

# Liberal Constitutionalism and Economic Inequality

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*Economic inequality is rising in democracies across the world and poses a clear threat to both the stability and legitimacy of liberal constitutional models. Can liberal constitutionalism respond to this threat? Or are there inherent limits to the liberal model that prevent an effective response? This Essay explores these questions by surveying the range of possible structural and rights-based constitutional responses to economic inequality, as well as possible obstacles to these responses—including problems of definition, leveling up versus down, unintended or counter-productive consequences, and institutional path dependence.*

## INTRODUCTION

Equality is guaranteed in every liberal-democratic constitution around the world, but inequality of wealth and income is widespread and on the rise. In recent years, there has been increasing attention by economists and political scientists to the widening gap between the rich and poor, as well as the erosion

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of the middle class.<sup>1</sup> Legal scholars<sup>2</sup> and politicians<sup>3</sup> have also recognized that rising economic inequality can undermine a well-functioning democracy. This Essay begins by identifying the threats posed by certain manifestations of economic inequality to liberal constitutionalism, and then shifts to evaluating the range of constitutional responses around the world to these threats. We focus on the enforcement of constitutional rights, such as equality and social rights, which has had limited success in reducing the problematic forms of economic inequality. We then consider structural interventions and other constitutional approaches to redistribution in order to highlight the enduring challenges for liberal constitutional orders in reducing the forms of inequality that can erode liberal-democratic institutions. In exploring the range of constitutional responses to extreme income inequalities, we illustrate the uncertainty and importance of confronting these inequalities for the future of liberal constitutionalism.

This Essay is divided into three Parts. Part I identifies the forms of inequality in income and wealth that are on the rise worldwide, and explains why they threaten basic democratic commitments and institutions. Part II surveys the ways in which liberal constitutions have responded to this problem, with a focus on a broader range of structural interventions, as a matter of constitutional design and legislative implementation, that could address the growing threat of economic inequality, in contrast to the enforcement of equality/nondiscrimination rights and social rights. Part III explores and compares the obstacles and limits to rights-based and structural responses, and reflects on the implications of these challenges for the future of liberal constitutionalism.

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<sup>1</sup> See generally, for example, Thomas Piketty, *Capital in the Twenty-First Century* (Belknap 2014); Anthony B. Atkinson, *Inequality: What Can Be Done* (Harvard 2015); Joseph E. Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (Norton 2012); Peter Temin, *The Vanishing Middle Class: Prejudice and Power in a Dual Economy* (MIT 2017); Claudia Goldin and Lawrence F. Katz, *The Race between Education and Technology* (Belknap 2009); Heather Boushey, J. Bradford DeLong, and Marshall Steinbaum, eds, *After Piketty: The Agenda for Economics and Inequality* (Harvard 2017); Larry M. Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age* (Princeton 2d ed 2016); Jacob S. Hacker and Paul Pierson, *Winner-Take-All Politics: How Washington Made the Rich Richer—and Turned Its Back on the Middle Class* (Simon & Schuster 2010).

<sup>2</sup> See, for example, Joseph Fishkin and William E. Forbath, *The Anti-oligarchy Constitution*, 94 BU L Rev 669, 670 (2014); Ganesh Sitaraman, *The Crisis of the Middle-Class Constitution: Why Economic Inequality Threatens Our Republic* 3–5 (Knopf 2017).

<sup>3</sup> See, for example, Bernie Sanders, *Our Revolution: A Future to Believe In* 188, 206 (Dunne 2016); Elizabeth Warren, *This Fight Is Our Fight: The Battle to Save America's Middle Class* 22–26 (Metropolitan 2017).

