views the poor's motives as highly suspect. *See, e.g.*, Wyman v. James, 400 U.S. 309, 318–26 (1971) (upholding home visits as a condition of receiving welfare because they serve a proper administrative purpose and are not an unwarranted invasion on personal privacy).

[144] *See* Barnes & Chemerinsky, *supra* note 86, at 127–29 (explaining how race and class overlap and should receive similar scrutiny).

[145] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40 (1973).

this lenient standard, and indeed, "the [Supreme] Court has not struck down a welfare classification on constitutional grounds in thirty-four years and counting."[146] Moreover, deference to economic policy means that even the most skewed tax rates cannot be challenged. The Court explained its rationale for imposing rational basis review on wealth classifications in *Dandridge v. Williams*,[147] in which the Court upheld Maryland's family cap welfare policy.[148] That is, a policy of capping welfare benefits regardless of the size of a family, thereby not meeting the state's self-defined "standard of need" for larger families.[149] The Court stated that, "[i]n the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect."[150] The Court acknowledged the difference between regulations affecting business and industry and those that involve "the most basic economic needs of impoverished human beings."[151] Yet, it could "find no basis for applying a different constitutional standard."[152] In short, "the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court."[153] This theme was echoed in *San Antonio Independent School District v. Rodriguez*,[154] discussed below, where the Court stated, with regard to school financing, that "the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them."[155] This deference, however, is selectively applied, as the Court has not deferred to other laws that serve the 99%, such as laws creating voluntary desegregation plans, laws regulating campaign finance, and laws regulating consumer welfare.

B. Businesses and the Court

In contrast to the poor, businesses have fared well before the Supreme Court in recent years. Numerous scholars have tracked the probusiness leanings of today's Court. Further, a close examination of business cases reveals a class-

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[146] Andrew M. Seigel, *From Bad to Worse?: Some Early Speculation About the Roberts Court and the Constitutional Fate of the Poor*, 59 S.C. L. REV. 851, 851 (2008). Deborah Malamud points out that if a legislature made clear its intent to protect class interests, "the more apparent would be the tension between the legislature's class-based theory of economic inequality and the economic-individualist theory upon which the legislature's freedom to act is predicated. This is hardly a prescription for clear and coordinated governmental thought and action." Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1859 (1996).

[147] 397 U.S. 471 (1970).

[148] *Id.*

[149] *Id.* at 473, 486.

[150] *Id.* at 485.

[151] *Id.* at 508.

[152] *Id.* at 485.

[153] *Id.* at 487.

[154] 411 U.S. 1 (1973).

[155] *Id.* at 59.

blindness that trivializes harm to consumers and employees, while being extremely solicitous to business motives. The Court sees the market as a natural system producing ideal outcomes, and thus, any challenges to market outcomes are seen as disruptive rather than corrective.

1. The Roberts Court

In 2008 Jeffrey Rosen wrote in The New York Times Magazine that the Roberts Court was "exceptionally good for American business."[156] Dean Erwin Chemerinsky similarly concluded that "the Roberts Court" is the most probusiness Supreme Court since the mid-1930s."[157] Progressive interest groups, liberal politicians, and the media picked up this theme, spurring academic interest in the alleged probusiness bias of the Roberts Court.[158] Studies confirm that business interests have indeed fared well under the Roberts Court.[159] From the beginning of the Roberts Court through the 2010 term, the position taken by the litigation arm of the Chamber of Commerce, which both represents and files amicus briefs in favor of business interests, "prevailed in 65% of cases before the Roberts Court."[160] In the 2011 term, the Chamber had a near-perfect record.[161] Moreover, the Roberts Court is more likely than its predecessors to grant certiorari to cases involving

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[156] *See* Jeffrey Rosen, *Supreme Court, Inc.*, N.Y. TIMES, Mar. 16, 2008, § MM (Magazine), at 38, 39–40 ("[E]ver since John Roberts was appointed chief justice in 2005, the court has seemed only more receptive to business concerns.").

[157] Erwin Chemerinsky, *An Overview of the October 2007 Supreme Court Term*, 25 TOURO L. REV. 541, 545 (2009).

[158] *See* Sri Srinivasan & Bradley W. Joondeph, *Business, The Roberts Court, and the Solicitor General: Why the Supreme Court's Recent Business Decisions May Not Reveal Very Much*, 49 SANTA CLARA L. REV. 1103, 1106 (2009) ("This perception of the Roberts Court as an institution increasingly aligned with business interests is widely shared. Indeed, it is conventional media wisdom that, with the additions of Chief Justice John Roberts and Associate Justice Samuel Alito, the newly constituted Court has been 'good for business.'") (internal quotation marks omitted).

[159] David L. Franklin, *What Kind of Business-Friendly Court?—Explaining the Chamber of Commerce's Success at the Roberts Court*, 49 SANTA CLARA L. REV. 1019, 1019–20 (2009) (explaining that between 2006 and 2009, the party supported by the Chamber of Commerce prevailed in almost 70% of cases in which Chamber of Commerce was either a party or amicus before the Roberts Court).

[160] CONSTITUTIONAL ACCOUNTABILITY CTR., BIG WINS FOR BIG BUSINESS: THEMES AND STATISTICS IN THE SUPREME COURT'S 2010–2011 BUSINESS CASES 1 (2011), *available at* http://theusconstitution.org/think-tank/issue-brief/big-wins-big-business-themes-and-statistics-supreme-courts-2010-2011-business (noting further that the Chamber's position prevailed in 81% of cases in the 2009 term and 57% in the 2010 term, including "the term's biggest cases").

[161] *See* Tony Mauro, *A Strong Supreme Court Term for Business*, NAT'L L. J., Aug. 1, 2012, http://www.mayerbrown.com/Lauren-Goldman-Supreme-Court-decisions/ (reporting that of the twenty-five business-related cases that the Court heard in the 2011 term, the business side won nineteen and lost three).

business law issues, which constitute one-half to one-third of its shrinking docket.[162]

Some commentators remark that these conclusions are overstated because some cases pit businesses against one another and the numbers may reflect the Chamber's careful selection of cases rather than a Court bias.[163] Professor Jonathan Adler concludes that the Roberts Court is probusiness "insofar as it is sympathetic to some basic business-oriented legal claims, it reads statutes narrowly, it resists finding implied causes of action, it has adopted a skeptical view of antitrust complaints, and it does not place its finger on the scales to assist non-business litigants."[164] Professor David Franklin identifies similar tendencies, finding that "businesses seem to fare especially well when they are defendants; even better when the justices appear to view the litigation in question as having broad regulatory goals as opposed to individualized remedial objectives; and better still when the justices view the litigation as lawyer-driven rather than party-driven."[165] Overall, businesses have done particularly well in securing their positions in cases involving "preemption, punitive damages, arbitration, pleading standards, and employment discrimination."[166]

One defense of the Roberts Court is that it is not significantly more probusiness than its predecessors. Indeed, history shows a steady uptick in probusiness outcomes from 28% before the Warren Court to 48% before the Burger Court to 54% before the Rehnquist Court.[167] Notably, the Rehnquist Court began hearing cases in 1987, paralleling the escalation in income inequality. Professor J. Mitchell Pickerill explains that the acceleration in probusiness outcomes under the Rehnquist Court resulted from the solidification of the New Right Regime under President Reagan, who was committed to an economic agenda that centered on deregulation, tax relief, and supply-side economics and who appointed jurists to the bench who shared his ideology.[168] He concludes that the Roberts Court's "pro-business decisions are best understood as the culmination of a long issue evolution during the New Right Regime."[169] President Clinton sought

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[162] Jonathan H. Adler, *Business, the Environment, and the Roberts Court: A Preliminary Assessment*, 49 SANTA CLARA L. REV. 943, 946 (2009); *see also* Jeffrey Rosen, Keynote Address, *Santa Clara Law Review Symposium: Big Business and the Roberts Court*, 49 SANTA CLARA L. REV. 929, 934 (2009) (arguing that the claim that the Roberts Court is probusiness is hard to dispute). Business cases include antitrust, bankruptcy, tort law, federal preemption of state law, punitive damages, and employment law. *See* J. Mitchell Pickerill, *Something Old, Something New, Something Borrowed, Something Blue*, 49 SANTA CLARA L. REV. 1063, 1069 (2009).

[163] *See, e.g.*, Adler, *supra* note 162, at 946–47 (arguing that decision where a corporation prevails is not necessarily evidence of a probusiness orientation).

[164] *Id.* at 951.

[165] Franklin, *supra* note 159, at 1021.

[166] *Id.* at 1028–29.

[167] Pickerill, *supra* note 163, at 1072.

[168] *See id.* at 1084–85.

[169] *Id.* at 1099.

to blunt the Republican's edge on business issues, and thus, he appointed Justices who were moderate on corporate issues, while generally progressive on civil rights and civil liberties issues.[170] President Obama's appointees appear to be from a similar mold. Overall, the Roberts Court has consolidated a probusiness tilt that began in the Reagan era.

2. Under the Surface

Of course, counting outcomes and votes does not tell the whole story. As Professor Martha McCluskey has pointed out, in order to understand how class assumptions shape the law, "we must look under the surface . . . to examine the way in which unequal class privileges and penalties become folded into the background as natural and necessary to the public order. . . ."[171] Demonstrating this approach, she unpacks the 2003 case of *State Farm Mutual Automobile Insurance Co. v. Campbell.*[172] In that case, the Supreme Court reversed a Utah Supreme Court decision upholding a punitive damage award of $145 million against State Farm.[173] The Utah Supreme Court found that State Farm had "repeatedly and deliberately deceived and cheated its customers" through a national scheme to meet corporate fiscal goals by capping payouts on claims and that its "fraudulent practices were consistently directed to persons—poor racial or ethnic minorities, women, and elderly individuals—who State Farm believed would be less likely to object or take legal action."[174] Despite these findings, the Supreme Court held that the punitive damage award violated the corporation's due process interests.[175]

McCluskey takes on each of the Court's rationales. First, the Court was concerned that giving juries too much discretion might lead them to award punitive damages based on arbitrary whims.[176] Yet, as McCluskey argues, the Court has conversely upheld the norm of discretion for jurors considering the death penalty in ways that result in racial discrimination and for police in enforcing mandatory court orders of protection in domestic violence cases—in both situations, such discretion can and has led to a loss of life or liberty.[177] Second, the Court contended that corporations must have fair notice about the severity of penalties for wrongdoing so that they can shape their behavior accordingly.[178] McCluskey counters that corporations are well positioned to take rational steps to prevent and mitigate the potential of any large punitive damages awards, especially insurance

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[170] *Id.* at 1064, 1088–90.

[171] Martha T. McCluskey, *Constitutionalizing Class Inequality: Due Process in State Farm*, 56 BUFF. L. REV. 1035, 1057 (2008).

[172] 538 U.S. 408 (2003).

[173] Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134, 1148, 1172 (Utah 2001), *rev'd*, 538 U.S. 408 (2003).

[174] *Id.* at 1148.

[175] *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 412.

[176] *Id.* at 417–18

[177] McCluskey, *supra* note 171, at 1043–45.

[178] *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 417.

companies, as they specialize in risk management.[179] Third, the Court concluded that evidence of systemic wrongdoing was inappropriate in determining punitive damages.[180] McCluskey contends that this "individualizes and trivializes . . . corporate wrongdoing," while disregarding the clash of collective economic interests between consumers and corporations as well as the systemic gain obtained by corporations against less powerful actors.[181] She summarizes that in the Court's view, "capital owners' organized and collective gain at the expense of the non-wealthy is a fundamentally normal, natural, and *just* exercise of power, while organized efforts to protect competing economic interests of the non-wealthy are fundamentally unfair, not just debatable policy."[182]

This class-blind approach exists throughout the Court's business law cases—including a trio of controversial, 5-4 business law cases from the 2010–11 term. Whereas the *State Farm* decision refused to allow evidence of systemic wrongdoing in an individual case, the Court in *Wal-Mart Stores Inc. v. Dukes*[183] shut the door to systemic evidence even in a class action, ruling that a proposed class of over one million female Wal-Mart employees could not prove common claims necessary for class certification.[184] In *Wal-Mart*, women employees alleged that the company's discretionary pay and promotion policies had a discriminatory impact on female employees, pointing to statistics showing that women filled 70% of the hourly jobs in Wal-Mart stores, but constituted only 33% of management positions, and across the company, women were paid less than men.[185]

In his majority opinion, Justice Scalia asserted that Wal-Mart's policy of granting discretion to supervisors over employment decisions was "a very common and presumptively reasonable way of doing business."[186] He assumed that "left to their own devices most managers in any corporation . . . would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all."[187] In this view, any disparity must arise from benign factors, such as women's lack of qualifications. For Justice Scalia, "it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction."[188] By contrast, this outcome was quite believable for Justice Ginsberg, who authored the dissent. As she explained, discriminatory, discretionary employment practices can result from unconscious biases as well as a corporate culture that reinforces gender stereotypes through meetings, managerial

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[179] McCluskey, *supra* note 171, at 1047–48.

[180] *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 422–23.

[181] McCluskey, *supra* note 171, at 1053.

[182] *Id.* at 1056 (emphasis in original).

[183] 131 S. Ct. 2541 (2011).

[184] *Id.* at 2547–48, 2553–61.

[185] *Id.* at 2562–63 (Ginsburg, J., dissenting) (summarizing factual findings of the trial court).

[186] *Id.* at 2554 (majority opinion).

[187] *Id.*

[188] *Id.* at 2555.

transfers, and corporate monitoring.[189] Whereas Justice Scalia assumed good faith on the part of the corporation and was incredulous at the stories of the plaintiffs, Justice Ginsberg did not view obvious gender disparities as innocent.[190] Here, the Justices' underlying assumptions about how the workplace really works shaped the outcome.

Class-based claims also failed in *AT&T Mobility v. Concepcion*,[191] in which consumers sued a cell phone company for fraud and false advertising after they were charged over $30 in sales tax under a contract offering a free phone.[192] In a 5-4 decision, the Supreme Court held that the plaintiffs could not proceed by class action in court because their contract required arbitration and, further, that the Federal Arbitration Act bars class actions in arbitration as well.[193] In so doing, the Court overturned California law that made it unconscionable for adhesion contracts to bar class-wide actions.[194] Writing for the majority, Justice Scalia's sympathies were entirely with corporate defendants, who might face pressure to settle questionable claims due to the "'in terrorem' settlements that class actions entail."[195] By contrast, Justice Breyer was less concerned with the "terror" facing corporations than the rights lost by consumers. He argued that agreements forbidding class actions "can lead small-dollar claimants to abandon their claims rather than to litigate."[196] Indeed, "[w]hat rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?"[197] Given this dilemma, California law sought to protect consumers from adhesion contracts that insulate corporations from liability for their own frauds by "deliberately cheat[ing] large numbers of consumers out of individually small sums of money."[198] However, the decision gives corporations the power to determine what protections to grant consumers, and the result may be a lack of any incentives for corporations to comply with consumer laws in the first place.[199] This case is part of a larger effort by the Supreme Court to interpret the Federal Arbitration Act beyond its legislative intent and history to "render unenforceable legal guarantees such as workplace discrimination protections—or protections of any sort for individuals obliged to sign nonnegotiable contracts imposed by

[189] *Id.* at 2563–64 (Ginsburg, J. dissenting).
[190] *Id.* at 2555 (majority opinion), 2563–64 (Ginsburg, J., dissenting).
[191] 131 S. Ct. 1740 (2011).
[192] *Id.* at 1744.
[193] *Id.* at 1748–53.
[194] *Id.* at 1746.
[195] *Id.* at 1752.
[196] *Id.* at 1760 (Breyer, J., dissenting).
[197] *Id.* at 1761 (2011).
[198] *Id.* at 1746 (majority opinion) (internal quotation marks omitted).
[199] *See* Adam Liptak, *Supreme Court Allows Contracts That Prohibit Class-Action Arbitration*, N.Y. TIMES, April 28, 2011, at B3 (summarizing reaction to the decision).

businesses or other large organizations such as consumers, patients, nursing home residents, depositors, retirees, or investors."[200]

In another 5-4 decision, *Janus Capital Group, Inc. v. First Derivative Traders*,[201] the Court held that a mutual fund investment advisor could not be liable for making false statements that were included in prospectuses filed by its separately incorporated mutual fund subsidiary.[202] In that case, the mutual fund's officers were all employees of the advisor arm, and the advisor entity drafted and reviewed the fund's prospectus.[203] Nevertheless, the Court held that only the party with ultimate authority over a statement can "make" the statement, not "[o]ne who prepares or publishes a statement on behalf of another."[204] The dissent took a broader view, noting that "[e]very day, hosts of corporate officials make statements with content that more senior officials of the board of directors have 'ultimate authority' to control. . . ."[205] The majority's interpretation insulates managers from liability, "even when those managers perpetrate a fraud through an unknowing intermediary," which may have been the situation at hand.[206] Professor Jeffrey Gordon commented that the majority's formalistic approach ignores how mutual funds are interrelated with advisory services in ways that spur "managing agents to pursue their own objectives at the expense of the ultimate beneficiaries."[207] Gordon asks, in an era when the financial system's gatekeepers failed to prevent the meltdown of Wall Street, "[w]hy . . . shift responsibility and accountability from actual wrong-doers?"[208]

These cases are part of an overall pattern in which, time and again, the Court's majority gives the benefit of the doubt to businesses while remaining skeptical of employees, consumers, and investors who challenge corporate practices.[209] The choice is not between treating businesses as perfectly innocent or wholly evil, as the majority seems to think. Rather, business enterprises are necessarily self-interested, and sometimes, this motivation is harmful to employees and consumers so as to require an outside check. The majority fails to

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[200] *See* Simon Lazarus, *Stripping the Gears of National Government: Justice Stevens's Stand Against Judicial Subversion of Progressive Laws and Lawmaking*, 106 NW. U. L. REV. 769, 810 (2012).

[201] 131 S. Ct. 2296 (2011).

[202] *Id.* at 2299.

[203] *Id.* at 2306 (Breyer, J., dissenting) (describing the relationship between the two corporate entities).

