The Fortification of Inequality: Constitutional Doctrine and the Political Economy

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

KATE ANDRIAS†

INTRODUCTION

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

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


3. Both labor unions and civic organizations more generally represent a fraction of their previous memberships, while political parties no longer function with significant grassroots participation. See JAKE ROSENFELD, WHAT UNIONS NO LONGER DO 10–30 (2014); THEDA SKOCPOL, DIMINISHED DEMOCRACY: FROM MEMBERSHIP TO MANAGEMENT IN AMERICAN CIVIC LIFE 128–74 (2003); Kate Andrias, Hollowed-Out Democracy, 89 N.Y.U. L. REV. ONLINE 48 (2014).
Meanwhile, income inequality in the United States is at its highest level since the period leading up to the New Deal. The top 1% of earners in the United States takes home nearly a quarter of our national income. The problem is not just the gap between the top and the bottom but the lived experience of the vast majority of Americans. Workers’ real wages have barely grown during recent decades, even as productivity has increased. Nearly one-third of workers earn less than $12 an hour, often with unpredictable schedules and poor working conditions. At the same time, economic mobility has declined, with elite education accessible disproportionately to the wealthy. The situation is most dire for people of color, particularly African Americans, but white Americans, particularly white men, have also suffered mounting health problems and diminishing opportunities. And although economic indicators have improved since the Great Recession ended in 2009, over 95% of the growth in the U.S. economy over the subsequent three years inured to the benefit of the top 1% of the income distribution.

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

5. See, e.g., id. at 23–24; Estelle Sommeiller, Mark Price & Ellis Wazeter, Econ. Policy Inst., Income Inequality in the U.S. by State, Metropolitan Area, and County 2, 7 (2016), http://www.epi.org/files/pdf/107100.pdf [https://perma.cc/P3LQ-8ZCA].
inequality.”\textsuperscript{12} Though economic inequality was by no means the only cause of Trump’s victory over Hillary Clinton,\textsuperscript{13} the 2016 election, like others around the globe, reflected voters’—and nonvoters’—widespread dissatisfaction with political elites and the economy they oversee.\textsuperscript{14} Indeed, both Trump and Bernie Sanders spoke directly to voters’ economic anxiety, channeling it in opposite directions.\textsuperscript{15} Meanwhile, many nonvoters, particularly in communities of color, stayed home due to a sense of economic and political impotence.\textsuperscript{16} Still others were discouraged or prevented from participating in the election through a range of obstacles that disproportionately burden the poor.\textsuperscript{17}

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

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

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


\textsuperscript{16} See Sargent, supra note 1; Tavernise, supra note 1.


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

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


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

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

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


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

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

I. L A B O R

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

31. See id. at 514 (“[D]eunionization explains a fifth of the inequality increase for women and a third for men.”).
33. See LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 2, 344 (2nd ed. 2016); GILENS, supra note 2, at 79–81, 157–58; HACKER &
The link between law and union decline has long been a subject of scholarly interest. The National Labor Relations Act (NLRA) purports to protect the ability of private sector employees to organize unions, bargain collectively, and engage in concerted action. Yet, as many legal scholars have detailed, the statute is largely ineffective in fulfilling its promise. Numerous reform proposals have been offered.

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

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

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

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36. *Id.* at 40–45.


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

40. There are numerous other obstacles to successful strikes in the contemporary economy, including the permissibility of permanent replacements; like the doctrine discussed above, this rule was doctrinally created and is not prescribed by the statute. See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938) (opining, in dicta, that an employer could permanently replace employees during an economic strike).
established precedent. Justice Marshall, joined by Justices Brennan and Blackmun, dissented, explaining that the majority’s approach contradicted the animus line of equal protection cases. The Food Stamp Amendment’s purpose, Marshall wrote, was to serve as a weapon against unions in labor disputes, a purpose “admittedly irreconcilable with the legitimate goals of the food stamp program. No other purpose can adequately explain the especially harsh treatment reserved for strikers and their families by the 1981 enactment.” Accordingly, the amendment should have failed even rational basis review. Had Marshall persuaded one more of his colleagues, the case would have come out the other way (only eight justices heard the case).