### I. TWENTY-FIRST CENTURY ECONOMIC INEQUALITY AS A CONSTITUTIONAL PROBLEM

There is a growing literature on the extremes of economic inequality that have become commonplace in liberal democracies throughout the world. First, income inequality is on the rise, with a widening gap between the highest- and lowest-income earners in almost every Organisation for Economic Co-operation and Development (OECD) country. Even in countries with a history of a more equal income distribution, such as Finland, Norway, and Sweden, the share of the top 1 percent has increased by 70 percent, reaching around 7–8 percent by the late 2000s.<sup>4</sup> In Germany, income inequality levels in the 1980s were close to those found in the traditionally equal Nordic countries, but there has been a sharp rise since 2000. In 2008, the average income of the top 10 percent of working-age Germans is nearly eight times higher than that of the bottom 10 percent, up from a ratio of six to one in the mid-1990s.<sup>5</sup> In France, the ratio between the top 10 percent and bottom 10 percent was seven to one in 2008, but levels of inequality have remained relatively stable since the 1990s, when inequality declined.<sup>6</sup> Nonetheless, as Professor Thomas Piketty and others have noted, France, too, has experienced some increases in inequality in recent years since 2008.<sup>7</sup> In the United States, the top 1 percent of families made 25.3 times as much as the bottom 99 percent in 2013.<sup>8</sup> In the United Kingdom, the share of the top 1 percent of income earners increased from 6.7 percent in 1981 to 12.9 percent in 2011.<sup>9</sup>

Second, poverty is on the rise in the developed world, coinciding with the shrinking of the middle class in many of the world's leading democracies. In the United States, from 2000 to 2014, the

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<sup>4</sup> *Top Incomes and Taxation in OECD Countries: Was the Crisis a Game Changer?* \*2 (OECD, May 2014), archived at <http://perma.cc/6CNS-54BL>.

<sup>5</sup> *Divided We Stand: Why Inequality Keeps Rising—Country Note: Germany* (OECD, 2011), archived at <http://perma.cc/9XXM-SLPE>.

<sup>6</sup> *Divided We Stand: Why Inequality Keeps Rising—Country Note: France* (OECD, 2011), archived at <http://perma.cc/4ZSE-NQMU>.

<sup>7</sup> See Nicolas Frémeaux and Thomas Piketty, *France: How Taxation Can Increase Inequality*, in Brian Nolan, et al, *Changing Inequalities and Societal Impacts in Rich Countries: Thirty Countries' Experiences* 248, 249–50 (Oxford 2014) (noting an “increase [in inequality] during the last decade of the period of observation” and that “[t]he 2008 recession does not modify this upward trend”).

<sup>8</sup> See Teresa Tritch, *The United States of Inequality* (NY Times, June 21, 2016), archived at <http://perma.cc/5W39-CENF>.

<sup>9</sup> *Income Inequality Data Update and Policies Impacting Income Distribution: United Kingdom* \*1 (OECD, Feb 2015), archived at <http://perma.cc/STW7-2RNH>.

share of adults living in middle-income households fell in 203 of the 229 metropolitan areas examined by the Pew Research Center, coupled with a decrease of 6 percentage points or more in 53 metropolitan areas.<sup>10</sup> In 2016, the OECD reported that the middle-income group of the population had decreased on average across the OECD since the 1980s. For example, since 2000, the share of middle-income households in the United States, Germany, and Luxembourg has fallen by 5 percent.<sup>11</sup> On average in the OECD, the middle-income group collectively had incomes six times the level of the collective incomes of the top income group in the 1980s; this ratio fell to five to one in the 1990s and has fallen to four to one since the 2000s.<sup>12</sup> In South Korea, the percentage of families that were middle class decreased from 75 percent in 1990 to 67.1 percent in 2013.<sup>13</sup> Studies have also shown that the distance between the market income share of the upper class and middle class has increased in the United Kingdom, the United States, and Poland.<sup>14</sup>

Both the concentration of wealth at the top and the decline of the middle class pose threats to liberal constitutionalism. Many commentators suggest that the rise of populist nationalism in some of the world's leading democracies—as evidenced by the election of Donald Trump to the US presidency and the Brexit vote to leave the European Union after openly xenophobic campaigns—is driven in part by the stagnation of wages and economic insecurity.<sup>15</sup> At the very least, there is a correlation between lower levels of education and income and support for populist-nationalist political agendas. In the United Kingdom, voters' support for leaving the European Union was highly correlated with lower levels of education and, to a lesser extent, income.<sup>16</sup> In the United

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<sup>10</sup> *America's Shrinking Middle Class: A Close Look at Changes within Metropolitan Areas* (Pew Research Center, May 11, 2016), archived at <http://perma.cc/2LUU-FP5Y>.