[204] *Id.* at 2302 (majority opinion).

[205] *Id.* at 2307 (Breyer J., dissenting).

[206] *Id.* at 2312.

[207] Jeffrey N. Gordon, Janus Capital Group v. First Derivative Traders*: Only the Supreme Court Can "Make" a Tree*, THE HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (June 29, 2011, 9:27 AM), http://blogs.law.harvard.edu/corpgov/2011/06/29/janus-capital-group-v-first-derivative-traders-only-the-supreme-court-can-"make"-a-tree/.

[208] *Id.*

[209] *See generally* Lazarus, *supra* note 200 (describing how the Supreme Court's statutory interpretation is eviscerating progressive reforms in the areas of regulatory, safety net, and civil rights laws).

acknowledge the complex incentives, cultural cues, and accountability failures within businesses, instead assuming that the market will correct most problems. The fate of Wal-Mart employees, AT&T consumers, and mutual fund investors shows this is not the case.

3. Unions

In contrast to the rise of corporate influence over politics, the economy, and the courts, the influence of unions has waned. In fact, the decline of organized labor is a major factor—at least one-fifth to one-third—in growing wage inequality, making it as significant as the stratification of pay by education.[210] Private sector union membership has plunged from almost 25% of all workers in the 1970s to today's 7%, while wage inequality shot up over 40% over this same time period.[211] The decline of unions impacts not only unionized workers, but also other workers, because unions have traditionally been the major interest group advocating on economic issues for the middle and lower classes, such as executive pay controls, pay equity, a higher minimum wage, and support for social welfare programs.[212] By contrast, advanced industrial nations with strong unions have seen less economic inequality.[213] The decline of American unions starting in the 1970s is traceable to several factors, including the growth of jobs in fields outside "traditional union strongholds;"[214] intensified employer opposition;[215] congressional defeats of prounion reforms spurred by increased corporate donations to Congress;[216] the appointment of Republican appointees to the National Labor Relations Board, which in turn issued decisions that limited union organizing;[217] and the defeat of the 1981 air controllers strike by President Reagan.[218] These trends reinforce a norm of free competition rather than fair competition.[219] The

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[210] Bruce Western & Jake Rosenfeld, *Unions, Norms, and the Rise in U.S. Wage Inequality*, 76 AM. SOC. REV. 513, 514–32 (2011) (providing factual support to show declining union membership in the United States over a thirty-year period from 34% to 8% for men and from 16% to 6% for women); *see also* HACKER & PIERSON, *supra* note 6, at 56–61 (discussing the collapse of American unions).

[211] HACKER & PIERSON, *supra* note 6, at 56–57; Western & Rosenfeld, *supra* note 210, at 513 (noting that between 1973 and 2007, "wage inequality in the private sector increased by over 40[%].").

[212] *See* Western & Rosenfeld, *supra* note 210, at 514–18.

[213] *See* HACKER & PIERSON, *supra* note 6, at 57–58 (noting that unions are fundamental "to offer an organizational counterweight to the power of those at the top").

[214] Western & Rosenfeld, *supra* note 210, at 516.

[215] *Id.*

[216] *Id.*; *see also* HACKER & PIERSON, *supra* note 6, at 127–32.

[217] Western & Rosenfeld, *supra* note 210, at 516.

[218] HACKER & PIERSON, *supra* note 6, at 58–59, 186–87.

[219] Michael Wachter, *The Rise and Decline of Unions*, 30 REGULATION 23, 23, 28 (2007). Contrast this trend to the rise of unionization in the New Deal, when policymakers "were in agreement that unregulated competitive forces were destructive and were the cause of the Great Depression." *Id.* at 25.

Supreme Court has not been a major player in driving these post-1970s trends because its interpretations of labor law after the New Deal had already greatly restricted the transformative potential of the National Labor Relations Act.[220] Recent cases are consistent with this history.

For instance, in 2012, the Court issued *Knox v. Service Employees International Union, Local 1000*,[221] ruling against a union that charged nonmembers a special fee to support political activity.[222] Under California law, public sector employees can create an "agency shop" by deciding through majority vote to be represented by a union.[223] In order to prevent free riding, nonmembers have to pay an annual fee for collective bargaining representation provided by the union, but due to First Amendment constraints, they can opt out of supporting the union's political activities.[224] In the summer of 2005, the Service Employees International Union ("SEIU") was fighting several anti-union ballot initiatives, and it decided to issue a special assessment to generate additional union fees.[225] Several nonmembers objected to having to support the SEIU's political activities.[226]

Writing for a five-member majority, Justice Alito held the union should have required an opt-in for nonmembers, rather than relying on an opt-out procedure and that this failure violated the nonmembers' First Amendment right against compelled support of private speech and created a "remarkable boon for unions."[227] The majority's approach purposefully limits unions' ability to raise money for political activity. In concurrence, Justice Sotomayor agreed that the nonmembers had the constitutional right not to financially support political speech, as this was settled law, but disagreed that the Constitution required an opt-in procedure for special assessments—an issue which the litigants did not request, argue, or brief.[228] In her words, the majority's opinion went far beyond the question presented and, thus, "breaks our own rules and, more importantly, disregards principles of judicial restraint that define the Court's proper role in our

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[220] *Cf.* Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799 (2003) (discussing Court decisions in the early part of the twentieth century that perpetuated race discrimination, thereby limiting class solidarity by workers that could have strengthened workers' rights). *See generally* Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265 (1978) (discussing the transformation of the labor movement); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981) (discussing "industrial pluralism" or self-government by management and labor). For a discussion of how law shaped the early American labor movement, see WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991).

[221] 132 S. Ct. 2277 (2012).

[222] *Id.* at 2294–96.

[223] *Id.* at 2284.

[224] *Id.* at 2284–85.

[225] *Id.* at 2285–86.

[226] *Id.* at 2286.

[227] *Id.* at 2289–90.

[228] *Id.* at 2296 (Sotomayor, J., concurring).

system of separated powers."[229] Justice Breyer remarked in dissent that the Court's decision lays the groundwork for mandatory opt-in procedures for regular union dues.[230] Moreover, by constitutionalizing the opt-in procedure, the Court short-circuited a political debate about union dues and right-to-work laws that is occurring across the states.[231] Here, deference to legislative choices is missing.

The outcome in *Knox* stands in stark contrast with *Citizens United v. FEC*,[232] discussed below, in which the Court held that corporate entities can spend their funds on political campaigns without concern for shareholder preferences.[233] To be sure, *Citizens United* also permits unions to spend money on political campaigns, yet there is an asymmetry between the ability of corporations and unions to fund this activity. Corporations can spend their treasury funds without shareholder approval, while unions must get the consent of their members.[234]

C. Education

In America, education is widely considered the springboard to financial security and an equalizer among social classes.[235] Nevertheless, our educational system perpetuates a wide achievement gap between high income and poor students, who are disproportionately minority and more likely to attend segregated schools.[236] Currently, "[m]ore than 75% of predominately minority schools are

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[229] *Id.*

[230] *Id.* at 2306 (Breyer, J., dissenting).

[231] *Id.* at 2306–07.

[232] 130 S. Ct. 876 (2010).

[233] *Id.* at 886.

[234] Benjamin I. Sachs, *Unions, Corporations and Political Opt-Out Rights After Citizens United*, 112 COLUM. L. REV. 800, 803 (2012).

[235] *See* PAGE & JACOBS, *supra* note 6, at 58–59 (public opinion polls show that Americans support government spending on education); Duncan & Murnane, *supra* note 75, at 3–7 ("For many generations of Americans, education was the springboard to upward mobility."). On the historic roots of this concept, see generally Blanche Brick, *Changing Concepts of Equal Educational Opportunity: A Comparison of the Views of Thomas Jefferson, Horace Mann and John Dewey*, 32 AM. EDUC. HIST. J. 166 (2005).

[236] *See* Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, *in* WHITHER OPPORTUNITY?, *supra* note 75, at 91 (stating the achievement gap is "now nearly twice as large as the black-white achievement gap"); Kimberly Jenkins Robinson, *The Past, Present, and Future of Equal Educational Opportunity: A Call for A New Theory of Education Federalism*, 79 U. CHI. L. REV. 427, 427 (2012) (reviewing JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA (2010)); Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1474 (2007) ("The 'achievement gap' results directly from the fact that high proportions of African-American and Latino students live in conditions of poverty and that by and large they attend segregated schools."); Sabrina Tavernise, *Education Gap Grows Between Rich and Poor, Studies Say*, N.Y. TIMES, Feb. 9, 2012, http://www.nytimes.com/2012/02/10/edu

also high-poverty schools."[237] The concentration of poverty drives an achievement gap that is compounded by lower funding for poor schools, despite the more costly needs of their students.[238] Compared to their more affluent peers, poor children attend schools with fewer quality teachers, less challenging curricula, lower rates of achievement, and lower graduation rates.[239] Many poor children also arrive at school with the challenges of living in high-crime neighborhoods and coming from less stable families struggling with the stresses of poverty.[240]

Not surprisingly, family background plays a large role in educational achievement, in part because wealthier families are able to invest more in their children through high-quality early childhood education, tutors, enrichment classes,

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cation/education-gap-grows-between-rich-and-poor-studies-show.html?pagewanted=all&_r=0.

[237] Derek W. Black, *The Uncertain Future of School Desegregation and the Importance of Goodwill, Good Sense, and a Misguided Decision*, 57 CATH. U. L. REV. 947, 959 (2008).

[238] *Id.* at 957–58; Raegen T. Miller & Cynthia G. Brown, *School Districts Give Low-Income Schools Less Than a Fair Share of Funds*, NBC NEWS EDUC. NATION, (Dec. 1, 2011, 5:53 PM), http://www.educationnation.com/index.cfm?objectid=32551596-1C6F-11E1-8E80000C296BA163&aka=0; *see also* Derek W. Black, *Middle-Income Peers as Educational Resources and the Constitutional Right to Equal Access*, 53 B.C. L. REV. 373, 409–10 (2012) (explaining that middle class students enhance the learning environment for all students).

[239] GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, HARVARD UNIV., BROWN AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE? 21–22 (2004); *see also* Don Boyd et al., *The Effect of School Neighborhoods on Teachers' Career Decisions*, *in* WHITHER OPPORTUNITY?, *supra* note 75, at 377, 377 (explaining that schools with large populations of poor children, on average, have more difficulty attracting high-quality teachers); Vilsa E. Curto et al., *It May Not Take a Village: Increasing Achievement Among the Poor*, *in* WHITHER OPPORTUNITY?, *supra* note 75, at 483, 483, 486 (discussing poor students' lower achievement); Black, *supra* note 237, at 959 (discussing low graduation rates of children at poor or minority schools).

[240] *See* David S. Kirk & Robert J. Sampson, *Crime and the Production of Safe Schools*, *in* WHITHER OPPORTUNITY?, *supra* note 75, at 397, 398 ("[T]here is growing evidence that violence in and around primary and secondary schools is a major barrier to physical, emotional, and educational well-being."); Erika K. Wilson, *Leveling Localism and Racial Inequality in Education Through the No Child Left Behind Act Public Choice Provision*, 44 U. MICH. J.L. REFORM 625, 647–48 (2011) (describing challenges poor children face in their home environments); MARGUERITE L. SPENCER & REBECCA RENO, KIRWAN INSTITUTE, THE BENEFITS OF RACIAL AND ECONOMIC INTEGRATION IN OUR EDUCATION SYSTEM: WHY THIS MATTERS FOR OUR DEMOCRACY 11 (2009), http://www.racialequitytools.org/resourcefiles/spencer.pdf ("Students of color are not only compromised in the classroom, they endure cumulative home and neighborhood disadvantages, including the scarcity of high-quality early childhood education programs, poor housing stock, relative inaccessibility of healthcare, greater exposure to harmful environmental pollutants, and high crime levels.").

private school tuition, and college.[241] For all these reasons, poor children are less likely to attend college, which is the single strongest predictor of success in the workforce.[242] We all pay a price for educational inequality because without competent workers, America is less able to compete in the global economy.[243] In short, educational inequality along race and class lines contributes to economic inequality, which in turn creates a vicious cycle that further entrenches the shortcomings of our educational system.[244] The Supreme Court has enabled these disheartening trends by denying deference to legislative decisions to pursue desegregation plans, while deferring to legislative judgments that skew school financing toward wealthier districts.[245] At the same time, the Court has refused to recognize a right to education, and its commitment to diversity in higher education is wavering. As one education law expert has summarized, "[w]hile the Court alone does not bear responsibility for the current pervasive presence of separate and unequal schools, the convergence of the Court's actions in these cases has substantially contributed to the deeply entrenched nature of segregation and inequality in these schools."[246]

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[241] Neeraj Kaushal et al., *How is Family Income Related to Investments in Children's Learning?*, *in* WHITHER OPPORTUNITY?, *supra* note 75, at 187, 187–205; Reardon, *supra* note 236, at 91, 105; Tavernise, *supra* note 236 (reporting on a forthcoming study by Sabino Kornrich and Frank F. Furstenburg that finds that in 1972, wealthy parents spent five times as much per child as low-income families, but that by 2007, the ratio was nine to one).

[242] Martha J. Bailey & Susan M. Dynarski, *Inequality in Postsecondary Education*, *in* WHITHER OPPORTUNITY?, *supra* note 75, at 117, 117–18; Robert Haveman & Timothy Smeeding, *The Role of Higher Education in Social Mobility*, 16 FUTURE CHILD. 125, 126 (2006) (articulating that in 2000 the median income for college graduates was twice that of high school graduates); Robinson, *supra* note 236, at 427–28 (poor and minority children are not adequately prepared for college or work); Michal Kurlaender & Stella M. Flores, *The Racial Transformation of Higher Education*, *in* HIGHER EDUCATION AND THE COLOR LINE: COLLEGE ACCESS, RACIAL EQUITY, AND SOCIAL CHANGE 11, 11–13 (Gary Orfield, et al. eds., 2005) (discussing the racial gap in college participation rates for minorities and the poor).

[243] *See* Rebell, *supra* note 236, at 1475; *see also* Wilson, *supra* note 240, at 648–49 (stating that the United States loses wage earning potential and tax revenues when minority children are not adequately educated).

[244] Duncan & Murnane, *supra* note 75, at 3, 8; *see* Stephen Machin, *Education and Inequality*, *in* THE OXFORD HANDBOOK OF ECONOMIC INEQUALITY, *supra* note 20, at 406, 406–31 (explaining how education is tied to wage inequality).

[245] *See* Robinson, *supra* note 236, at 443–44, 454.

[246] Kimberly Jenkins Robinson, *Resurrecting the Promise of Brown: Understanding and Remedying How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787, 837 (2010).

1. Desegregation

In *Brown v. Board of Education*,[247] the Court struck down "separate but equal" schools and committed the nation to equal educational opportunity for all children.[248] For over a decade afterward, southern states aggressively resisted complying with *Brown*'s mandate,[249] thus prompting the Court to issue several decisions in the mid-1960s striking down a variety of obstructionist tactics.[250] In 1971 the Court told the lower federal courts that they had the power to desegregate schools, including using busing as a remedy.[251] In subsequent years, desegregation made a difference; up until the late 1980s, the percentage of students attending integrated schools continually increased, and by 1988 nearly half of all black students in the South attended majority white schools.[252] To date, desegregation remains a proven method for improving the outcomes for poor, minority children, without harming the achievement of white students.[253]

However, beginning in the 1970s, the Court put the brakes on desegregation. In *Keyes v. School District No. 1*,[254] a 1973 decision, the Court distinguished between de jure and de facto segregation and held that only segregation taken with

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[247] 347 U.S. 483 (1954).

[248] *Id.* at 495.

[249] *See* Michael Murakami, *Desegregation*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 18, 21–30 (Nathaniel Persity et al. eds., 2008) (describing public reaction and responses in the South to *Brown* both immediately after and in years following *Brown*); Robinson, *supra* note 246, at 798–800 (describing the pressures on school board members, politicians, and judges to oppose desegregation).

[250] *E.g.*, Green v. Cnty. Sch. Bd., 391 U.S. 430, 441–42 (1968) (ordering Virginia school board to desegregate and rejecting race-neutral freedom of choice plan); Rogers v. Paul, 382 U.S. 198, 199–200 (1965) (per curiam) (ordering Arkansas school district to permit black students to attend the high school of their choice); Griffin v. Cnty. Sch. Bd., 377 U.S. 218, 231–32 (1964) (holding as unconstitutional a county school board decision to close all local public schools and provide vouchers to attend private schools).

[251] Swann v. Bd. of Educ., 402 U.S. 1, 30–32 (1971).

[252] Derek W. Black, *Voluntary Desegregation, Resegregation, and the Hope for Equal Educational Opportunity*, 38 HUM. RTS. 2, 4 (2011) ("Though it is not the story often told today, desegregation was very successful for a period of time. From the mid-1960s until the late 1980s, the percentage of students attending desegregated schools expanded each year." (citing ORFIELD & LEE, *supra* note 239)).

[253] *See* Black, *supra* note 252, at 2 ("[D]esegregation is the only policy with a long and consistent track record of improving educational outcomes for disadvantaged students."); GARY ORFIELD & CHUNGMEI LEE, THE CIV. RTS. PROJECT, HISTORIC REVERSALS, ACCELERATING RESEGREGATION, AND THE NEED FOR NEW INTEGRATION STRATEGIES 6, 11 (2007), *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/historic-reversals-accelerating-resegregation-and-the-need-for-new-integration-strategies-1/orfield-historic-reversals-accelerating.pdf; SPENCER & RENO, *supra* note 240, at 13; Erika Frankenberg, *School Integration: The Time is Now*, *in* LESSONS IN INTEGRATION: REALIZING THE PROMISE OF RACIAL DIVERSITY IN AMERICAN SCHOOLS 7, 16 (Erika Frankenberg & Gary Orfield eds., 2007).