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

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

43. Id. at 385.
44. Id.
45. Id. at 381–82.
48. For a discussion of this trajectory, see James Gray Pope, How American Workers Lost the Right to Strike, and Other Tales, 103 MICH. L. REV. 518 (2004).
50. Id. at 285.
Three of eight justices objected, pointing out that the Court was stepping away from its prior precedent and allowing a return to the Gilded Era law such that “legislatures are free to decide whether to permit or suppress any particular picket line for any reason other than a blanket policy against all picketing.”

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

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

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


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


56. Id. at 616.


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

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

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

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

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

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

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

62. Id. at 76; see also Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) (holding that union’s peaceful distribution of handbills at shopping mall’s entrances, absent any picketing, did not violate statute).  
64. Id. at 79 (Black, J., concurring) (emphasis in original).  
65. Id. at 102 (“[T]he dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.”).  
67. Id. at 103.  
68. Id. at 103.  
69. Id. at 79 (Black, J., concurring).  
70. 307 U.S. 496 (1939).
the Act, and of the opportunities and advantages offered by it, is a privilege or immunity of a citizen of the United States secured against state abridgement by Section 1 of the Fourteenth Amendment.\textsuperscript{71}

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

* * *

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

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

\textsuperscript{71} \textit{Id.} at 512 (footnote omitted); see Risa L. Goluboff, \textit{The Lost Promise of Civil Rights} 32 (2007).

\textsuperscript{72} See Weinrib, supra note 64.


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

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

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77. Id. at 1168, 1213 n.301.
84. 136 S. Ct. 1083 (2016) (per curiam).

If, as anticipated, the Court imposes, as a matter of constitutional law, a “right-to-work” or “open-shop” regime on all public-sector worksites across the country, irrespective of state and local government preferences, the result will likely be sharply declining resources and diminishing power for an already weakened labor movement. As Justice Kagan pointed out in her dissent in \textit{Harris}, this result is far from compelled; the conservative majority on the Court is reaching for it.\footnote{\text{88.} \textit{Harris}, 134 S. Ct. at 2645–51 (Kagan, J., dissenting).} Contrary to principles of stare decisis, constitutionalizing a ban on fair-share agreements would reverse long-standing precedent on which governments and unions have relied.\footnote{\text{89.} Id. at 2651–53.} Moreover, as Kagan wrote, constitutionalizing a ban on fair-share agreements would run contrary to other areas of doctrine, setting up the possibility of a “serious anomaly” in the area of public employee speech—“a different legal standard . . . applying exclusively to union fees.”\footnote{\text{90.} Id. at 2653.} That is, if the Court’s opinion is taken to its logical conclusion, the expressive interests of workers objecting to payment of union fees would be given greater weight than the expressive interests of public employees in all other contexts; conversely, the managerial rights of the state when acting as employer would be given less weight in this context than in any other.\footnote{\text{91.} Id. at 2645–53.}

Kagan’s dissent thus expertly points out the extent to which the Court is actively working to disable unions. At the same time, Kagan’s dissent might be critiqued for what it lacks: a robust defense of unions and workers’ collective rights. Invoking \textit{Abood}, Kagan’s dissent rests the government’s interest in fair-share agreements on the need to promote industrial peace and protect managerial prerogative.\footnote{\text{92.} Id. at 2654–58.} Missing from this account is Justice Murphy’s embrace of the role that unions play in advancing public debate or protecting workers’ liberties—or other judicial articulation of the constitutional rights of workers.\footnote{\text{93.} See supra notes 46–47, 67–70 and accompanying text; cf. Int’l Ass’n of Machinists v. Street, 367 U.S. 740, 800, 812–13 (1961) (Frankfurter, J., dissenting) (“[W]hat is loosely called political activity of American trade unions . . . [is] activity indissolubly relating to the immediate economic and social concerns that are the \textit{raison d’être} of unions.”) (italics in
II. Education