<sup>11</sup> *The Squeezed Middle Class in OECD and Emerging Countries: Myth and Reality* \*2 (OECD, Dec 1, 2016), archived at <http://perma.cc/C93R-59YY>.

<sup>12</sup> *Id.* at \*7 (the OECD defining the “middle-income group” as between 0.75 and 2 times the median and top income as exceeding twice the median).

<sup>13</sup> Kye-wan Cho, *South Korea's Middle Class Is Shrinking, According to Recent Report* (The Hankyoreh, Feb 13, 2015), archived at <http://perma.cc/EFM8-TUZW>.

<sup>14</sup> Ursula Dallinger, *The Endangered Middle Class? A Comparative Analysis of the Role Played by Income Redistribution*, 23 *J Eur Soc Pol* 83, 95 (2013).

<sup>15</sup> See, for example, Ronald F. Inglehart and Pippa Norris, *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash* \*10–12 (HKS Faculty Research Working Paper Series, Aug 2016) (on file with author) (explaining the “economic insecurity thesis” as one explanation for rise of populist nationalism).

<sup>16</sup> See Andrew McGill, *Who Voted for the Brexit?* (The Atlantic, June 25, 2015), archived at <http://perma.cc/437T-X552>.

States, there was also a close correlation between income levels and support for Trump in key states like Michigan, Ohio, Wisconsin, and Pennsylvania.<sup>17</sup>

What Brexit and Trump have in common is not a set of policies likely to be advanced by each electoral victory, but rather a politics of resentment against a status quo created by incumbent governing elites.<sup>18</sup> The populist resentment and rejection of the professional elites who lead most governing institutions begin to threaten liberal democracy when they include xenophobic scapegoating and a disregard for the rule of law. Notwithstanding the Left's critique of the European Union's democratic deficit,<sup>19</sup> the politics of Brexit and the rise of Trump have raised concerns about racism and the erosion of the liberal-democratic institutions necessary to a stable constitutional order. Leading scholars of comparative constitutional law, such as Professors Tom Ginsburg and Aziz Huq, have suggested that inequality of wealth and income are clearly correlated with a reversion from democratic to anti-democratic rule, or are "significantly higher in democracies that eventually underwent a reversal."<sup>20</sup>

There are various accounts of the dynamics by which economic inequality undermines liberal democracy. Some have argued that the current growing forms of economic inequality are inimical to economic growth.<sup>21</sup> Others have noted that the growing divide between rich and poor effectively limits class mobility.<sup>22</sup> When individuals who are born poor cannot become rich, and vice versa, liberal constitutions' commitment to the freedom of individuals to determine their own fates is exposed as false. When individuals' lives are determined by parental wealth with no significant role for individual autonomy, that society is an aristocracy;

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<sup>17</sup> Nate Cohn, *Why Trump Won: Working-Class Whites* (NY Times, Nov 9, 2016), online at <http://www.nytimes.com/2016/11/10/upshot/why-trump-won-working-class-whites.html> (visited Sept 1, 2017) (Perma archive unavailable).

<sup>18</sup> See John Cassidy, *What Do the Brexit Movement and Donald Trump Have in Common?* (New Yorker, June 23, 2016), archived at <http://perma.cc/XSE8-Q974>; Joan C. Williams, *White Working Class: Overcoming Class Cluelessness in America* 3 (Harvard Business Review 2017) (reporting that white working-class voters supported Trump because, in the words of one of them, "We're voting with our middle finger," in an era when the economic fortunes of working class voters have plummeted).