[254] 413 U.S. 189 (1973).

a discriminatory purpose violated the equal protection clause.[255] This made it nearly impossible to challenge racially isolated schools that resulted from residential segregation, even though housing patterns are rooted in governmental policies.[256] A year later, in *Milliken v. Bradley*,[257] the Court took a narrower view of its remedial authority and struck down a federal court order that imposed an interdistrict remedy on Detroit's majority black schools and its surrounding predominantly white suburbs, making it difficult to desegregate urban schools.[258] By bowing to the politically powerful "suburban veto," the Court reinforced inequality.[259]

The Court stopped mandatory desegregation in its tracks with a series of decisions in the early 1990s that not only limited the authority of the federal district courts to order desegregation, but also encouraged them to dissolve existing decrees—even if the dissolution would result in a return to racially identifiable schools.[260] The lower federal courts complied. As a result, our schools are now

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[255] *Id.* at 208–09, 213–14. The discriminatory purpose test has been widely criticized because it obscures the government's role in reinforcing patterns of private discrimination. *See, e.g.*, David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 939, 975 (1989) (asserting "that the discriminatory intent standard is not a satisfactory comprehensive account of discrimination" because it is "vague and indeterminate"); Owen M. Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 584 (1965) (asserting "that the labels '*de facto* segregation' and 'state action' only obscure the issue of governmental responsibility").

[256] *See* Black, *supra* note 237, at 950–51 ("Proving intentional discrimination or de jure segregation, however, can be difficult, particularly in northern school districts that never passed laws explicitly mandating segregation.").

[257] 418 U.S. 717 (1974).

[258] *Id.* at 744–45; *see, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 729 (3rd ed. 2006) ("There simply are not enough white students in the city, or enough black students in the suburbs, to achieve desegregation without an interdistrict remedy."); Black, *supra* note 237, at 951–52 ("In addition, *Milliken* signaled to whites that they could avoid desegregation and build exclusive enclaves by simply moving across the school district line. In that respect, *Milliken* likely exacerbated segregation."); Rachel F. Moran, *Let Freedom Ring: Making* Grutter *Matter in School Desegregation Cases*, 63 U. MIAMI L. REV. 475, 487 (2009) ("As a result, *Milliken* sounded the death knell for meaningful school integration in most cities outside the South."); Robinson, *supra* note 236, at 434–35 ("The *Milliken I* decision dealt a crippling blow to desegregation efforts because most urban schoolchildren in northern and western cities were trapped within urban districts that lacked sufficient numbers of white students for meaningful desegregation given the substantial exodus of middle-class whites to the suburbs that occurred during the 1960s and 1970s.").

[259] James E. Ryan, Brown, *School Choice, and the Suburban Veto*, 90 VA. L. REV. 1635, 1646 (2004) (noting that the Court gave suburban schools the "power to limit any education reform that would interfere with suburban autonomy").

[260] Missouri v. Jenkins, 515 U.S. 70 (1995) (holding that salary increases for staff ordered as part of a desegregation remedy went beyond the authority of the court); Freeman v. Pitts, 503 U.S. 467, 495–96 (1992) (holding that a federal trial court can release a school

segregated, mostly by district, at levels not found since 1970, when desegregation was just taking root.[261] Now, the average white student attends a school that is 83% white, while about one-third of black and Latino students attend schools that are 90% to 100% minority.[262] In short, "with the help of the courts, middle-class whites successfully fought to preserve their schools for themselves by preventing integration—and the minority students that integration required—from entering their schoolhouse doors."[263] The Court's doctrine shifted from equal education as a civil right to school choice as a civil right.[264]

Even voluntary desegregation plans are under fire by the Court. In 2007 in *Parents Involved in Community Schools v. Seattle School District No. 1*,[265] the Court struck down voluntary desegregation plans undertaken by Louisville, Kentucky, and Seattle, Washington, that considered race in certain school assignments in order to ensure diverse schools.[266] The Court's long-standing deference to local authorities since the 1970s is missing in this case.[267] The complicated opinion resulted in a 4-1-4 split among the Justices. The plurality opinion by Justice Roberts held that the only permissible use of race in school assignments is to remedy past, purposeful discrimination.[268] As Justice Roberts stated, Seattle's plan "is contrary to our rulings that remedying past societal

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board from active judicial oversight incrementally before the board's district achieves full unitary status); Bd. of Educ. of Okla. City v. Dowell, 498 U.S. 237 (1991) (ending a federal desegregation order).

[261] *See* ORFIELD & LEE, *supra* note 253, at 5–7; Robinson, *supra* note 236, at 325; James E. Ryan, *The Real Lessons of School Desegregation*, *in* FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY'S ROLE IN AMERICAN EDUCATION 87 (Joshua M. Dunn & Martin R. West eds., 2009) ("The plain, somewhat shocking truth is that the majority of school districts—not schools, but districts, are either at least 90[%] white or 90[%] minority.").

[262] Robinson, *supra* note 236, at 428.

[263] *Id.* at 440.

[264] *See* John Charles Boger, *Standing at a Crossroads: The Future of Integrated Public Schooling in America*, *in* INTEGRATING SCHOOLS IN A CHANGING SOCIETY: NEW POLICIES AND LEGAL OPTIONS FOR A MULTIRACIAL GENERATION 13, 18 (Erika Frankenberg & Elizabeth Debray eds., 2011).

[265] 551 U.S. 701 (2007).

[266] *Id.*

[267] *See* Ryan, *supra* note 261, at 89.

[268] *Parents Involved*, 551 U.S. at 720. Daniel Tokaji remarks that the case "overrules decisions of democratically elected school boards, made after years of trial-and-error experience in trying to integrate public schools. Yet missing from the majority Justices' opinions is a persuasive justification for the federal judiciary's substitution of its own judgment regarding the costs and benefits of race-conscious integration programs for those made by fairly elected local school boards." Daniel P. Tokaji, *Desegregation, Discrimination and Democracy:* Parents Involved*'s Disregard for Process*, 69 OHIO ST. L.J. 847, 847 (2008). Rachel Moran critiques the decision, stating that "a majority of the Justices were so concerned with limiting remedies for past discrimination that they largely overlooked the problem of constraining a community's capacity to imagine its racial future." Moran, *supra* note 258, at 477.

discrimination does not justify race-conscious government action."[269] By contrast, the dissenting Justices, led by Justice Breyer, concluded that the voluntary desegregation plans satisfied compelling state interests in diversity and avoiding racial isolation and were narrowly tailored to achieve that interest.[270]

In his controlling opinion, Justice Kennedy agreed with the dissent that the government has a compelling state interest "in ensuring all people have equal opportunity regardless of their race."[271] However, he joined with the plurality in concluding that the plans at issue were not narrowly tailored to survive strict scrutiny because they classified students on the basis of race.[272] Instead of racial classifications, Justice Kennedy suggested that school districts promoting diversity can survive by using race-neutral mechanisms, such as site selection of new schools, redrawn attendance zones, or even individualized evaluations that might include race as a factor, in accordance with the *Grutter* case, which permits the use of race along with other factors in law school admissions.[273]

Importantly, the breakdown of votes reflects underlying assumptions about the causes of residential and educational segregation. In his plurality opinion, Justice Roberts stated, "The distinction between segregation by state action and racial imbalance caused by other factors has been central to our jurisprudence in this area for generations."[274] In other words, for Justice Roberts, housing and school segregation result from "other factors" (i.e., private, natural, market forces outside the scope of government responsibility).

By contrast, Justice Breyer explicated a long history of purposeful, governmental discrimination in the educational systems of Seattle and Louisville, as well as governmental policies that created residential segregation.[275] He then linked both these patterns to the current barriers facing cities that want to provide diverse educational opportunities for their students. As he put it, "[t]he historical and factual context in which these cases arise is critical."[276] In light of this history, Justice Breyer claimed that the cities had an interest "in continuing to combat the remnants of segregation caused in whole or in part by these school-related policies, which have often affected not only schools, but also housing patterns, employment practices, economic conditions, and social attitudes."[277] In Justice Breyer's view, government played a role in creating segregation, and thus, it should play a role in dismantling it. For his part, Justice Kennedy similarly acknowledged that "[d]ue to a variety of factors—some influenced by government, some not—neighborhoods in our communities do not reflect the diversity of our Nation as a whole."[278] In

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[269] *Parents Involved*, 551 U.S. at 731.
[270] *Id.* at 803 (Breyer, J., dissenting).
[271] *Id.* at 788 (Kennedy, J., concurring).
[272] *Id.* at 787.
[273] *Id.* at 789–90.
[274] *Id.* at 736 (majority opinion).
[275] *Id.* at 804–19 (Breyer, J., dissenting).
[276] *Id.* at 804.
[277] *Id.* at 838.
[278] *Id.* at 798 (Kennedy, J., dissenting).

short, Justices who draw a stark line between de jure and de facto segregation without seeing the possible linkages between them do not support remedial efforts to desegregate schools.

The majority's refusal to acknowledge this connection appears either clueless or willfully blind to the government's role in creating segregated housing patterns, which in turn, impacts school enrollment.[279] Professors Douglas Massey and Nancy Denton have explained in detail how federal governmental policies served to isolate and segregate urban, African-American communities from the rest of the urban and regional environment.[280] In brief, the history is as follows. During the 1930s and '40s, African-Americans were trapped as renters within inner cities when the federal government and private banks redlined minority neighborhoods and refused to provide African-Americans with mortgages, thus reducing a source of household wealth for generations.[281] Meanwhile, the white middle class left the inner cities for suburban homes subsidized by federally underwritten mortgages and on highways built with federal funds.[282] Further, the location of the highways

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[279] "Just as students of society know that race still matters, students of American history understand that ghetto and barrio schools are not natural, but manmade. They grew from a tangled mix of forces. This includes the blatant racial discrimination in housing and seemingly 'race-neutral' zoning, and mortgage lending and real estate practices that over many decades corralled people of color and the poor into what are now overburdened communities and schools." Charles J. Ogletree, Jr. & Susan Eaton, *From Little Rock to Seattle and Louisville: Is "All Deliberate Speed" Stuck in Reverse?* 30 U. ARK. LITTLE ROCK L. REV. 279, 288 (2008).

[280] *See* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 149 (1998); *see also* Alice O'Connor, *Historical Perspectives on Race and Community Revitalization*, THE ASPEN INST., http://www.aspeninstitute.org/sites/default/files/content/upload/9OConnor.pdf (last visited Nov. 16, 2013) ("[H]istory, with its central concern for human agency, shows unequivocally that there is nothing 'natural' or inevitable about the racialized 'pockets' of concentrated poverty that have become an accepted part of the urban—and rural—United States.").

Denton and Massey argue for dismantling the ghettos through integrationist policies. For a critique of their approach, see John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope From a Mountain of Despair,"* 143 U. PA. L. REV. 1233, 1245 (1995) (arguing that the culture of segregation thesis is a variation on the culture of poverty thesis that perpetuates stereotypes of the poor).

[281] *See* DENTON & MASSEY, *supra* note 280, at 50–52. As a result, property owners in the inner cities could not sell their properties, which declined in value and led to a "pattern of disrepair, deterioration, vacancy, and abandonment." *Id.* at 55; *see also* Florence Roisman, *Teaching About Inequality, Race, and Property*, 46 ST. LOUIS U. L.J. 665, 669–70 (2002).

[282] *See* DENTON & MASSEY, *supra* note 280, at 44. "As poor blacks from the south entered cities in large numbers, middle-class whites fled to the suburbs to escape them and to insulate themselves from the social problems that accompanied the rising tide of poor." *Id.* at 55; *see also* WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS 46 (1996) ("By manipulating market incentives, the federal government drew middle-class whites to the suburbs and, in effect, trapped blacks in the inner cities.").

destroyed many viable low-income communities and created physical barriers within cities that separated poor neighborhoods from central business districts.[283] In turn, suburban planners used zoning and other exclusionary policies, such as restrictive deeds, to keep out blacks and other minorities.[284]

These segregated housing patterns were then reinforced by urban renewal programs in the 1950s and 1960s, which compounded the isolation of poor blacks by clearing slum neighborhoods in the cities to make way for redevelopment of central business districts.[285] Displaced blacks were forced into new, high-density public housing projects situated in already crowded black neighborhoods, which became further destabilized.[286] Urban problems intensified in the 1970s, despite the civil rights movement and rising incomes among black workers, due to subtle (and ongoing) forms of racial discrimination in which "blacks [were] systematically shown, recommended, and invited to inspect many fewer homes than comparably qualified whites."[287] Thus, segregated housing patterns did not emerge by private choice; rather minorities "do not now, nor have they ever had the range of housing choices that are available to whites with comparable incomes and credit histories."[288] Yet the federal government has failed to enforce the nation's fair housing laws, thereby permitting segregated housing patterns to continue.[289] In short, government policies have been a key factor in creating housing segregation, which in turn leads to school segregation, and vice versa.[290]

The *Parents Involved* plurality ignores this history. As a result of *Parents Involved*, local school districts and education advocates are going back to the

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[283] *See* WILSON, *supra* note 282, at 47; Michael Katz, *Reframing the Underclass Debate*, *in* A NEW INTRODUCTION TO POVERTY: THE ROLE OF RACE, POWER, AND POLITICS 68 (Louis Kushnick & James Jennings eds., 1999).

[284] *See* WILSON, *supra* note 282, at 50–51 ("Many states delegate broad powers to localities that allow them to separate from predominantly poor and minority central cities").

[285] *See* Katz, *supra* note 283, at 68.

[286] *See* DENTON & MASSEY, *supra* note 280, at 55–56.

[287] *See id.* at 104; *see also id.* at 60–82, 98–100. "Although each individual act of discrimination may be small and subtle, together they have a powerful cumulative effect in lowering the probability of black entry into white neighborhoods." *Id.* at 98.

[288] Leland Ware, *The Demographics of Desegregation: Residential Segregation Remains High 40 Years After the Civil Rights Act of 1964*, 49 ST. LOUIS U. L.J. 1155, 1157 (2005).

[289] *See* Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PRO PUBLICA, Oct. 28, 2012 (describing how the Department of Housing and Urban Development gave billions of dollars to cities from the 1960s to the present without enforcing fair housing laws).

[290] School segregation also influences housing choices. As Justice Blackmun stated, "schools that are demonstrably black or white provide a signal to these families, perpetuating and intensifying the residential movement." Freeman v. Pitts, 503 U.S. 467, 513 (1992) (Blackmun, J., concurring); *see also* Erika Frankenberg, *Metropolitan School and Housing Desegregation*, 18 J. AFF. HOUSING & COMM. DEV. L. 193, 195 (2009) (discussing "the reciprocal effects that school and housing patterns can have on each other").

drawing board to devise new ways to ensure racial and socioeconomic diversity.[291] Perhaps the "silver lining" of the Court's jurisprudence is that pursuit of socioeconomic diversity raises no constitutional flags because wealth discrimination is viewed under a lenient rational basis test. [292] The class achievement gap is now larger than the racial achievement gap. Currently, eighty school districts, educating over four million children, use some form of socioeconomic school integration.[293] Supporters assert that socioeconomic integration raises achievement of low-income students, without any negative impacts on other students. [294] Others are more skeptical about the benefits of the socioeconomic approach, noting that it does not lead to significant racial mixing or overcome the racial achievement gap.[295] "Class-based solutions do not consider the fact that white resistance to being in predominantly black neighborhoods is independent of class and that the highest-income black families are as segregated from white counterparts as the lowest-income."[296] Thus, class-based solutions may not be able to overcome the racial dimension of income inequality. In sum, it remains to be seen whether class-based integration can reduce educational inequality.

2. School Financing

When civil rights advocates became discouraged by the slow pace of desegregation in the 1960s, they began litigating to secure equal financing of schools. [297] School district boundaries reinforced existing patterns of housing

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[291] *See* Black, *supra* note 252, at 5.

[292] Martha Minow, *After* Brown*: What Would Martin Luther King Say?*, 12 LEWIS & CLARK L. REV. 599, 635 (2008).

[293] Richard D. Kahlenberg, *Integrating Rich and Poor Matters Most*, N.Y. TIMES, May 21, 2012, http://www.nytimes.com/roomfordebate/2012/05/20/is-segregation-back-in-us-public-schools/integrating-rich-and-poor-matters-most.

[294] Richard D. Kahlenberg, *Socioeconomic School Integration*, 85 N.C. L. REV. 1545, 1557 (2007).

[295] Minow, *supra* note 292, at 638; Ogletree & Eaton, *supra* note 279, at 288. Some conservatives dislike socioeconomic integration because they fear it is a proxy for race, as well as ineffective. *See, e.g.*, *Issues in K-12 Education*: SELECTIONS FROM CQ RESEARCHER 8–9 (2010) (summarizing objections).

[296] Gary Orfield, *Response*, POVERTY & RACE (Sept./Oct. 2001) *available at* http://www.prrac.org/full_text.php?text_id=711&item_id=7761&newsletter_id=58&header=Symposium:%20Socioeconomic%20School%20Integration. "Student assignment plans that use poverty tend to exclude remedies for minority middle-class students, who are often isolated in inferior schools and behind in achievement." SPENCER & RENO, *supra* note 240, at 8.

[297] James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 253 (1999) ("School finance litigation began in the late 1960s, at a time when civil rights advocates were growing disillusioned with the pace and progress of desegregation.").

segregation.[298] At the same time, state legislatures have little incentive to equalize funding across school districts given that suburban districts predominate in terms of voting power and political clout.[299] Accordingly, in 1968 a group of parents turned to the courts to challenge Texas's education financing system, which was funded largely through local property taxes, resulting in disparities between wealthy and poor districts.[300] In *San Antonio Independent School District v. Rodriguez*,[301] the Supreme Court rejected their claim, holding that unequal financing schemes did not violate the Constitution. The Court concluded that strict scrutiny of the law was not triggered because the poor did not constitute a suspect class[302] and because education is not a fundamental right.[303] While acknowledging that education is important to the effective exercise of First Amendment freedoms and the right to vote, the Court asserted that education is not guaranteed by the text of the Constitution.[304] Moreover, the Court ruled that the school-financing scheme was a form of economic and social legislation subject to rational basis review, which in turn demands deference to legislative choices.[305] As the Court stated, "the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them."[306] This paean to deference is missing in the most recent desegregation cases.