While education as a field is almost entirely distinct from labor, courts have played a similar role in fortifying inequality here. The American education system today is characterized by an extraordinary degree of inequity on the basis of wealth. In recent years, the achievement gap between more and less affluent children has grown wider, as has the gap in resources allocated. One component of the problem is the absence of affordable, quality preschool and daycare. Another is the great disparity in educational resources in elementary and secondary public schooling, where a system of funding by local property taxes results in schools in poor neighborhoods receiving a fraction of what schools in affluent neighborhoods receive. Considerable interstate variation exists as well. Meanwhile, American higher education is increasingly populated by elites. At many of the best-ranked colleges in America, more students come from the top 1% of the income scale than from the entire bottom 60%. Less than 0.5% of children from the bottom fifth of American
families attend an elite college, while less than half attend any college at all.\textsuperscript{100} Those low-income students who do make it to college are saddled by increasing amounts of debt.\textsuperscript{101}

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

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

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{100} Aisch et al., \textit{supra} note 99.
\item \textsuperscript{101} Tens of millions of Americans together owe more than a trillion dollars in student debt, Dynarski, \textit{supra} note 22.
\item \textsuperscript{102} \textit{E.g.}, \textsc{Claudia Goldin & Lawrence F. Katz}, \textit{The Race Between Education and Technology} 3–6 (2008); Daniel Markovits, Professor, Yale Law Sch., Yale Law School Commencement Address, May 2015: A New Aristocracy (May 18, 2015) (transcript available at https://law.yale.edu/system/files/area/department/studentaffairs/document/markovitscommencementrev.pdf [https://perma.cc/W783-L95L]).
\item \textsuperscript{103} \textit{See} Putnam, \textit{supra} note 96, at 230–34; Jonathan Rothwell, \textit{Is Income Inequality Really Unrelated to Education?}, \textsc{Brookings: The Avenue} (Mar. 3, 2015), https://www.brookings.edu/blog/the-avenue/2015/03/03/is-income-inequality-really-unrelated-to-education [https://perma.cc/U4Q2-EXKM] (arguing that without structural market changes, better education is unlikely to significantly reduce inequality).
\item \textsuperscript{105} 411 U.S. 1 (1973).
\item \textit{Id}.
\item \textit{Id.} at 19–28.
\item \textit{Id.} at 23.
\end{enumerate}
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right to education.  
Since Rodriguez, the received wisdom has been that the judicially enforced U.S. Constitution does not have anything to say about funding disparities in public school, nor does it provide guarantees of welfare rights or require heightened scrutiny for laws that burden the poor, including poor children. Firmly part of constitutional orthodoxy, these principles are generally accepted even by the Court’s most liberal Justices, and conceded by many liberal scholars. That said, it is hard not to conclude that Rodriguez’s dissenters, and the Texas school children, had strong doctrinal arguments on their side. As Justice White pointed out in dissent, the Texas scheme lacked rational basis. The state argued that its funding scheme was justified by an interest in local control, but, in fact, the Texas system utterly failed to advance that interest. Equalizing funding through the property tax, which was the primary revenue-raising mechanism extended to school districts, was practically and legally unavailable to poor districts. Justice Brennan agreed that the statute could not pass even rational basis review, but he wrote separately to emphasize that strict scrutiny should have applied. After all, he opined, “education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment.”