<sup>19</sup> See Richard Tuck, *The Left Case for Brexit* (Dissent, June 6, 2016), archived at <http://perma.cc/96BU-CBWY>.

<sup>20</sup> Ethan B. Kapstein and Nathan Converse, *Why Democracies Fail*, 19 J Democracy 57, 61 (Oct 2008). See also Aziz Huq and Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L Rev \*4 (forthcoming 2018), archived at <http://perma.cc/G48G-6ZDB>.

<sup>21</sup> See Stiglitz, *The Price of Inequality* at 83 (cited in note 1).

<sup>22</sup> See Bartels, *Unequal Democracy* at 18–22 (cited in note 1).

it is not the society that liberal-democratic constitutions purport to create. In these extreme forms, economic inequality is at odds with the political and legal equality on which the legitimacy of liberal constitutional orders depends. Political legitimacy, in a liberal constitutional order, depends on there being, at a minimum, substantive equality of opportunity and substantively equal forms of political participation. High levels of inequality in wealth and income threaten both of these commitments.<sup>23</sup> High levels of income, and especially wealth, enable some citizens to exercise greater control over political institutions, to hoard opportunities for themselves and their progeny, and to enact policies that perpetuate and reproduce the disadvantage of the unlucky.<sup>24</sup> When disparate economic power enables disparate political power, the situation is not only at odds with democracy; it is also resented. Populist resentment, even if grounded in legitimate concerns about injustice, can be expressed in political movements with unjust and hateful agendas that threaten other important foundations of liberal-democratic constitutions, such as commitment to race and gender equality. For these reasons, the survival and health of liberal-democratic constitutional orders require some attention to the current dynamics of rising economic inequality.

## II. CONSTITUTIONAL RESPONSES TO ECONOMIC INEQUALITY

Can liberal-democratic constitutional orders respond to the threat posed by the rise of economic inequality? In this Part, we survey the various ways in which liberal democracies have attempted to prevent or reduce economic inequality, focusing on the constitutional provisions and resources that have been deployed. Economists suggest that, to mitigate the threat of economic inequality, three broad policy responses are needed: measures that can foster more inclusive forms of growth, policies that can prevent the overconcentration of wealth and income, and forms of

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<sup>23</sup> See John Rawls, *Political Liberalism* 6 (Columbia 1993) (“Social and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least advantaged members of society.”).

<sup>24</sup> See K. Sabeel Rahman, *Democracy against Domination* 2–3 (Oxford 2016).

economic redistribution that can mitigate the downsides of ongoing poverty and middle-class compression.<sup>25</sup> In most liberal democracies, such policies are statutory and regulatory, and their adoption or success may not have an obvious constitutional dimension.

In many constitutional democracies, legislatures are actively considering, and passing, measures to increase investments in education and training, raise the minimum wage, guarantee a universal basic income, and invest in new industries they identify as providing opportunities for growth in high-paying jobs. But there are also many democracies in which such measures are noticeably absent. Solutions for addressing inequality do not make it into mainstream political debate, and any proposals for change are easily defeated by opposition parties or a minority within the governing coalition. Powerful economic elites and interest groups will often work to prevent significant changes that would reduce their privilege or redistribute their wealth. Legislatures may also be subject to burdens of inertia, which impede or delay measures of this kind; individual legislators will often disagree about the best way to respond to complex problems like inequality. This can also lead party leaders to avoid addressing particular issues, even when they are of clear concern to voters.