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[298] Wilson, *supra* note 240, at 628 (explaining how the "Supreme Court[] has arguably contributed to the inter-district disparities by legitimizing the primacy of localism in its school equity jurisprudence") (emphasis omitted).

[299] Robinson, *supra* note 236, at 434; *see* Lisa R. Pruitt, *Spatial Inequality as Constitutional Infirmity: Equal Protection, Child Poverty and Place*, 71 MONT. L. REV. 1, 96 (2010) ("Residents of more affluent counties . . . are unlikely to support a more redistributive mechanism for financing local government or otherwise providing services when the status quo so clearly operates to their immediate benefit.").

[300] *See generally* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). The wealthiest school district in San Antonio spent $594 per pupil, while the poorest district spent $356 per student. *Id.* at 12–13.

[301] 411 U.S. 1 (1973).

[302] *Id.* at 28. ("The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.").

[303] *Id.* at 35.

[304] *Id.* at 35–37.

[305] *Id.* at 40.

[306] *Id.* at 59. The Court has continued to uphold state laws burdening the access of the poor to education. *See, e.g.*, Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450 (1988) (rejecting a challenge by poor families to a state law permitting local school districts to charge a fee for bus usage). *But see* Plyler v. Doe, 457 U.S. 202, 221 (1982) (striking down a Texas law that required undocumented immigrants to pay for public school education due to the unfairness of penalizing children for their parents' choices and in light of the importance of education to "maintaining the fabric of our society").

Like the twenty-first century desegregation cases, the financing cases reflect the Justices' assumptions about the underlying causes of the challenged inequities. The Court majority in *Rodriguez* viewed the financing disparities as resulting from inevitable residential patterns created by "the growth of commercial and industrial centers and accompanying shifts in population."[307] As the Court viewed these housing patterns, the Justices concluded, "[i]t is equally inevitable that some localities are going to be blessed with more taxable assets than others."[308] The majority commented that wealth is not "a static quantity," and it can change "from any number of events, some of which local residents can and do influence," as well as from public and private incentives for businesses to locate within certain districts.[309] In this view, the state has no responsibility to correct for segregated housing patterns because these patterns result primarily from market forces.

By contrast, in dissent, Justice Marshall went further in identifying government as a cause for educational inequality, emphasizing "the extent to which . . . the State is responsible for the wealth discrimination in this instance."[310] As he explained, the state not only created local school districts and tied school funding to the local property tax, it also "imposed land use controls [that] have undoubtedly encouraged and rigidified natural trends in the allocation of particular areas for residential or commercial use, and thus determined each district's amount of taxable property wealth."[311] For Justice Marshall, the extent of state involvement warranted close scrutiny of the state's financing decisions; for the majority, the financing patterns reflected preordained, mostly private choices.

As a result of *Rodriguez*, there are no federal constitutional constraints on unequal education spending, and not surprisingly, vast disparities remain within and between states. Even federal funding under Title I, the education law designed to support low-income schools, creates and permits disparities.[312] On average, schools with high levels of poor students spend $825 fewer per pupil than higher income schools, creating an average shortfall of over $500,000 in a typical low-income elementary school.[313] In light of these disparities and the Supreme Court's abandonment of poor students, advocates have challenged unequal school financing in state courts, relying on state constitutional provisions that provide a right to education.[314] The results have been mixed.[315] Even where lawsuits have

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[307] *Rodriguez*, 411 U.S. at 48.

[308] *Id.* at 54.

[309] *Id.*

[310] *Id.* at 123 (Marshall, J., dissenting).

[311] *Id.* at 123–24.

[312] *See* Derek W. Black, *The Congressional Failure to Enforce Equal Protection Through the Elementary and Secondary Education Act*, 90 B.U. L. REV. 313, 315 (2010).

[313] *Id.* at 315–16 ("If one factors in the additional cost associated with educating poor students, that gap actually jumps to over $1300 per student.").

[314] *See, e.g.*, Pruitt, *supra* note 299, at 80–81 (2010) (stating that some state constitutions provide greater educational rights than the federal Constitution).

[315] For a summary of school finance litigation and its impacts, see RYAN, *supra* note 236, at 145–70.

been successful, changes to financing systems have been modest and failed to remedy the challenges facing poor schools.[316] School financing lawsuits also do not enhance racial or socioeconomic diversity.[317] Further, state-based constitutional litigation cannot address the wide disparities between states.[318] Thus, unequal school financing—reinforced by the Supreme Court—remains a problem underlying educational inequality.[319]

3. Affirmative Action and Higher Education

A college degree is increasingly associated with higher lifetime earnings,[320] as well as better health, longer life expectancy, and increased civic involvement.[321] However, there is an income gap impacting college access and graduation rates.[322] Whereas 80% of high school graduates from the upper quintile of the income distribution attend college, only 44% do so from the bottom quintile.[323] In top tier colleges, 74% of the students come from the top quartile, while 3% come from the bottom quartile.[324] This attendance and graduation gap is driven by several factors that plague low-income schools, including lower-quality preparation in K-12 education, less ability by students to afford college, decreasing financial assistance for low-income students, and a lack of understanding of the college application

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[316] *See* Robinson, *supra* note 236, at 436 (reviewing RYAN, *supra* note 236) ("Instead, resulting school finance reforms typically focus on modest increases in funding levels for low-wealth districts while simultaneously maintaining existing funding levels or raising more slowly the funding rate for wealthier districts. This approach preserves the fiscal autonomy of wealthier, typically suburban school districts.") (citations omitted).

[317] *See* Ryan, *supra* note 297, at 255.

[318] David Karen & Kevin J. Dougherty, *Necessary but Not Sufficient: Higher Education as a Strategy of Social Mobility*, *in* HIGHER EDUCATION AND THE COLOR LINE: COLLEGE ACCESS, RACIAL EQUITY, AND SOCIAL CHANGE, *supra* note 242, at 33 (higher education is "the necessary passport to middle-class success"). *See generally* Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2044 (2006) (examining "the empirical and policy dimensions of the problem of interstate inequality").

[319] *See* Horne v. Flores, 557 U.S. 433 (2009). In *Horne*, a 5-4 majority overturned the lower court rulings that Arizona had failed to adequately fund English Language Learner ("ELL") programs, in violation of the Equal Educational Opportunities Act. The Court decided that the Act's "ultimate focus is on the quality of educational programming and services provided to students, not the amount of money spent on them." *Id.* at 466–67. In so ruling, the Court intimated that the achievement gap facing ELL students was not impacted by funding, but rather by other causes, "such as drug use and the prevalence of gangs." *Id.* at 467 n.20. Of course, these causes allow the Court to place the blame for the achievement gap on ELL students themselves, rather than the school districts that serve them.

[320] Haveman & Smeeding, *supra* note 242, at 135.

[321] Karen & Dougherty, *supra* note 318, at 36.

[322] Haveman & Smeeding, *supra* note 242, at 126.

[323] *Id.*

[324] *Id.* at 130.

process.[325] Thus, higher education is not promoting social equality to the extent possible.[326]

One mechanism to expand college access for minority students is affirmative action. Initially, affirmative action was designed to equalize access to higher education in light of our history, in which colleges enrolled few minorities due to overt segregation and discriminatory admissions policies.[327] Currently, the Court approves affirmative action for a separate rationale of ensuring diversity, which the Court recognizes as a compelling state interest.[328] In 2013 the Court held in *Fisher v. University of Texas at Austin*[329] that the means a university uses to achieve racial diversity must be narrowly tailored and are subject to strict scrutiny.[330] It remains unclear whether and how universities will be able to meet this stringent standard.

Accordingly, like desegregation at the K-12 level, this may be another area where class-based affirmative action will become increasingly attractive to colleges looking to maintain diverse student bodies. Here, too, the lack of constitutional protection for class may prove beneficial for low-income and minority students, as any college wishing to diversify socioeconomically would be subject to a lenient rational basis review standard. However, the efficacy of class-based affirmative action is unclear. On the one hand, some charge that emphasis on class may reduce racial diversity, given that poor whites not only outnumber blacks, but also tend to have higher scores.[331] In other words, even within social classes, resources and opportunities are distributed unequally and on a racialized basis.[332] On the other hand, it appears that some carefully constructed class-based plans can boost both socioeconomic and racial diversity.[333] At the same time,

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[325] *Id.* at 127, 135–37.

[326] *Id.* at 128.

[327] *See* Angelo N. Ancheta, *After* Grutter *and* Gratz*: Higher Education, Race, and the Law*, *in* HIGHER EDUCATION AND THE COLOR LINE, *supra* note 242, at 175. The Court took this rationale off the table in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978).

[328] *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2417 (2013) (citing *Bakke*, 438 U. S. at 307–09 (1978)); Grutter v. Bollinger, 539 U.S. 306, 325 (2003).

[329] 133 S. Ct. 2411 (2013).

[330] *Id.* at 2419.

[331] *See* Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 452, 465–66 (1997).

[332] *See* Carson Byrd et al., *Class-Based Policies are Not a Remedy for Racial Inequality*, CHRON. HIGHER ED., Sept. 30, 2011, at B37 ("While poor white children also face substantial obstacles, their difficulties are not exacerbated by racial inequality and prejudice. . . ."); Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, *in* AMERICA'S UNTAPPED RESOURCE: LOW-INCOME STUDENTS IN HIGHER EDUCATION 101, 132 (Richard D. Kahlenberg ed., 2004) ("Race and ethnicity matter in the distribution of opportunity, independent of other characteristics."). Carnevale & Rose argue for both race-based and class-based affirmative action to achieve diversity. *Id.*

[333] *See generally* RICHARD D. KAHLENBERG & HALLEY POTTER, CENTURY FOUND., A BETTER AFFIRMATIVE ACTION: STATE UNIVERSITIES THAT CREATED ALTERNATIVES TO

skeptics will be eager to challenge class-based plans that look like proxies for race, making litigation over race-based and socioeconomic affirmative action a reality for years to come.

D. Politics and Power

Shortly before the 2012 presidential election, over 80% of Americans stated that there is too much corporate money in politics.[334] Americans understand the power wielded by money in politics but may not fully comprehend how the Supreme Court supports this financial scaffolding. If the political system contributes to economic inequality, then it is important to understand how law impacts politics. As this Part explains, the Supreme Court has directed political outcomes, dismantled congressional attempts to rein in corporate political spending, and undermined the electoral process for low-income voters. In each of these areas, the 1% flourishes, while the 99% becomes increasingly disenfranchised.

1. Supreme Court Influence over Politics

A main tenet of the OWS movement is that income and wealth inequality are not driven solely by economics, but also by politics. Political scientists have analyzed how political decisions reinforce and create economic inequality, both through affirmative legislation, as well as through drift, or failure to respond to changing circumstances.[335] As noted above, studies show that at the federal level, senators ignore the policy preferences of people at the low end of the income ladder, are minimally attuned to the middle, and are highly responsive to high-income voters.[336] Further, there are partisan differences within these trends; political scientist Larry Bartels has shown that Republican senators are about twice as responsive to high-income voters as compared to Democratic senators.[337]

Moreover, Bartels found that over the last fifty years, the incomes of middle-class families grew twice as fast under Democratic Administrations than they did under Republican administrations, while the incomes of the working poor grew six times as fast under Democrats.[338] This pattern results from partisan differences in

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RACIAL PREFERENCES (2012), *available at* http://tcf.org/assets/downloads/tcf-abaa.pdf; Matthew N. Gaertner & Melissa Hart, *Considering Class: College Access and Diversity* (Univ. of Colo. L. Legal Studies Res. Paper Series, Paper No. 12-18, 2012), *available at* http://ssrn.com/abstract=2137126 (describing a class-based affirmative action plan that increased both socioeconomic and racial diversity at the University of Colorado).

[334] *See* Jordy Yager, *Poll: Majority Wants Corporate Money Out of Politics*, THE HILL (Oct. 25, 2012, 4:57 PM), http://thehill.com/blogs/ballot-box/campaign-ads/264087-poll-majority-want-corporate-money-out-of-politics.

[335] HACKER & PIERSON, *supra* note 6, at 52 (defining drift as "the deliberate failure to adapt public policies to the shifting realities of a dynamic economy").

[336] BARTELS, *supra* note 24, at 254–65.

[337] *Id.* at 269–70.

[338] *Id.* at 3.

macroeconomic policies.[339] In short, "a great deal of economic inequality in the contemporary United States is specifically attributable to the policies and priorities of Republican presidents."[340] Bartels notes that in his first term, "President George W. Bush presided over a 2% cumulative increase in the real incomes of families at the 95th percentile of the income distribution," while there was a simultaneous 1% drop in the real incomes for the middle class and a 3% drop for the working poor.[341] By contrast, if Vice President Gore had governed over this time period, the real incomes of the working poor would likely have grown 6%, the real incomes of the middle class would have grown by 4.5%, and the real incomes of the top 5% would have remained unchanged.[342]

Of course, President George W. Bush can thank the Supreme Court for his presidency. In *Bush v. Gore*,[343] the Supreme Court decided the outcome of the November 2000 Presidential election.[344] Preceding the decision, Vice President Gore had a popular vote advantage of over a half million votes and a slight advantage in electoral college votes (267 versus President Bush's 246).[345] The election came down to Florida and its twenty-five electoral votes.[346] Out of almost six million votes cast in Florida, and after a statutorily required machine recount in the event of close elections, Governor George W. Bush led Gore by 327 votes.[347] Gore relied on Florida's election law to challenge the results, and the Florida Supreme Court ordered a recount of all ballots that either indicated no presidential preference or more than one.[348] The dispute culminated in the *Bush v. Gore*[349] decision, in which the Court stopped the recount.[350]

In its per curiam decision, the majority held that the use of manual recounts violated the Equal Protection Clause because there were no uniform standards governing how to discern voter intent on ambiguous ballots, and moreover, that it was too late to implement proper procedures.[351] However, as Justice Stevens stated

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[339] *Id.* at 3, 34–42.

[340] *Id.* at 3. Data "impl[ies] that continuous Democratic control would have produced an essentially constant level of economic inequality over the past three decades, despite all the technological, demographic, and global competitive forces emphasized in economists' accounts of escalating inequality." BARTELS, *supra* note 24, at 61.

[341] BARTELS, *supra* note 24, at 63.

[342] *Id.*

[343] 531 U.S. 98 (2000).

[344] *Id.*

[345] Richard Briffault, Bush v. Gore *as an Equal Protection Case*, 29 FLA. ST. U. L. REV. 325, 330 (2001).

[346] *Id.*

[347] *Id.*

[348] *See id.* at 330–36.

[349] 531 U.S. 98 (2000).

[350] *Id.* at 98, 110. For a more in-depth timeline of the developments that led to *Bush v. Gore*, see Briffault, *supra* note 345, at 330–41.

[351] 531 U.S. at 105–06, 110. There are wide variations within and between states as to how elections are administered, yet "[b]y the Court's reasoning all of these variations violated equal protection." Erwin Chemerinsky, *How Should We Think About* Bush v. Gore?

in dissent, the decision disenfranchised many voters whose ballots did reveal their intent—thus creating an equal protection problem for those voters.[352] Indeed, the losers were largely people of color, the elderly, and the poor, since many of them face structural barriers to casting a perfect ballot, such as voting booth time limits, lack of help for illiterate voters, and complex ballot technology.[353] Professor Spencer Overton has further elaborated that the Court's stress on a voter's ability to cast a perfect ballot emphasizes the merits of individual voters while ignoring barriers facing people of color and denying them full political participation.[354] Overall, the overwhelming weight of media and academic commentary deemed the decision highly partisan, given that the conservative Justices that constituted the majority abandoned their professed commitments to states' rights, a narrow interpretation of equal protection, and judicial restraint.[355] The decision not only replicated patterns of economic inequality by disenfranchising certain groups of voters, but it also enhanced Republican preeminence in the executive and judicial branches, leading to policies that further entrenched economic inequality.

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34 LOY. U. CHI. L.J. 1, 17 (2002); *see also* Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics,* 1110 YALE L.J. 1407, 1427–28 (2001) (noting the variety of voting procedures used by states and their subdivisions and commenting that the "irony is that when the Florida Supreme Court tried to step in to remedy the problems caused by differences in technology, the U.S. Supreme Court held that this—and not the more serious technological differences—constituted a violation of the Equal Protection Clause").

[352] 531 U.S. at 127 (Stevens, J., dissenting).

[353] Lani Guinier, *Supreme Democracy:* Bush v. Gore *Redux*, 34 LOY. U. CHI. L.J. 23, 48 (2002). Guinier notes that although blacks made up 16% of the voting population, they constituted 54% of ballots that were rejected by voting machines. *Id.*; *see also* Spencer Overton, *A Place at the Table:* Bush v. Gore *Through the Lens of Race*, 29 FLA. ST. U. L. REV. 469, 483 (2001) (explaining that the Court's merit-based vision either ignores or tolerates barriers such as "lower education, a greater percentage of first-time voters, a greater reluctance to ask for assistance, segregated residential patterns, and substandard voting equipment and assistance at the polls in predominantly African-American neighborhoods").

Compare Overton's explanation of why some voters struggle at the polls to Justice O'Connor's impatient question during the oral argument of *Bush v. Gore*, in which she asked, "Well, why isn't the standard the one that voters are instructed to follow, for goodness sakes? I mean, it couldn't be clearer." Transcript of Oral Argument at 58, Bush v. Gore, 531 U.S. 98 (2000) (No. 00-949).

[354] Overton, *supra* note 353, at 472, 476–77, 481–82.

[355] *See* David Cole, *The Liberal Legacy of* Bush v. Gore, 94 GEO. L.J. 1427, 1429–30 (2006) (describing the "overwhelmingly critical" reaction to the decision); *see also* Chemerinsky, *supra* note 351, at 18 ("The supreme irony of the case is that the majority was comprised of five Justices who are revolutionizing constitutional law through their commitment to federalism and states' rights, but here showed no deference whatsoever to the state court.").