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

113. Id. at 68.
114. Id. at 68–69.
115. Id. at 62–63 (Brennan, J., dissenting).
116. Id. at 63.
117. Id. at 70–71 (Marshall, J., dissenting).
Rather, the opinion represented “an abrupt departure from the mainstream of recent state and federal court decisions concerning the unconstitutionality of state educational financing schemes dependent upon taxable local wealth” and “a retreat from our historic commitment to equality of educational opportunity.” And, he offered a powerful retort to the argument, advanced recently even by liberals, that courts were inappropriate venues for addressing economic inequality:

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

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

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

118. Id.
119. Id.
120. Id. at 71–72 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954)).
121. For a discussion of the state litigation, see Michael Heise, State Constitutions, School Finance Litigation, and the “Third Wave”: From Equity to Adequacy, 68 Temp. L. Rev. 1151 (1995); Driver, supra note 111, at 186.
with extraordinary amounts of college tuition debt. Long considered a political impossibility, calls for free college tuition have been gaining popular support and some legislative backing. To be sure, no federal bill could be enacted anytime soon. But what if the politics were to change sufficiently to enable Congress to enact a new tuition spending program—a program designed to encourage states to provide free tuition at public community colleges, for example?

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

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

124. See supra note 101 and accompanying text.
128. Id. at 2607–08 (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.); see also id. at 2666–68 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting). In NFIB, seven Justices concluded, in two separate opinions, that Congress impermissibly coerced the states when it required any state that wished to continue participating in the existing Medicaid program to expand coverage to residents with an income below 133% of the federal poverty level. Id. at 2607–08.
129. See id. at 2661–63 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).
130. See id.
131. Id. at 2607 (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.). For a detailed analysis of the differences between the joint dissent and the controlling plurality and for an elaboration of this reading of the plurality opinion, see Samuel R. Bagenstos, The Anti-Leveraging Principle and the Spending Clause After NFIB, 101 GEO. L.J. 861, 864 (2013). For an explanation of why existing spending programs are not likely to be found coercive under the plurality opinion, see Pasachoff, supra note 126. But see Rick Hills, Fair-Weather Friends of Federalism (and Nationalism) in King v. Burwell? The Dilemma of Supporting Principles That Hurt One’s Cause, PRAWFSBLAWG (Mar. 7, 2015, 9:40 PM), http://prawfsblawg.blogs.com/prawfsblawg/2015/03/fair-weather-friends-of-federalism-and-nationalism-in-king-v-burwell.html [https://perma.cc/74VB-XPNN] (deriving from NFIB a broad anticoercion principle that would protect states against both conditional spending and
have sponsored would likely survive under the plurality opinion: the proposed bill would create a new spending program, without leveraging an existing one. Nonetheless, as Justice Ginsburg pointed out in dissent, even this narrower rule is “unsettling.” As a formal matter, it restrains Congress’s ability to assist the needy, treating earlier congressional decisions as binding on future Congresses. Perhaps most “unsettling” is that Justices Breyer and Kagan signed on to this unprecedented restriction on Congress’s power to spend for the general welfare.

III. A JUST DOCTRINE, WITHOUT UTOPIANISM

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

133. See *id.* at 2634–35 (“[I]f States choose not to comply, Congress has not threatened to withhold funds earmarked for any other program. Nor does the [statute] use [ ] funding to induce States to take action Congress itself could not undertake.”).
134. See *id.* at 2630 (emphasizing that the Court was striking down a spending measure as too coercive “for the first time ever”) (emphasis in original).
136. See *supra* Parts I & II.
method for opposing economic inequality makes little tactical sense. Moreover, there are normative reasons why those who oppose inequality should favor social movement building and political organizing over an excessive focus on litigation.\textsuperscript{137}

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

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

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

\textsuperscript{137} See Andrias, supra note 135, at 1614–15 (noting the irony of relying on elite, non-democratic institutions to achieve a more egalitarian distribution of power and resources). For a robust defense of popular constitutionalism, see, for example, Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (2004).

\textsuperscript{138} See supra notes 42–44, 114–120 and accompanying text.

\textsuperscript{139} See supra notes 59–63, 93, 111, 135 and accompanying text.