2. Business Influence over Politics

Businesses influence politics in many ways—from donating to political campaigns to running ads supporting or denouncing politicians to lobbying politicians once they are in office. There are almost no restraints on the extent or form of corporate influence over politics, and this is a factor in maintaining economic inequality. Still, the Court has struck down Congress's own attempts to limit its exposure to corporate influence.

As Professors Nolan McCarty, Keith Poole, and Howard Rosenthal have demonstrated, both political polarization and economic inequality have swelled since 1975, and they are linked because polarization creates gridlock, thus making it difficult to redress inequality.[356] Republican electoral success has driven extreme polarization,[357] resulting in a decline in the real value of the minimum wage, a drop in the estate tax rate, and lower federal income tax rates at the top of the income scale.[358] In other words, people at the top of the income scale are obtaining economically beneficial policies; those at the bottom are not. Escalating campaign expenditures feed polarization, as a small group of extremely wealthy contributors can focus their funds on politicians who support their ideology.[359] Because Democrats are just as dependent as Republicans on campaign funds, they have similarly failed to take on economic inequality as an issue and have become increasingly probusiness.[360] Moreover, in today's polarized climate, taking extreme political positions makes fundraising easier,[361] and funds are desperately needed to meet the expenses of media and advertising that drive modern campaigns.[362] Despite congressional efforts to rein in campaign financing, the Supreme Court has reinforced the primacy of corporate money in politics, most recently in *Citizens United v. FEC*.[363]

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[356] NOLAN MCCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 3, 165–66 (2006); *see also* Linda Feldmann, *Pew Survey: Partisan Polarization in U.S. Hits 25-Year High*, CHRISTIAN SCI. MONITOR (June 4, 2012), http://www.csmonitor.com/USA/Politics/2012/0604/Pew-survey-Partisan-polarization-in-US-hits-25-year-high.

[357] Voter preferences are tied to income, with high-income voters more likely to support Republicans than low-income voters, who tend to support Democrats. MCCARTY, POOLE & ROSENTHAL, *supra* note 356, at 71, 106–07.

[358] *Id.* at 168–72

[359] *Id.* at 141, 160–61 ("The American economy . . . has created thousands of not-so-typical American multimillionaires and billionaires who have the resources to make contributions substantial enough to have a major effect on electoral outcomes."); *see also* Paul Krugman & Robin Wells, *The Widening Gyre: Inequality, Polarization, and the Crisis*, *in* THE OCCUPY HANDBOOK, *supra* note 2, at 10 ("[I]ncreased income and wealth of a small minority has, in effect, bought the allegiance of a major political party.").

[360] *See* LESSIG, *supra* note 45, at 96–98; HACKER & PIERSON, *supra* note 6, 179–82; MCCARTY, POOLE & ROSENTHAL, *supra* note 356, at 142.

[361] LESSIG, *supra* note 45, at 97.

[362] HACKER & PIERSON, *supra* note 6, at 181.

[363] 558 U.S. 310 (2010).

The modern era of campaign finance law arose in 1974 in the wake of the Watergate scandal when Congress passed the Federal Election Campaign Act (FECA), a campaign finance law that, among other things, limited campaign contribution amounts, limited how much candidates could spend on a campaign, and required disclosures for entities engaging in express advocacy.[364] In ruling on the constitutionality of FECA in 1976, the Court held in *Buckley v. Valeo*[365] that Congress could mandate disclosures and limit individual political contributions, as they do not constitute speech or raise the risk of quid pro quo contributions to candidates.[366] However, the restrictions on political expenditures, or money spent on communications to voters, were invalid because such restrictions "limit political expression at the core of our electoral process and of the First Amendment freedoms."[367]

After *Buckley*, the Court waffled in its deference to congressionally enacted campaign spending limits.[368] In 1990, in *Austin v. Michigan Chamber of Commerce*,[369] the Court upheld electoral spending limits on corporations in order to limit the "corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[370] Nevertheless, by the 1990s, soft money, or money spent by political parties for party building, began pouring into the political process through issue ads, which avoided FECA regulations of express advocacy.[371] Entities such as PACs, 527s, and other nonprofit groups also funded issue ads, which avoided forbidden "magic words" that urge viewers to vote for or against a particular candidate, but are still designed to shape electoral outcomes.[372] Congress passed the McCain-Feingold Act in 2002 to close this soft money loophole in campaign finance law.[373] Among other things, the Act prohibited corporations and unions from running electioneering broadcast ads thirty days before primaries and sixty days before general elections.[374]

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[364] James A. Gardner & Guy-Uriel Charles, ELECTION LAW IN THE AMERICAN POLITICAL SYSTEM 640–52 (2012).

[365] 424 U.S. 1 (1976) (per curiam).

[366] *Id.* at 143.

[367] *Id.* at 39 (internal quotation marks omitted).

[368] *See* Richard L. Hasen, Citizens United *and the Illusion of Coherence*, 109 MICH. L. REV. 581, 586 (2011) ("Since *Buckley*, the Court's campaign finance jurisprudence has swung like a pendulum toward and away from deference . . . however, the Court has not formally overturned any of its campaign finance precedents until *Citizens United*.").

[369] 494 U.S. 652 (1990).

[370] *Id.* at 660.

[371] *See* Michael S. Kang, *After* Citizens United, 44 IND. L. REV. 243, 252 (2010) (defining soft money and its application after *Buckley*).

[372] *See* Hasen, *supra* note 368, at 588–89.

[373] Bipartisan Campaign Reform (McCain-Feingold) Act of 2002 §101, 2 U.S.C. § 441i(a) (2000 & Supp. V 2005); *see also* Hasen, *supra* note 368, at 588–89 (describing the McCain-Feingold Act and its purpose).

[374] 2 U.S.C. § 441i(a).

Initially, in *McConnell v. FEC*,[375] the Court held that the McCain-Feingold Act permissibly restricted corporate and union funded ads that were "the functional equivalent of express advocacy."[376] However, the tide began to turn with the additions of Justices Roberts and Alito to the Court and the decision in *FEC v. Wisconsin Right to Life, Inc.*,[377] in which the Court took a narrow view of express advocacy and ruled that government could only restrict corporate spending on advertising that was "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[378]

In *Citizens United*,[379] the Court went even further, striking down all campaign finance prohibitions on corporate expenditures—whether for express or issue advocacy.[380] Such prohibitions were found to be unconstitutional because "the First Amendment generally prohibits the suppression of political speech based on the speaker's identity."[381] *Citizens United* resulted from an anti-Hillary Clinton documentary shown on cable television via video-on-demand before the presidential primaries of 2008 in violation of McCain-Feingold electioneering restrictions.[382] According to the Court, it would be unfair to permit individuals and unincorporated associations free rein to spend on independent expenditures, while "certain disfavored associations of citizens—those that have taken on the corporate form—are penalized for engaging in the same political speech."[383] Based on *Citizens United*, federal courts and the FEC have subsequently opened the door to unlimited contributions by individuals or groups to super PACs,[384] which were previously limited to $5,000 donations.[385] Critics of the decision, and there are many,[386] have remarked on the Court's overly solicitous stance toward corporations given that "a corporation is an economic entity, not a citizen; a profit-making enterprise, not an enlightened intelligence; a creature of the law, not a

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[375] 540 U.S. 93 (2003).

[376] *Id.* at 206–07.

[377] 551 U.S. 449 (2007).

[378] *Id.* at 451.

[379] 558 U.S. 310 (2010).

[380] *Id.* at 365.

[381] *Id.* at 350.

[382] *Id.* at 319–20.

[383] *Id.* at 356.

[384] A super PAC is technically known as an independent-expenditure-only committee; these groups may not donate money directly to political candidates, but they can raise unlimited sums to advocate for or against political candidates. R. SAM GARRETT, CONG. RES. SERV., R42042, SUPER PACS IN FEDERAL ELECTIONS: OVERVIEW AND ISSUES FOR CONGRESS 1–2 (2013), *available at* http://www.fas.org/sgp/crs/misc/R42042.pdf.

[385] *See* SpeechNow.org v. FEC, 599 F.3d 686, 698 (D.C. Cir. 2010) (holding that the provision limiting contributions by individuals to political committees that made only independent expenditures violated the First Amendment); Emily's List v. FEC, 581 F.3d 1, 25 (D.C. Cir. 2009) (striking down restrictions on use of soft money by nonconnected committees).

[386] *See* Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 3 (2012) (summarizing the critical response).

partner in a democratic project of political self-governance."[387] As Justice Stevens remarked in his dissent, "[corporations] are not themselves members of 'We the People' by whom and for whom our Constitution was established."[388]

Importantly, *Citizens United* has implications beyond corporate spending. In its opinion, the Court narrowed its conception of corruption to quid pro quo campaign donations and rejected *Austin*'s endorsement of the antidistortion interest.[389] In other words, "[a]ny concern for political equality—for limiting the ability of the wealthy to deploy their financial advantage in the political arena—has been ruled out."[390] Yet, as Lawrence Lessig points out, corruption arises from more than bribes.[391] Although such unsavory incidents do occasionally occur, a far more pervasive corrupting influence comes from the normalization of dependency, that is, "a corruption practiced by decent people" that leads politicians to focus their efforts on initiatives favored by their financial supporters, simultaneously souring citizens on democracy.[392] Justice Stevens put it succinctly in dissent: "[c]orruption operates along a spectrum."[393] Yet, after *Citizens United*, individuals, corporations and other groups do not have to limit themselves to issue advertising but can engage in express advocacy to elect or defeat certain candidates. Thus, *Citizens United* results in "the nearly complete deregulation of independent expenditures,"[394] or as Michael Kang writes, "the end of campaign finance law as we knew it."[395]

Indeed, there has been a flood of money from outside groups in recent elections; in 2010 outside groups spent $300 million, constituting an increase of 168% in House races and 44% in Senate races compared to 2008.[396] In 2012 *Citizens United* led to almost $1 billion in new spending out of the $6 billion spent total, which is more than outside groups spent in the prior four election cycles combined.[397] Time will tell if citizens, bombarded by corporate electioneering, will

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[387] Steven L. Winter, *Citizens Disunited*, 27 GA. ST. U. L. REV. 1133, 1142 (2011); *see also* Kang, *supra* note 386, at 12–13.

[388] Citizens United v. FEC, 558 U.S. 310, 466 (2009) (Stevens, J., concurring in part and dissenting in part).

[389] *Id.* at 363.

[390] Richard Briffault, *On Dejudicializing American Campaign Finance Law*, 27 GA. ST. U. L. Rev. 887, 890 (2011).

[391] LESSIG, *supra* note 45, at 106–07.

[392] *Id.* at 8.

[393] *Citizens United*, 558 U.S. at 448.

[394] Kang, *supra* note 386, at 5.

[395] *Id.* at 4.

[396] *Id.* at 37–38; *see also* Winter, *supra* note 387, at 1134 (estimating that outside spending exceeded $448 million in 2010); Richard L. Hasen, *The Numbers Don't Lie: If You Aren't Sure* Citizens United *Gave Rise to the Super PACs, Just Follow the Money*, SLATE (Mar. 9, 2012, 2:56 PM), http://www.slate.com/articles/news_and_politics/politics/2012/03/the_supreme_court_s_citizens_united_decision_has_led_to_an_explosion_of_campaign_spending_.html.

[397] Reity O'Brien, *Court Opened Door to $933 Million in New Election Spending*, CTR. FOR PUB. INTEGRITY (Jan. 16, 2013, 6:00 AM), http://www.publicintegrity.org/2013/0

become cynical and disenchanted, and whether lawmakers will feel compelled to bend to corporate desires.[398] Professor Gene Nichol writes despairingly that *Citizens United* rests on a "foundational conclusion that the United States Constitution, ultimately, secures a power for people of wealth to use their disproportionate economic resources to get their way in our politics."[399] In so doing, the Court overturned legislative judgments and elevated its own values over those of the politically accountable branches. Justice Stevens summed up the irony of the decision: "[w]hile American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics."[400]

3. Declining Political Participation by the Poor

While money is playing an increasing role in influencing the legislative agenda, the poor are participating in politics in lower numbers than other Americans and at decreasing rates. There are many reasons behind this trend: the poor have less access to skills and resources that facilitate participation; they have weaker ties to civic organizations and to trade unions that mobilize participation; and they are not targeted by interest groups.[401] In addition, the poor face institutional barriers that can limit their participation, such as felon disenfranchisement laws, citizen-initiated voter registration systems, and workday voting schedules.[402] Furthermore, the poor become discouraged about the efficacy of political participation when they observe social welfare cutbacks and personally interact with government bureaucracies, where they often face demeaning and skeptical treatment.[403] Part of the decline is also linked to increasing residential segregation; the least political participation exists among low-income Americans who live in low-income counties.[404] "The result is that, as the most affluent become more segregated from other parts of American society, the social ecologies that provide

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1/16/12027/court-opened-door-933-million-new-election-spending; ADAM CROWTHER, PUBLIC CITIZEN'S CONGRESS WATCH DIVISION, OUTSIDE MONEY TAKES THE INSIDE TRACK 3 (Taylor Lincoln ed., 2012), *available at* http://www.citizen.org/documents/outsid e-spending-dominates-2012-election-report.pdf. It appears that corporations accounted for only part of this spending; money mainly flowed from highly partisan groups who do not have to disclose their contributors. Kang, *supra* note 386, at 6.

[398] *See* Citizens United v. FEC, 558 U.S. 310, 471 (2010) (Stevens, J., dissenting) (arguing that Congress was entitled to take these concerns into account and to receive deference for its judgments).

[399] Gene Nichol, Citizens United *and the Roberts Court's War on Democracy*, 27 GA. ST. U. L. REV. 1007, 1016 (2011).

[400] *Citizens United*, 558 U.S. at 479 (Stevens, J., dissenting).

[401] Joe Soss & Lawrence R. Jacobs, *The Place of Inequality: Non-Participation in the American Polity*, 124 POL. SCI. Q. 95, 98 (2009).

[402] *Id.*

[403] *See id.* at 113–14.

[404] *See id.* at 122.

the most basic backdrop for political life grow farther apart and more unequal as conditions for political engagement."[405]

For its part, the Court has recently reinforced the decline in political participation by the poor by putting on its "class-blinders" in electoral cases. In *Crawford v. Marion County*,[406] the Court upheld an Indiana election law that required citizens voting in person to present government-issued photo identification.[407] The challengers alleged that the new law substantially burdened their right to vote in violation of the Fourteenth Amendment and, further, that the law was unnecessary to combat voter fraud.[408] Indeed, even the majority conceded that the record contains no evidence of any voter fraud actually occurring in Indiana at any time in its history.[409] Nevertheless, the Court held that the State's interest in orderly administration outweighed any burden to voters in obtaining identification.[410]

In dissent, Justice Souter highlighted the burdens on poor, old, and disabled voters to travel to the bureau of motor vehicles, especially given the limited public transportation in Indiana and paucity of license branches.[411] In addition, the required documentation for a voter identification card, such as a birth certificate or United States passport, could be costly for "the poor, the old, and the immobile."[412] Justice Souter also pointed out the restricted nature of Indiana's law when it comes to provisional ballots, which are ballots filled out by voters who arrive at the polls lacking proper identification.[413] In Indiana, anyone who fills out a provisional ballot and wants their vote counted must go to a circuit court or election board within ten days of the election to sign an affidavit—another potentially costly trip "uncomfortably close to the outright $1.50 fee we struck down 42 years ago" in *Harper*, outlawing the poll tax.[414]

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[405] *Id.* at 123.

[406] 553 U.S. 181 (2008).

[407] *Id.* at 204.

[408] *Id.* at 187.

[409] *Id.* at 194.

[410] *Id.* at 196.

[411] *Id.* at 211–16 (Souter, J., dissenting).

[412] *Id.* at 216 (2008).

[413] *Id.* at 216–18.

[414] *Id.* at 237 (citing Harper v. Va. Bd. of Elections, 383 U.S. 663, 665–66 (1966)). A win for voting rights occurred in Arizona v. Inter Tribal Council of Arizona, 133 S. Ct. 2247 (2013), when the Supreme Court struck down an Arizona law requiring proof of citizenship for voter registration on federal forms on the grounds that federal law (the National Voter Registration Act) preempted the state law. *Id.* at 2254–57. Only about 5% of Arizona voters registered via the federal form versus the state form. Michael Muskal, *Arizona to Keep Requiring Citizenship Proof on State Voter Forms*, L.A. TIMES, June 17, 2013, http://articles.latimes.com/2013/jun/17/nation/la-na-nn-arizona-officials-to-continue-requiring-citizenship-on-state-voter-registration-forms-20130617.

The state form is still allowed to ask for proof of citizenship. 133 S. Ct. at 2255. Moreover, the Court left open the possibility that the state could ask the Federal Election Assistance Commission to include state-specific instructions on the federal form. *Id.* at

The Court delivered another blow to minority electoral access in *Shelby County, Alabama v. Holder*,[415] in which it struck down Section 4 of the Voting Rights Act by a 5-4 vote.[416] Section 4 identified certain jurisdictions with histories of voting discrimination.[417] In turn, Section 5 required those jurisdictions to seek preclearance, or approval, from the Justice Department before making any changes to their voting systems, such as changing polling place locations or hours or altering voting district boundaries.[418] Thus, Section 5, considered the most effective civil rights statute ever enacted, is now effectively dead.[419] Congress had reauthorized the Act as recently as 2006, extending it for twenty-five years.[420] Nevertheless, writing for the majority, Justice Roberts contended that changing political conditions over the last fifty years, exemplified by increased minority voter registration and minority elected officials, no longer warranted the Act's "extraordinary measures."[421] As he stated, "Coverage today is based on decades-old data and eradicated practices" that have "no logical relation to the present day."[422] Justice Ginsberg, in dissent (for Justices Breyer, Kagan, and Sotomayor), disagreed, arguing that deference to Congress's judgment in protecting the right to vote was warranted, especially in light of a voluminous legislative record of recent examples of discrimination in voting, particularly through "second generation" tactics designed to dilute the minority vote.[423] She warned, "[t]hrowing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[424] As she predicted, the impact of *Shelby County* has been swift. Immediately, Texas and Mississippi announced they would effectuate voter identification laws;[425] these laws disproportionately impact poor and minority

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2259–60. Thus, because Arizona has indicated it will do so, this victory for voting rights may be short-lived and its impact limited.

[415] 133 S. Ct. 2612 (2013).

[416] *Id.* at 2631.

[417] *Id.* at 2619–20.

[418] *Id.* at 2620. The test for Section 5 coverage was articulated in Section 4: States or political subdivisions that had maintained a test or device as a prerequisite to voting as of November 1, 1964, and had fewer than 50% voter registration or turnout in the 1964 Presidential election. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 438, § 4(b) (1965). Covered jurisdictions could also seek preclearance approval from the District Court for the District of Columbia. *Id.*

[419] 133 S. Ct. at 2634 (Ginsberg, J., dissenting).

[420] *Id.* at 2621.

[421] *Id.* at 2619, 2625.

[422] *Id.* at 2617.

[423] *Id.* at 2632, 2636 (Ginsberg, J., dissenting).

[424] *Id.* at 2650. "All told, between 1982 and 2006, DOJ objections blocked over 700 voting changes based on a determination that the changes were discriminatory." *Id.* at 2639 (citing H.R. REP. NO. 109-478, at 21 (2006)).

[425] *See* Bill Barrow, *Voting Rights Act Ruling Prompts Action by States*, HUFFINGTON POST (June 26, 2013, 8:02 AM), http://www.huffingtonpost.com/2013/06/26/voting-rights-act-states_n_3502062.html; Adam Liptak, *Supreme Court Invalidates Key Part of Voting*

voters. In light of the role of money in political campaigns and policy-making, one might query whether giving low-income individuals and minorities access to the polls matters. In other words, do *Crawford* and *Shelby County* matter? Professor Larry Bartels answers yes, explaining that the views of poor people have an indirect effect because their votes can tip an election toward a Democrat rather than a Republican.[426] They may not have a direct influence on politicians once they are elected, but by shaping who enters office, the poor can impact the course of public policy.[427]

III. EXPLANATIONS AND SOLUTIONS

On January 20, 2012, around two hundred demonstrators took to the steps of the Supreme Court to protest the *Citizens United* decision on its second anniversary.[428] Nearly a dozen people were arrested after storming through police barricades.[429] Asked why she was demonstrating at the Court, one protestor said, "This is the scene of the crime."[430] The "occupiers" might have been even more numerous and agitated if they knew the extent of the Court's bias toward corporations, disdain for the poor, and suspicion of equality-promoting legislation. Protests are certainly one way to register dissent. While the Court is unlikely to make decisions based on public pressure, the Justices are clearly aware of public mood. Today, the lasting influence of the Occupy movement is its impact on public opinion. Any future strategies for reform must consider the motivations underlying Court decision-making processes. Accordingly, this Part offers some explanations for Court doctrines that exacerbate economic inequality and makes some suggestions for a long-lasting, progressive legal reform movement.

A. Explanations

Economic inequality results from a political process that is distorted by corporations and the wealthy due to the influence of money in politics. However, Supreme Court Justices are not supposed to be subject to the seductive influence of

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Rights Act, N.Y. TIMES, June 25, 2013, at A1. While Congress could enact a new coverage formula under Section 4, it is unlikely to do so given the current state of political partisanship.

[426] BARTELS, *supra* note 24, at 282.

[427] *Id.*

[428] *See* Mike Sacks & Ariel Edwards-Levy, *Occupy the Courts Clashes With Supreme Court Police in Citizens United Protest*, HUFFINGTON POST (Jan. 20, 2012, 6:19 PM), http://www.huffingtonpost.com/2012/01/20/occupy-the-courts-supreme-court-police-citizens-united_n_1219968.html.

[429] *Id.*

[430] Tony Mauro, *"Occupy the Courts" Protests Hit Supreme Court and Federal Courthouses Nationwide*, THE BLOG OF LEGAL TIMES (January 20, 2012, 5:05 PM), http://legaltimes.typepad.com/blt/2012/01/occupy-the-courts-protests-hit-supreme-court-and-federal-courthouses-nationwide-.html.

money. The Justices do not campaign for office, and business interests cannot lobby them. They have entirely different incentives than political leaders because they are appointed and have life tenure and, thus, do not have to fill campaign coffers to maintain their jobs. They have nowhere higher to go professionally. Moreover, they are insulated from the hurly-burly of politics because they select the cases they will decide and cannot be reversed on constitutional questions.[431] Why, then, is there such a strong strain in Supreme Court jurisprudence in favor of the 1%? There are two major models of Supreme Court decision making that shed light on this question: the attitudinal model and the majoritarian model.

1. The Attitudinal Model

Under the attitudinal model, Supreme Court Justices vote their policy preferences because they can.[432] In other words, Justice Scalia votes the way he does because he is conservative; Justice Breyer votes the way he does because he is liberal.[433] Political scientists have generated significant empirical evidence showing that the ideological preferences of the Justices are predictive of their votes in up to three-quarters of cases.[434] The attitudinal model reflects the insights of legal realism in rebuking the traditional legal model,[435] under which judges neutrally discern the meaning of law through formal tools. Justices themselves claim fealty to the legal model,[436] and to be sure, Justices sometimes vote contrary to expectations. Many decisions are unanimous, suggesting that the Justices "share legal values that can supersede policy preferences."[437] Even proponents of the attitudinal model recognize that other factors are at work in Supreme Court decision making, such as precedent and modes of interpretation.[438] Nevertheless, the attitudinal model is highly predictive and usually prevails when law is indeterminate,[439] which is often the case in highly salient issues that come before

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[431] JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 86, 92–93 (2002); Jeff Yates & Elizabeth Coggins, *The Intersection of Judicial Attitudes and Litigant Selection Theories: Explaining U.S. Supreme Court Decision-Making*, 29 WASH. U. J.L. & POL'Y 263, 264, 271 (2009).

[432] SEGAL & SPAETH, *supra* note 431, at 86; *see also* DAVID W. ROHDE & HAROLD J. SPAETH, SUPREME COURT DECISION MAKING 70 (1976) ("[T]he primary goals of Supreme Court justices in the decision-making process are *policy goals.*").

[433] SEGAL & SPAETH, *supra* note 431, at 86 (making this comparison with regard to Justice Rehnquist and Justice Marshall).

[434] *Id.* at 415–24.

[435] *See* JEROME FRANK, LAW AND THE MODERN MIND 5–7 (6th ed. 1949); Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1231–37 (1931).

[436] *See* MICHAEL A. BAILEY & FORREST MALTZMAN, THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE 6–7 (2011); Frank B. Cross, *The Ideology of Supreme Court Opinions and Citations*, 97 IOWA L. REV. 693, 697 (2012).

[437] BAILEY & MALTZMAN, *supra* note 436, at 2.

[438] *See* Yates & Coggins, *supra* note 431, at 265.

[439] Cross, *supra* note 436, at 697.

the Supreme Court.[440] Along with their publicly professed ideologies, the Justices' attitudes can also reflect subconscious biases in favor of elites and against the poor.[441]

The attitudinal model foretells that a right-leaning Court will issue conservative decisions. President Nixon made several conservative appointments to the Court beginning in 1969, halting the liberal gains of the Warren Court, and President Reagan subsequently "solidified a conservative majority on the Court" with his appointments.[442] Since the rise of economic inequality began in the 1970s, there have been eleven appointments to the Supreme Court. Four were liberals appointed by Democratic presidents (Justices Ginsberg, Breyer, Sotomayor, Kagan), six were conservatives appointed by Republican presidents (Justices O'Connor, Kennedy, Scalia, Thomas, Roberts, Alito), and one was a Republican appointee who turned out to be liberal (Justice Souter). Conservative Justices have predominated during the bulk of the time period in which economic inequality has increased. This is no accident. Conservative Republicans opposed to big government and dedicated to protecting the wealthy successfully launched a disciplined strategy to get conservative judges appointed throughout the judiciary.[443]

Currently, there are four liberal Justices, four conservative Justices, and a swing Justice whose vote is often determinative in close cases (Justice Kennedy). Since 2005, Justice Kennedy has sided twice as often with the conservative wing than the liberal wing in 5-4 decisions.[444] Given this 5–4 line-up, the attitudinal model may well explain the Court's conservatism. The four most conservative Justices share a meritocratic conception of American society that is class blind and colorblind. They also view the private market as descriptively and normatively separate from government. Given these underlying ideological commitments, the Court has rejected legislative efforts to regulate market excesses, to restrain the influence of money in campaigns, and to diversify schools, while upholding

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[440] *See* SEGAL & SPAETH, *supra* note 431, at 86, 92–93; Pickerill, *supra* note 163, at 1067.

[441] *See* Beth Loy, *Exploring a "Non-Traditional" Contender in the Battle for Equitable Justice: Introducing Economic Welfare Bias*, 11 KAN. J.L. & PUB. POL'Y 395, 400 (2002) (finding that judges based decisions under the Americans with Disabilities Act on the economic status of their circuit's constituents). "The essence of this hypothesis is that judiciaries tend to excuse discrimination in tough economic times when viable employers are needed to stimulate growth for their constituents." *Id.* at 400.

[442] Pickerill, *supra* note 163, at 1067.

[443] *See* Simon Lazarus, *Hertz or Avis? Progressives' Quest to Reclaim the Constitution and the Courts*, 72 OHIO ST. L.J. 1201, 1203–04 (2011) (evaluating progressive responses to the growth of originalism and the success of conservatives in shaping the judiciary); *see generally* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008) (examining the rise of conservatives to challenge liberalism in academic and legal institutions).

[444] Amanda Cox & Matthew Ericson, *Siding With the Liberal Wing*, N.Y. TIMES, June 28, 2012, http://www.nytimes.com/interactive/2012/06/28/us/supreme-court-liberal-wing-5-4-decisions.html.

legislation that draws lines between and among the poor. At the same time, the Court upholds private market outcomes, such as corporate cultures and practices that disadvantage employees and consumers. The attitudinal model suggests that the Court's policy preferences will not change unless the composition of the Court changes or individual Justices evolve in their policy preferences.

2. The Public-Opinion Model

The second model stresses the majoritarian role of the Court, arguing that the Justices vote in accord with public opinion in order to preserve their legitimacy.[445] This model responds to the countermajoritarian difficulty posed by Professor Alexander Bickel; that is, why courts, which are not accountable politically, should have the final say in striking down popularly enacted laws.[446] If courts reflect popular will, this moral problem with judicial review disappears. Professor Barry Friedman is a prominent proponent of the majoritarian view, asserting that "judicial decisions fall within the range of acceptability,"[447] at least over time.[448] Indeed, a comparison of Court votes and public opinion polls confirms an association between the Court's decisions and public mood.[449] This correlation could result simply from the fact that the Justices are subject to the same cultural stimuli as the rest of the citizenry,[450] or alternatively, the Justices may be constrained by public opinion because they want to ensure their decisions are enforced and survive attacks by the other branches.[451]

Does the majoritarian model mean that the public supports a Supreme Court for the 1%? On the one hand, the public has long overestimated the extent of social mobility in America. One poll showed that 69% of Americans believe that "[p]eople are rewarded for intelligence and skills;" even in the heart of the recession, a poll found that 39% believed that it was common for people to start out poor and end up rich.[452] In this regard, there are divisions along party lines.

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[445] Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2599 (2003). Friedman's writings are part of the popular constitutionalism literature, which argues that there are multiple interpreters of the Constitution, including elected officials, the public, and social movements; *see also* Nathaniel Persily, *Introduction* to PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 4 (Nathaniel Persily et al. eds., 2008).

[446] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962).

[447] Friedman, *supra* note 445, at 2606.

[448] BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 382 (2009).

[449] Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 263 (2010). "What is surprising is that even after taking into account ideology, *Public Mood* continues to be a statistically significant and seemingly non-trivial predictor of outcomes." *Id.* at 279.

[450] *Id.* at 281; SEGAL & SPAETH, *supra* note 431, at 425.

[451] Friedman, *supra* note 445, at 2610–12.

[452] NOAH, *supra* note 14, at 28–29.

Republicans are twice as likely to believe that everyone in American society has an opportunity to succeed, while Independents and Democrats are three and four times more likely to say that only some people have the opportunity to exceed.[453]

On the other hand, there is growing awareness, partly culminating in and resulting from the Occupy Wall Street movement, that the wealthy have advantages over other Americans.[454] In November 2011, during the height of the Occupy movement, a Wall Street Journal poll found that 76% agreed (with 60% strongly agreeing) that "the nation's economic structure of the country is out of balance and favors a very small proportion of the rich over the rest of the country."[455] In April 2012, 62% thought it was important that "the government introduce policies to reduce inequality in the U.S.," with 34% stating that this was very important.[456] Another survey asked respondents to select a diagram showing an ideal distribution of wealth, and they overwhelmingly selected a wealth distribution chart that reflected Sweden rather than the United States.[457] In sum, "Americans are both philosophically conservative and operationally liberal."[458] In other words, "[t]hey believe in individual responsibility, free enterprise, and the American Dream," but also "accept that government help may be needed to address concrete barriers to pursuing opportunity."[459] Public opinion thus suggests that most Americans would disapprove of Supreme Court decisions that foster inequality—if they were aware of the decisions and how they are connected to inequality.

However, the range of decisions discussed in this Article stretch over a wide array of substantive issues, not all of which are obviously linked to economic inequality. Most of these decisions are not about inequality on their face; rather, they contribute to inequality. Further, the bulk of Supreme Court decisions fly under the radar screen of public scrutiny, further attenuating the constraint of public opinion on the Court. In studies of specific issues that impact inequality, the Court is sometimes aligned with public opinion, such as with affirmative action in higher education (the public generally supports soft preferences for diversity and rejects quotas),[460] and sometimes out of alignment, such as with public school

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[453] *See* BARTELS, *supra* note 24, at 150.

[454] *See* PAUL KRUGMAN, THE CONSCIENCE OF A LIBERAL 251 (2d ed. 2009) (arguing that most Americans believe that government is run "for a few big interests").

[455] Jonathan Weisman, *Election 2012: Poll Finds Voters are Deeply Divided*, WALL ST. J., Nov. 8, 2011, at A6.

[456] Humphrey Taylor, *Americans See Inequality as a Major Problem: Division as to Who Would be Best to Address It—Republicans or President Obama*, HARRIS INTERACTIVE (Apr. 5, 2012), http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/mid/1508/articleId/1002/ctl/ReadCustom%20Default/Default.aspx (citing The Harris Poll #37, Apr. 5, 2012).

[457] *See* STIGLITZ, *supra* note 11, at 127.

[458] PAGE & JACOBS, *supra* note 6, at 3.

[459] *Id.*

[460] Loan Le & Jack Citrin, *Affirmative Action*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 162, 162–64 (Persily et al. eds., 2008).

integration (which the public generally supports)[461] and campaign finance reform (which the public also supports).[462] Yet, even when the Court issues wildly unpopular decisions, such as *Bush v. Gore* and *Citizens United*, it retains the support of the public as an institution.[463] Its diffuse support is quite strong.

What are the implications of this support? In the aftermath of the Court's decision in *National Federation of Independent Business v. Sebelius*[464] to uphold the individual health care mandate in the Affordable Care Act, news reports speculated that Justice Roberts switched his vote in order to win public support and enhance the legitimacy of the Court.[465] On the one hand, this case may demonstrate the majoritarian model in action. On the other hand, Justice Roberts may simply have been articulating his own view of judicial restraint without regard to popular opinion, and indeed, popular opinion was quite split on the advisability of the individual health care mandate.

Along these lines, Professor Richard Pildes argues that the majoritarian model overstates the constraints on the Court, given that the political branches rarely confront the Court, particularly in highly polarized periods in which a Court majority can garner the support of enough lawmakers to protect itself.[466] As a result, "[t]he modern Court has considerably more latitude to depart from 'majoritarian preferences,' however defined, and the Court knows it."[467] If the majoritarian model is accurate, it implies that public opinion on inequality may influence the Court, but only if the public and the Court understand and accept the complex connection between law and economic inequality. Even if the majoritarian model overstates its case, no one—including the Justices themselves[468]—denies that the Court is aware of public opinion and that it can sometimes shape Supreme Court decision making. In turn, this suggests that a movement such as Occupy Wall Street can have an impact on the Court, but only to the extent that a Justice's attitudinal preferences are open to persuasion. In the end, attitude and public opinion can be mutually reinforcing and both appear to play a role in Supreme Court decision making.

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[461] Michael Murakami, *Desegregation*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra* note 460, at 18, 18–39.

[462] Manoj Mate & Matthew Wright, *The 2000 Presidential Election Controversy*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra* note 460, at 333, 347–48.

[463] FRIEDMAN, *supra* note 448, at 15.

[464] 132 S. Ct. 2566 (2012).

[465] *See, e.g.*, Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS, (July 1, 2012, 9:43 PM), http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law/.

[466] Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 SUP. CT. REV. 103, 147–48 (2010).

[467] *Id.* at 148.

[468] FRIEDMAN, *supra* note 448, at 371.

B. Solutions

In July 2012 economists Jacob Hacker and Nate Loewentheil released a manifesto, full of detailed suggestions for reducing economic inequality,[469] which was supported by groups, including the AFL-CIO, Center for Community Change, Economic Policy Institute, Leadership Conference on Civil and Human Rights, National Council of La Raza and SEIU. The report's recommendations are organized around the principles of growth, security, and democracy, and its ideas are specific and wide ranging, including spurring job growth through infrastructure improvements, guaranteeing college for all, expanding rights to collective bargaining, and limiting corporate lobbying.[470] Indeed, there is no shortage of detailed, carefully considered suggestions for reform from these and other experts. After examining the economic literature on inequality, journalist Timothy Noah recommends a progressive tax system, expanding the federal payroll, importing skilled labor, universalizing preschool, controlling the prices of higher education, regulating Wall Street, electing Democratic presidents, and reviving the labor movement.[471] Stiglitz envisions a similar reform agenda that would increase economic efficiency, fairness, and opportunity by curbing excesses at the top with some redistribution towards the 99%.[472] Professor David Brady calls for tested policies that have proven to work in other affluent democracies.[473] In general, these proposals do not address the Supreme Court, other than to call for an overruling of *Citizens United*. Yet, as this Article demonstrates, *Citizens United* is just one piece of a much larger problem.