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


\textsuperscript{142} E.g., Eskridge, supra note 141; see also Michael J. Klarman, How Brown Changed Race Relations: The Backlash Thesis, 81 J. Am. Hist. 81, 82 (1994).

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

\textsuperscript{144} See Frank B. Cross, The Error of Positive Rights, 48 UCLA L. Rev. 857, 862–63 (2001) (invoking all of these arguments and others against social welfare rights).
and as the history of regressive court decisions suggests. But the doctrine also underlines a fundamental weakness with the commitment to judicial minimalism. The reigning approach has encouraged liberal justices, wary of judicial activism, to acquiesce to legislation and common law rules that promote inequality. Meanwhile, even in dissent, and even when colleagues have disabled legislators’ ability to remEDIATE inequality, liberal justices have frequently failed to develop robust accounts of countervailing substantive constitutional rights.

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

Professor Tushnet urges a “utopian” approach to constitutional theory, including in the area of social welfare rights. As he points out, claims about social welfare rights are unlikely to prevail before the current Supreme Court. The same is true for labor rights and educational equity and adequacy claims. More long-term constitutional thinking is necessary. But “utopian”—that is, “impossibly ideal,” or “imaginary and indefinitely remote”—may be a misframing of the constitutional theory needed.

Utopianism, in history, has often had a dark underbelly, with the promise of a better world invoked to excuse sordid acts of tyranny.

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146. See supra notes 46–47, 93 and accompanying text. For extended critique of judicial minimalism as it applies to other areas of law, see Driver, supra note 140; Post & Siegel, supra note 140.
147. See Mark Tushnet, Abandoning Defensive Crouch Liberal Constitutionalism, BALKINIZATION (May 6, 2016, 1:15 PM), https://balkin.blogspot.fr/2016/05/abandoning-defensive-crouch-liberal.html [https://perma.cc/8UCD-7MBX] (describing “[d]efensive-crouch constitutionalism, with every liberal position asserted nervously, its proponents looking over their shoulders for retaliation by conservatives (in its elevated forms, fear of a backlash against aggressively liberal positions)).
149. Id.; see also Mark Tushnet, Utopian Thinking for Progressive Constitutionalists, 93 IND. L.J. 235 (2018).
152. Professor Tushnet, in the published version of his Essay, notes that he is using the term “utopian” to refer to a “realistic” and “achievable” progressive constitutionalism. In that sense, I have little disagreement with the substance of his argument; we both urge an achievable progressive constitutionalism. The concern, however, is that in common usage “utopian” carries a different meaning.
carries such ugly connotations ought to give us pause. Moreover, a more just and egalitarian constitutional law doctrine is not actually utopian. As the preceding discussion highlights, the doctrine that has helped fortify inequality in the areas of labor and education is the product of close votes. Contrary outcomes are easy to imagine; they are neither impossible nor remote.

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

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

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


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


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

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

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

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

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

\footnote{159}{See supra notes 67–69 and accompanying text.}
\footnote{160}{Complaint, Gary B. v. Snyder, No. 16-CV-13292 (E.D. Mich. Sept. 13, 2016).}
\footnote{161}{Id. at 8–9, 84–85, 98.}
\footnote{162}{Id. at 5.}
\footnote{165}{See Siegel, Text in Contest, supra note 135, at 312–13 (2001) (demonstrating that “[c]laims on the text of the Constitution made by mobilized groups of Americans outside the courthouse helped bring into being the understandings that judges then read into the text of the Constitution”).}
And they have rallied behind a more robust conception of workers’ rights. Meanwhile, a few judges and Justices are beginning to draw attention to how the law fortifies inequality, to take up constitutional claims against economic inequality, and to flesh out substantive constitutional arguments in support of a more egalitarian distribution of power and resources. In short, a constitutional vision that diminishes, rather than fortifies, economic inequality may be hard to achieve, but it is neither unimaginable nor impossibly ideal.