We currently have a Court majority that is not only unsympathetic to inequality arguments, but also seemingly oblivious to (or skeptical of) the connection between government policies and market outcomes. The Court has ruled that it is up to the legislative branch, rather than the Courts, to remedy economic inequality. Yet, the Court has doomed legislative enactments that would ameliorate inequality, such as desegregation plans, campaign finance reforms, and consumer protection laws. Conversely, when legislatures enact policies that tend to worsen economic inequality or magnify its effects, the Court defers, such as school financing laws and voter identification requirements. In short, the Court's rulings consistently sustain policies that create or maintain economic inequality. Nevertheless, and in the spirit of the OWS movement, progressive lawyers can develop strategies for expanding social justice, using the tools that lawyers can bring to the table. After all, the Court's membership will change with new

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[469] JACOB S. HACKER & NATE LOEWENTHEIL, PROSPERITY ECONOMICS: BUILDING AN ECONOMY FOR ALL iv, 1–2 (2012), *available at* http://www.prosperityforamerica.org/wp-content/uploads/2012/09/prosperity-for-all.pdf.

[470] *Id.* at vii–viii.

[471] NOAH, *supra* note 14, at 179–95.

[472] STIGLITZ, *supra* note 11, at 263–90.

[473] BRADY, *supra* note 36, at 178–79 (these include better unemployment insurance, a more expansive earned income tax credit, more progressive payroll taxes, family assistance, investments in public goods, and universal welfare programs).

appointments, and the Justices' attitudes can evolve over time—just as public opinion does.

Thus, this Article makes five suggestions for the economic justice lawyering movement. First, we need to continue to develop theoretical and doctrinal frameworks centered on economic fairness. Second, we need to engage with other disciplines in building a social science record that reveals the connection between law, policy, and economic hardship. Third, progressive lawyering movements need to recognize the role of class in racial and gender disparities and to advance a robust economic justice movement that benefits the entire 99%. Fourth, we need multidisciplinary strategies for fighting economic injustice that expand beyond litigation and courts to ensure rights. Finally, we need to expand access to justice in order to ensure that the judicial system is responsive to the 99%.

1. A Legal Philosophy of Equality

To begin with, progressive lawyers need to continue the work of Professor Frank Michelman and other scholars to develop legal theories that promote and sustain economic justice for the 99%. In the 1970s, as the Court appeared poised to enforce social and economic rights, Michelman reflected upon the political philosophy of John Rawls and advocated for a baseline minimum of social and economic rights in lieu of equality, as the Court is better suited to articulate the former than the latter.[474] Professor William Forbath extended Michelman's theory and argued that a baseline minimum should include not only welfare, but also a right to dignified work in order to ensure social citizenship for all.[475] He asserts that welfare alone cannot ensure political equality or "undo the stigma of permanent exclusion from a shared destiny of work and opportunity."[476] Using a more communitarian framework, Professor Goodwin Liu veers away from Rawlsian notions of justice to endorse political philosopher Michael Walzer's thoery of "shared understandings."[477] In Walzer's approach, society arrives at a consensus about essential welfare goods through its "institutions, laws, and practices."[478] Liu acknowledges that under this approach, law follows politics, which in turn suggests a focus on the political branches to effectuate change.[479] As

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[474] Frank I. Michelman, *The Supreme Court 1968 Term: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 13–14 (1969); *see also* Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973).

[475] William E. Forbath, *Constitutional Welfare Rights: A History, Critique, and Reconstruction*, 69 FORDHAM L. REV. 1821, 1887–88 (2001).

[476] *Id.* at 1888.

[477] Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 210 (2008). "The need to tie welfare rights to the shared understandings of our own society, and not to the hypothetical choices of rational persons denuded of culture and context, serves to cabin the judicial role." *Id.* at 247.

[478] *Id.* at 210.

[479] *Id.* at 212, 268.

an example, Liu suggests that society has arrived at a shared commitment to equal educational opportunities, which in turn, supports a legal claim to equal federal educational financing between states.[480]

In another theoretical stance, several prominent constitutional law professors have turned the conservative commitment to originalism on its head by explaining how the original meaning of the Constitution is consistent with liberal, progressive positions.[481] Alternatively, Professor Helen Hershkoff argues that state constitutions, which often provide express social and economic rights, are more viable mechanisms for protecting the poor than the federal Constitution.[482] While these various approaches differ, they share a belief in the constitutional viability of rights claims for the poor, and thus, give hope that social movements toward economic justice can shape constitutional interpretation in the future. Giving up on constitutional claims for economic justice can become a self-fulfilling prophecy,[483] as can ceding legitimacy to conservative interpretations of the constitution.[484] One need only look at the Court's reversal of its views with regard to the criminalization of homosexual conduct to know that theory needs to be ready and waiting when the Court catches up to societal norms.

2. The Facts of Economic Inequality

Theory alone is not enough. Courts need to see a factual record that reveals the connections between government policies and economic inequality and debunks the idea that the market always produces fair outcomes. They need to be educated about the real world consequences of the decisions they make.[485] Many of the books cited in this Article, written by renowned economists, political scientists, and journalists, make this case through careful empirical analysis. Thus, interdisciplinary explanations regarding economic inequality are available for lawyers to present to courts. Further, social scientists have established that one's economic status is not determined solely by behavior, as the majority of Justices seem to assume, but rather, that structural economic factors are at play.[486] This challenges the Justices' ingrained notions of deservedness.

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[480] *See id.* at 266.

[481] *See* James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1525, 1543–50 (2011) (explaining the significance of the work of Professors Akhil Reed Amar and Jack Balkin).

[482] *See* Helen Hershkoff, *"Just Words": Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1533–46 (2010).

[483] *See* Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law & Dialogic Default*, 35 FORDHAM URB. L.J. 629, 634–45 (2008).

[484] *See* Lazarus, *supra* note 443, at 1214, 1235; *see generally* GARRETT EPPS, WRONG AND DANGEROUS: TEN RIGHT-WING MYTHS ABOUT OUR CONSTITUTION (2012) (explaining the importance of debunking conservative myths about the Constitution).

[485] *See* Lazarus, *supra* note 443, at 1231–35.

[486] Michele Estrin Gilman, *The Poverty Defense*, 47 U. RICH. L. REV. 495, 541–42 (2013).

In the United States, poverty is seen as a personal failing.[487] In this dominant "culture of poverty" perspective, poverty is tied to individual behavior.[488] This viewpoint is consistent with our American myth of meritocracy, which holds that with hard work and sheer grit, anyone can pull themselves up by their bootstraps.[489] Conversely, a failure to thrive in our capitalist marketplace is a moral failure.[490] If poverty is a choice, then the rest of society has "a justification for doing so little," and we are off the hook for assisting the poor.[491] An alternate narrative focuses on how structural forces within our economy and society cause poverty.[492] In this perspective, the poor are trapped in the underclass due to forces outside their control that limit their economic opportunities and social mobility.[493] For instance, trends discussed previously in this Article, such as globalization, the weakening of unions, and economic shifts from a manufacturing base to a service economy, have left behind people without college degrees.[494] Likewise, even working adults can remain trapped below the poverty line if they do not have a living wage, affordable housing, or child-care.[495] Some people of color remain

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[487] *Id.* at 540; *see also* JOEL F. HANDLER & YEHESKEL HASENFELD, BLAME WELFARE, IGNORE POVERTY AND INEQUALITY 70 (2007); James Jennings, *Persistent Poverty in the United States: Review of Theories and Explanations*, *in* A NEW INTRODUCTION TO POVERTY: THE ROLE OF RACE, POWER, AND POLITICS 13, 14–21 (Louis Kushnick & James Jennings eds., 1999) (summarizing behavioral theories); Frank Munger, *Identity as a Weapon in the Moral Politics of Work and Poverty*, *in* LABORING BELOW THE LINE: THE NEW ETHNOGRAPHY OF POVERTY, LOW-WAGE WORK, AND SURVIVAL IN THE GLOBAL ECONOMY 3 (Frank Munger ed., 2002) ("More strictly than other industrialized societies, we measure the worthiness of all our citizens by the level of their commitment to the labor market. . . .").

[488] Gilman, *supra* note 486, at 540. Oscar Lewis first articulated this theory within social science scholarship, concluding that poor people develop their own value system, which perpetuates itself over generations and is nearly impossible to escape—even if structural conditions change. The people in this culture share a "strong feeling of marginality, of helplessness, of dependency, of not belonging . . . [a]long with this feeling of powerlessness is a widespread feeling of inferiority, of personal unworthiness." Oscar Lewis, *The Culture of Poverty*, 35 TRANSACTION SOC. SCI. & MODERN SOC'Y 7, 7 (1998).

[489] Gilman, *supra* note 486, at 540; *see also* STEPHEN J. MCNAMEE & ROBERT K. MILLER, JR., THE MERITOCRACY MYTH 1–9 (2d ed. 2009); Mark R. Rank, *Toward a New Understanding of American Poverty*, 20 WASH. U. J. L. & POL'Y 17, 25 (2006).

[490] Gilman, *supra* note 486, at 540; *see also* GEORGE GILDER, WEALTH AND POVERTY 68 (1981) ("The only dependable route from poverty is always work, family, and faith . . . the current poor . . . are refusing to work hard.").

[491] Gilman, *supra* note 486, at 541 (quoting Rank, *supra* note 489, at 25).

[492] Gilman, *supra* note 486, at 541.

[493] *Id.*; *see also* HANDLER & HASENFELD, *supra* note 487, at 18; ICELAND, *supra* note 129, at 96; Jennings, *supra* note 487, at 1–2, 21–26.

[494] Gilman, *supra* note 486, at 541; *see also* HANDLER & HASENFELD, *supra* note 487, at 49; ICELAND, *supra* note 129, at 76; DOUGLAS S. MASSEY, CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM 31–33 (2007).

[495] Gilman, *supra* note 486, at 541; *see also* HANDLER & HASENFELD, *supra* note 487, at 151; MASSEY, *supra* note 494, at 140, 166–68.

excluded from the mainstream economy as a result of a legacy of race discrimination in housing and the workplace, as well as the criminal justice system.[496] These structural forces undermine the meritocracy myth.

While debates have raged between the behaviorist and structuralist explanations for poverty, sociologist William Julius Wilson instead explains how behavioral and structural factors intersect.[497] His work focuses on low-income, urban, African-American communities, and he has shown how people who grow up in racially segregated, poor neighborhoods develop coping mechanisms and responses that "emerge from patterns of racial exclusion" and end up limiting social mobility.[498] Accordingly, Wilson concludes that "structural factors are likely to play a far greater role than cultural factors in bringing about rapid neighborhood change. As he points out, a strong economy lessens poverty (and its associated pathologies), while a weak economy increases poverty. If culture were determinative, then increased economic opportunity would not have a transformative impact in poor communities.[499] In short, structural forces drive behavioral responses, and the resultant behavior "often reinforces the very conditions that have emerged from structural inequities."[500] Most judges do not come to the bench with these sophisticated understandings about poverty; thus, this is an area where cross-disciplinary explanations and evidence may make a difference to legal advocacy.

3. Coalitions for Economic Justice

Historically, unions have been the main advocacy group for issues related to economic equality. Yet, unions have been criticized for representing the interests of white, male workers, rather than of women and minorities.[501] Moreover, labor

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[496] Gilman, *supra* note 486, at 541; *see also* MASSEY, *supra* note 494, at 109; MCNAMEE & MILLER, *supra* note 489, at 192.

[496] Gilman, *supra* note 486, at 541; *see also* ICELAND, *supra* note 129, at 80 ("Discrimination arises out of competition for scarce resources and serves to protect group solidarity."); MASSEY, *supra* note 494, at 109; MCNAMEE & MILLER, *supra* note 489, at 192.

[497] Gilman, *supra* note 486, at 541; *see also* WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDER CLASS, AND PUBLIC POLICY 12 (1987).

[498] Gilman, *supra* note 486, at 542 (quoting WILLIAM JULIUS WILSON, MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY 43 (2009)); *see also* WILSON, *supra* note 497, at 134.

[499] Gilman, *supra* note 486, at 542; *see also* MASSEY, *supra* note 494, at 57 (citing PAUL JARGOWSKY, POVERTY AND PLACE: GHETTOS, BARRIOS, AND THE AMERICAN CITY 145 (1997)).

[500] Gilman, *supra* note 486, at 542 (quoting MASSEY, *supra* note 494, at 133–34).

[501] *See* Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CAL. L. REV. 1767, 1782, 1796–1800, 1823–34 (2001) (providing a detailed, historically based explanation of how "organized labor, and the working class more generally, came to be associated with a conservative defense of the status quo and white male privilege"); Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 488

law as implemented by legislatures and interpreted by courts has encouraged "a divide between unionism and social justice movements" by narrowing the labor agenda and focusing on particular constituencies.[502] Conversely, identity-based movements based on race and gender have tended to focus on civil rights rather than economic issues,[503] and within these movements, some voices have been marginalized.[504] Furthermore, progressive lawyering has splintered into highly specialized focus areas (such as immigration law, homelessness, domestic violence, and the like) that provide targeted representation to clients, but limit cross-collaboration.[505] In light of these tensions, both real and perceived, a movement for economic equality will be more effective if it brings together these movements and issues, along with the energy, wisdom, and experience these divergent strands can bring together.[506] For instance, in recent years unions and civil rights groups have recognized "common interests in order to further their shared goals,"[507] and unions have played a role in improving communities of color.[508]

In this spirit, social justice advocates need to recognize the intersectional impacts of class, race, gender, and other identities on economic welfare.[509]

(2001) ("The labor organizing movement, which has focused on creating class solidarity among the working poor, also has a history of ignoring identity-based interests."). *Cf.* Charlotte Garden & Nancy Leong, *"So Closely Intertwined": Labor and Racial Solidarity*, 81 G.W. L. REV. 1135 (2013) (arguing that while this may have been true historically, today civil rights groups and unions often work collaboratively and share the same interests).

[502] *See* Crain & Matheny, *supra* note 501, at 1792.

[503] *See id.* at 1784 ("Just as race and gender have proved to be divisive forces within the labor movement, however, class differences similarly have divided the antiracist and feminist movements.").

[504] Cummings & Eagly, *supra* note 501, at 488–89 ("Similarly, the civil rights movement, another precursor of modern organizing practice, has often been criticized for its patriarchal structure and its marginalization of black women's issues.").

[505] *See* Gary Blasi, *Advocacy and Attribution: Shaping and Responding to Perceptions of the Causes of Homelessness*, 19 ST. LOUIS U. PUB. L. REV. 207, 234 (2000) ("Among reformers generally, Balkanization—or at least a fairly fine division of political labor by issues and groups—is seemingly universal. Advocates tend to specialize: on race discrimination and affirmative action, gender equity, low wage work, welfare reform, child care, housing, education, trade globalization, and so on.").

[506] *See, e.g.*, Sheryll Cashin, *Shall We Overcome? "Post-Racialism" and Inclusion in the 21st Century*, 1 ALA. C.R. & C.L. L. REV. 31, 45–46 (2011) (describing the effectiveness of the Gamaliel Foundation, which has helped form multifaith, "multiracial, multi-class coalitions" that advocate on behalf of progressive public policy reforms). Cashin writes, "[t]he people, movements, or political parties that prevail in the twenty-first century will have spoken to a broad range of people." *Id.* at 47.

[507] Garden & Leong, *supra* note 501, at 48.

[508] *Id.* at 73–80.

[509] *See* Darren Lenard Hutchinson, *Progressive Race Blindness: Individual Identity, Group Politics, and Reform*, 49 UCLA L. REV. 1455, 1470 (2002) ("[I]dentity is multidimensional: The various identity categories interact to shape our individual and collective identities and experiences.").

Professor Mari Matsuda proposes a way to "understand the interconnection of all forms of subordination" by asking "the other question."[510] As she states:

> When I see something that looks racist, I ask, "Where is the patriarchy in this?" When I see something that looks sexist, I ask, "Where is the heterosexism in this?" When I see something that looks homophobic, I ask, "Where are the class interests in this?" Working in coalition forces us to look for both the obvious and non-obvious relationships of domination, helping us to realize that no form of subordination ever stands alone.[511]

In addition to asking "the other question," we need a sophisticated understanding of class,[512] which provides less of a personal identity or basis for group solidarity in the United States than other shared aspects of identity, such as race or gender or sexual orientation.[513] As Professor Trina Jones explains, class stereotypes and beliefs are "dynamic and fluid" and not easy to define, as class emerges from "[w]ealth, educational background, occupational skill and status, consumption patterns and practices, and residential location, among other things."[514] Professor Deborah Malamud similarly observes, "[t]he factors contributing to relative economic advantage exist in a delicate balance and interact in space and time, as is generally true of the elements of society and culture."[515] Moreover, in this country the vast majority of people identify as middle class, even if they are economically at the far ends of the spectrum, making it hard to organize on the basis of shared economic status.

At the same time, the very nuance required to understand class and its relationship to race, gender, and other identities can make it hard to generate a movement.[516] Perhaps for this reason, Occupy Wall Street identified a 99% with a

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[510] Mari Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189–90 (1991).

[511] *Id.*; *see also* Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) (unpacking how the welfare system responds to multiple oppressions of class, race, and gender).

[512] On various conceptions of "class," see Angela Onwuachi-Willig & Amber Fricke, *Class, Classes, and Classic Race-Baiting: What's in a Definition?*, 88 DENV. U. L. REV. 807, 808–10 (2011).

[513] *See, e.g.*, Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1886–87 (explaining why college students do not form identity groups based on class).

[514] Trina Jones, *Race and Socioeconomic Class: Examining an Increasingly Complex Tapestry*, 72 LAW & CONTEMP. PROBS. 1 (2009); *see also* Malamud, *supra* note 513, at 1866–94 (discussing the difficulty of defining class).

[515] Malamud, *supra* note 513, at 1889.

[516] There is a vigorous debate within political philosophy as to whether identity based politics obscure the importance of the political economy. *See* MARTHA R. MAHONEY ET AL., SOCIAL JUSTICE: PROFESSIONALS, COMMUNITIES, AND LAW 50–53 (2003) (describing the

shared interest in greater distribution of resources, without emphasizing the immense variances between and among the 99%. For instance, a professional in the top 10% has a far different life experience than an individual who is homeless because he recently lost his job. Not surprisingly then, Occupy Wall Street did not generate its own political movement; its base of support was extremely diffuse. A social-justice movement dedicated to legal change needs to mobilize multiple constituencies, while recognizing shared interests and marked differences.[517]

4. Multidimensional Strategies

As lawyers in both progressive and conservative social-change movements know well, litigation is not the only way to reform law or even the best way. Rather, there are multiple tools for effectuating systemic change, including community organizing,[518] legislative and administrative advocacy, civil disobedience, public education,[519] and community education.[520] Indeed, the Occupy Wall Street movement combined elements of organizing, protest, media attention, and social-media activism. While it did not attempt to change law directly, Occupy Wall Street altered public and political dialogue, and probably helped lay the groundwork for the fiscal cliff deal reached by President Obama and Congress in early 2013, a central piece of which was higher taxes for top earners. Notably, Occupy Wall Street was not a rights-based movement; it focused on a societal critique rather than affirmative claims.

Lawyers who advocate for social reform disagree over the utility of rights-based strategies. On the one hand, the major social-justice movements in the 1960s and 1970s, such as the fight for civil rights and gender equality, were focused on attaining rights for subordinated people and relied on the persuasive power of rights-based discourse and the legal power of rights-based claims. As Professor

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debates between Iris Marion Young, who defends identity-based politics, and Nancy Fraser, who argues for a greater focus on material deprivations).

[517] *See* Crain & Matheny, *supra* note 501, at 1825 (making this recommendation for the labor movement).

[518] *See* Cummings & Eagly, *supra* note 501, at 460–61 (the community organizing movement "has focused on fostering grassroots participation in local decision making, coordinating the strategic deployment of community resources to achieve community-defined goals, and building community-based democratic organizations led by local leaders who advocate for social and economic change").

[519] Professor Gary Blasi argues that advocates who serve the homeless effectively educated the public about the causes of homelessness, such that the public now accepts that homelessness is rooted in structural, rather than individual, causes. Gary Blasi, *Advocacy and Attribution: Shaping and Responding to Perceptions of the Causes of Homelessness*, 19 ST. LOUIS U. PUB. L. REV. 207, 220–22, 234 (2000).

[520] Community legal education is "a form of systemic advocacy that aims to educate a segment of the community about its rights in a particular legal context to advance the empowerment of that community." Margaret Martin Barry et al., *Teaching Social Justice Lawyering: Systematically Including Community Legal Education in Law School Clinics*, 18 CLINICAL L. REV. 401, 404 (2012).

Martha Minow has stated, rights rhetoric "enables a devastating, if rhetorical, exposure of and challenge to hierarchies of power."[521] On the other hand, rights have been critiqued for failing to achieve transformative change in political and social structures and for individualizing and masking collective forms of oppression.[522] Professor Marc Tushnet contends that "social circumstances," rather than court-based rules, actually change outcomes.[523] Moreover, people who already hold power in society sometimes co-opt newly recognized rights.[524]

This dichotomy is mirrored in the debates over whether litigation or other forms of advocacy can better achieve social justice.[525] Litigation is credited for changing "many aspects of the social, political, and economic landscape,"[526] such as the decision in *Roe v. Wade*,[527] establishing a right to abortions, or the decision in *Brown v. Board of Education*, striking down separate but equal schools.[528]

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[521] Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1910 (1987); *see also* Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 305 (1987) ("Rights do, at times, give pause to those who would otherwise oppress us; without the law's sanction, these individuals would be more likely to express racist sentiments on the job. It is condescending and misguided to assume that the enervating effect of rights talk is experienced by the victims and not the perpetrators of racial mistreatment." (footnote omitted)); Francesca Polletta, *The Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961–1966*, 34 LAW & SOC'Y REV. 367, 377 (2000) (stating rights "can mobilize people by casting grievances as legitimate entitlements and by fostering a sense of collective identity"); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 598 (1986) (stating rights discourse "can help to affirm human values, enhance political growth, and assist in the development of collective identity"); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 430 (1987) (describing how black Americans "nurtured rights and gave rights life").

[522] *See* Richard L. Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 UCLA L. REV. 474, 595–96 (1985); Lucie E. White, *To Learn and Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 757 (1988) (noting the "oft-observed risk that litigation will co-opt social mobilization"); *see also* Schneider, *supra* note 521, at 593–99 (summarizing the critical legal studies critique of rights).

[523] Marc Tushnet, *The Critique of Rights*, 47 S.M.U. L. REV. 23, 32–33 (1993).

[524] *See* Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747, 1752 (2000) ("[T]his progressive civil rights legacy has been undermined by conservative political backlash and rhetorical appropriation of rights language and its moral claims."); Martha R. Mahoney, *Whiteness and Remedy: Under-Ruling Civil Rights in* Walker v. City of Mesquite, 85 CORNELL L. REV. 1309, 1352–54 (2000).

[525] While there are many conceptions of social justice, Iris Marion Young helpfully defines it as "the elimination of institutionalized domination and oppression." IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 15 (1990).

[526] Cummings & Eagly, *supra* note 501, at 491.

[527] 410 U.S. 113 (1973).

[528] *See* Nan D. Hunter, Response, *Lawyering for Social Justice*, 72 N.Y.U. L. REV. 1009, 1013 (1997). *Cf.* Thomas B. Stoddard, *Bleeding Heart: Reflections on Using the Law*

Sometimes, creative litigation can be used to unmask existing power structures,[529] and even when litigation fails, it can still reshape public dialogue and opinion and generate leverage for alternate solutions.[530] Yet, litigation can also breed a sense of powerlessness in ordinary people, as it is a world dominated by privileged experts.[531] Litigation does not help people "gain control of the forces which affect their lives,"[532] as it forces people to voice their aspirations in terms cognizable by courts.[533] This critique has led to new forms of community-based lawyering in which "[a]ttorneys appear as supporting players rather than main characters, seeking to help organizations build the power needed to achieve their goals."[534] In this capacity, a lawyer can hold many roles—"litigator and litigation analyst, transactional lawyer, political strategist, negotiator, community educator, broker, writer, lobbyist, and staff member."[535] As part of this nonhierarchical relationship, clients "are transformed through the process of struggle by learning about, and participating in, a decision that will fundamentally affect their quality of life."[536]

Suffice to say, in developing strategies for obtaining economic equality, there is space for all these models and strategies. Just as the causes of economic equality are complex, strategies to achieve equality need to be equally multifaceted and

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to Make Social Change, 72 N.Y.U. L. REV. 967, 991 (1997) (arguing that legislative reform can be more "culture shifting" than judicial reform).

[529] Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 375–76 (1983) ("[T]he lawyer should always attempt to reshape the way legal conflicts are represented in the law, revealing the limiting character of legal ideology and bringing out the true socioeconomic and political foundations of legal disputes.").

[530] *See* Jennifer Gordon, *The Lawyer is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CAL. L. REV. 2133, 2141 (2007) ("These lawyers measure the success of their work in relation to how much power the groups develop and how much closer it brings them to achieving their vision."); White, *supra* note 522, at 758–59 (In some situations, litigation "widens the public imagination about right and wrong, mobilizes political action behind new social arrangements, or pressures those in power to make concessions.").

[531] *See* Steve Bachmann, *The Hollow Hope: Can Courts Bring About Social Change?*, 19 N.Y.U. REV. L. & SOC. CHANGE 391, 391–92 (1992) (book review).

[532] William P. Quigley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455, 455–56 (1995).

[533] *See* Virginia P. Coto, *LUCHA, The Struggle for Life: Legal Services for Battered Immigrant Women*, 53 U. MIAMI L. REV. 749, 753 (1999) ("The lawyer for poor individuals is likely, whether he wins cases or not, to leave his clients precisely where he found them, except that they will have developed a dependency on his skills to smooth out the roughest spots in their lives."); White, *supra* note 522, at 757.

[534] Gordon, *supra* note 530, at 2133; White, *supra* note 522, at 764 ("The role of the lawyer is to help the group learn a *method* of deliberation that will lead to effective and responsible strategic action.").

[535] Sheila R. Foster & Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CAL. L. REV. 1999, 2057–58 (2007).

[536] LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 14–15 (2001).

ongoing. For instance, the foreclosure crisis—a key ingredient of the Great Recession and a focus of Occupy Wall Street protests—had many causes, requiring multiple responses. Roots of the crisis included a rise in subprime and predatory lending fueled by low interest rates; risk taking behavior by lenders and borrowers; lender fraud; a burst in the housing market bubble that led to the rapid devaluation of housing prices; an economic downturn that lead to financial hardship and inability by some homeowners to pay mortgages; a lack of regulatory oversight of the mortgage market and ratings agencies; and the collapse of the asset-backed securitized mortgage market.[537] Notably, the foreclosure crisis was fueled by and magnified income inequality.[538] Social justice advocates have responded to this crisis with a wide variety of tactics in the hopes of helping homeowners and tenants remain in their homes. Lawyers have worked with community groups to educate homeowners about their rights.[539] Lawyers have filed class actions challenging a wide array of discriminatory, unfair, and misleading lending practices.[540] Lawyers have represented individuals in court and in new forums of alternative dispute resolution.[541] Lawyers have provided federal policymakers with recommendations based on their on-the-ground perspectives.[542] Lawyers have moved legislatures to enact new protections and processes to govern the foreclosure process.[543] While litigation has been a piece of the response to the

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[537] U.S. DEP'T OF HOUSING & URBAN DEV., REPORT TO CONGRESS ON THE ROOT CAUSES OF THE FORECLOSURE CRISIS vii–xi (2010), *available at* http://www.huduser.org/Publications/PDF/Foreclosure_09.pdf (summarizing the literature on the crisis).

[538] Raymond H. Brescia, *The Cost of Inequality: Social Distance, Predatory Conduct, and the Financial Crisis*, 66 N.Y.U. ANN. SURV. AM. L. 641, 643 (2011) (arguing that income and racial inequality created social distance that lead to predatory conduct). Brescia notes that the greater the income inequality in a state, the greater the rate of mortgage delinquencies. *Id.* at 644.

[539] *See* Nicholas Hartigan, *No One Leaves: Community Mobilization as a Response to the Foreclosure Crisis in Massachusetts*, 45 HARV. C.R.-C.L. L. REV. 181, 197–99 (2010) (describing how lawyers and community groups came together to canvass every home facing foreclosure to educate homeowners about their rights).

[540] *See* Raymond H. Brescia, *Tainted Loans: The Value of a Mass Torts Approach in Subprime Mortgage Litigation*, 78 U. CIN. L. REV. 1, 23–29 (2009) (describing various forms of litigation against lenders for misconduct); *see generally* Gary Klein & Shennan Kavanagh, *Causes of the Subprime Foreclosure Crisis and the Availability of Class Action Responses*, 2 NORTHEASTERN U. L.J. 137 (2010) (discussing recent class actions).

[541] *See* Lydia Nussbaum, *ADR's Place in Foreclosure: Remedying the Flaws of a Securitized Housing Market*, 34 CARDOZO L. REV. 1889, 1908–15 (2013) (discussing the increased use of procedures for alternative dispute resolution to mitigate the harms of the foreclosure crisis); *see generally* Janet Stidman Eveleth, *Foreclosure Crisis: Volunteer Lawyers Help Homeowners*, 42 MD. BAR J. 50 (2009) (describing a pro bono project in Maryland to help those affected by the foreclosure crisis).

[542] Robin S. Golden, *Building Policy Through Collaborative Deliberation: A Reflection on Using Lessons from Practice to Inform Responses to the Mortgage Foreclosure Crisis*, 38 FORDHAM URB. L.J. 733, 737 (2011).

[543] *See, e.g.*, Frank S. Alexander et al., *Legislative Responses to the Foreclosure Crisis in Nonjudicial Foreclosure States*, 31 REV. BANKING & FIN. L. 341, 371–83 (2012);

foreclosure crisis, it has only been one part of a broad-based movement to preserve housing. Likewise, other areas of economic inequality will require similarly broad-based, creative, and coordinated approaches.

5. Access to Justice

Of course, the Supreme Court is not the entire story of how law reinforces inequality. The judicial branch encompasses federal, state, and administrative courts, and these fora have much greater day-to-day contact with the 99%. Indeed, most Americans have contact with the judicial branch through lower-level district courts when they owe a debt, are part of a dissolving family, or are accused of committing a crime. Yet, there is no right to civil legal counsel, and as a result, "the market controls the distribution, availability, and quality of legal services."[544] The market outcome is grim. Fewer than one in five low-income people have access to a lawyer for their civil legal problems,[545] while only two to three-fifths of middle-income Americans can afford civil legal help.[546] Fewer than 1% of the nation's total legal expenditures go to the bottom seventh of Americans who qualify for legal aid,[547] and thus, poor litigants are left to fend for themselves pro se. Moreover, the fora where these low-income citizens often appear have none of the trappings of the Supreme Court. On the one hand, harried judges may be presiding over hundreds of cases in a single day; on the other hand, administrative law judges may take months to process even basic claims for benefits.[548] With regard to criminal justice systems, the vast majority of criminal defendants are indigent.[549] While they have a formal right to counsel, this right is illusory given that 90% of defendants plead out with no factual investigation on their case, largely because public defenders are grossly overworked and underpaid.[550]

This lack of equal access to justice compounds economic inequality for those who cannot afford lawyers, experts, and other accoutrement of modern day

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The Foreclosure Crisis and Its Impact on Tenants, NAT'L HOUSING L. PROJECT, http://nhlp.org/foreclosureandtenants/ (last visited Mar. 10, 2014) (describing new federal and state laws designed to protect tenants who live in homes going through foreclosure).

[544] Robert Rubinson, *A Theory of Access to Justice*, 29 J. LEGAL PROF. 89, 100 (2005).

[545] LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1 (2009), *available at* http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

[546] DEBORAH L. RHODE, ACCESS TO JUSTICE 3 (2004).

[547] *Id.* at 7; Rubinson, *supra* note 544, at 103.

[548] *See* Rubinson, *supra* note 544, at 109–16 (describing the staggering caseloads of judges and administrative law judges).

[549] RHODE, *supra* note 546, at 11 ("In criminal cases, over three-quarters of defendants facing felony charges are poor enough to qualify for court-appointed counsel.").

[550] *See id.* at 4 ("Fewer than 1[%] of lawyers are in legal aid practice, which works out to about one lawyer for every 1,400 poor or near-poor persons in the United States."); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1126 (2006).

litigation. As Professor Deborah Rhode says, "[w]e tolerate a system in which money often matters more than merit, and equal protection principles are routinely subverted in practice."[551] Thus, any progressive movement aimed at reducing income inequality needs to consider reforms of the entire judicial system and to strategize around ways to give voice and fair process to the 99%. Professor Robert Rubinson identifies proposals that work within existing frameworks, such as expansions of pro bono programs, enhanced government spending on legal representation for the poor, and a right to counsel in civil cases.[552] Further, he suggests reforms that are more transformative and that break the reliance on lawyers to achieve justice, such as evolving models of alternative dispute resolution and community lawyering, in which lawyers help communities reach their self-defined goals through organizing, lobbying, and transactional law.[553] These multidimensional approaches may not only hold greater promise for expanding access to justice, but also for achieving justice.

CONCLUSION

The Occupy Wall Street protests in 2011 focused public attention on economic inequality, as well as the role of government policies in contributing to economic inequality. The invisible or impartial hand of the marketplace does not cause economic inequality. Rather, the marketplace exists and operates within a framework established by government. President Obama amplified the themes of Occupy Wall Street, calling economic equality the "defining issue of our time," in his 2012 State of the Union Address.[554] In line with this theme, Obama supported the 2009 stimulus legislation, health care coverage for the uninsured in the Affordable Care Act, and he repeatedly called on the 1% to pay their share of the nation's tax bill.[555] After winning re-election, in 2013 his State of the Union featured several additional proposals to reduce economic inequality, such as a rise in the minimum wage and universal preschool. In his 2014 State of the Union, President Obama again addressed inequality, which "has deepened," and he accordingly pushed ideas such as stricter enforcement of equal pay laws for women, an expansion of unemployment insurance, and a higher minimum wage.[556] Laws and measures such as these recognize the role of government in both creating

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[551] RHODE, *supra* note 546, at 3.

[552] Rubinson, *supra* note 544, at 100 n.10, 139, 153–54.

[553] *Id.* at 139–44, 153; *see supra* notes 534–543 and accompanying text.

[554] *Remarks by the President in State of the Union Address*, WHITEHOUSE.GOV (Jan. 24, 2012, 9:10 PM), http://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address.

[555] Zachary A. Goldfarb, *How Fighting Income Inequality Became Obama's Driving Force*, WASH. POST, Nov. 23, 2013, http://articles.washingtonpost.com/2012-11-23/opinions/35512079_1_income-inequality-fiscal-cliff-disposable-income.

[556] *Remarks by the President in State of the Union Address*, WHITEHOUSE.GOV (Jan. 28, 2014), http://www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obama-state-union-address.

and ameliorating economic inequality. Nevertheless, the judicial branch is rarely part of the narrative of economic inequality, despite its significant impact.

The Supreme Court reinforces economic inequality by selectively employing deference to legislative judgments. When legislatures act to level the playing field, the Court generally abandons deference, such as with voluntary desegregation plans, consumer protection and employment statutes, and campaign finance laws. By contrast, when legislatures pass laws that engender economic inequality, the Court is happy to defer, such as with school financing laws, voter identification requirements, and punitive social welfare policies. Either way, the 99% do not win. Thus, any social movement for economic equality needs to consider the impact of the judiciary and its potential for reforming law. Extreme levels of economic inequality harm our entire society. To succeed as a nation, we need laws and a judiciary that serves us all—the full 100%.