To illustrate, most Americans support paid family or medical leave for workers, according to a recent poll.<sup>26</sup> Paid family and medical leave is a measure that would alleviate a significant source of economic insecurity for families who depend on their salaries to live, particularly the working and middle classes.<sup>27</sup>

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<sup>25</sup> See, for example, Era Dabla-Norris, et al, *Causes and Consequences of Income Inequality: A Global Perspective* \*30–32 (IMF, June 2015), archived at <http://perma.cc/92TX-ZQM6>; *A Family Affair: Intergenerational Social Mobility across OECD Countries*, in *Economic Policy Reforms: Going for Growth* \*183, 195–98 (OECD, 2010), archived at <http://perma.cc/AX6D-3CTP>; Estanislao Gacitúa Marió, Michael Woolcock, and Marisa von Bulow, *Overview: Assessing Social Exclusion and Mobility*, in Estanislao Gacitúa Marió and Michael Woolcock, eds, *Social Exclusion and Mobility in Brazil* 1, 22–24 (World Bank 2008). See also Daniel A. Crane, *Antitrust and Wealth Inequality*, 101 *Cornell L Rev* 1171, 1219–26 (2016); Jonathan B. Baker and Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 *Georgetown L J Online* 1, 13–15 (2015) (offering and analyzing various antitrust policies to alleviate economic inequalities).

<sup>26</sup> See Lauren Weber, *Most Americans Support Paid Leave for Workers, Poll Finds* (Wall St J, Dec 13, 2016), online at <http://www.wsj.com/articles/most-americans-support-paid-leave-for-workers-poll-finds-1481641205> (visited Dec 23, 2017) (Perma archive unavailable), citing *Election Analysis Suggests Voters Reward Candidates Who Advocate for Family Friendly Workplace Policies* (National Partnership for Women and Families, Dec 6, 2016), archived at <http://perma.cc/4B66-STYQ>.

<sup>27</sup> For a broader discussion of the class effects of work-family conflict, see Joan C. Williams, *Reshaping the Work-Family Debate: Why Men and Class Matter* 42–76 (Harvard 2010).

President Barack Obama called on Congress to pass paid-family-leave legislation year after year in his State of the Union address. Congress adopted the Family and Medical Leave Act<sup>28</sup> in 1993, guaranteeing *unpaid* leave. The Family and Medical Leave Insurance Act has been proposed in Congress since 2013.<sup>29</sup> Even President Trump, while cutting other social welfare benefits, voiced his support for paid parental leave, especially maternity leave, throughout his electoral campaign. But to date, Congress has not legislated paid parental leave. Legislators disagree about the scope of coverage, methods of funding the benefit, and the extent to which employers should be required or incentivized to provide it. Today, a quarter century after Congress legislated unpaid leave, only 14 percent of American workers receive paid leave from their employers.<sup>30</sup>

Constitutional enforcement can play a role in light of these obstacles to legislative solutions to economic inequality. The idea that economic inequality is a constitutional problem has been engaged by constitutional courts and judges, as well as lawyers and legislators in many liberal constitutional democracies. We begin by mapping out the broad range of contexts in which economic inequality has been imagined as a constitutional problem, and evaluate the efforts to explain, overcome, or resolve it. First, we consider structural interventions. Next, we survey the equality provisions in various constitutions. Finally, we consider the adjudication of constitutional rights. Litigants before some constitutional courts around the world have often invoked the nearly ubiquitous constitutional guarantee of equality to challenge certain manifestations of inequality. In several countries, unequal education, as measured by resources allocated or by admissions requirements, is a frequent subject of such constitutional claims. The efforts to enforce constitutional equality rights in the education context also draw out a related set of constitutional provisions that are frequently invoked to disrupt economic inequality: social and economic rights. Such claims are often simultaneous with equality-based claims, but they need not be. An increasing number of constitutions worldwide contain a long list of social-rights guarantees: in addition to education rights, constitutions

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<sup>28</sup> Pub L No 103-3, 107 Stat 6 (1993), codified as amended at 29 USC § 2601 et seq.

<sup>29</sup> See Family and Medical Insurance Leave Act of 2013, HR 3712, 113th Cong, 1st Sess, in 159 Cong Rec H 8107 (daily ed Dec 12, 2013).

<sup>30</sup> See *Health Policy Brief* \*2 (Robert Wood Johnson Foundation, Nov 21, 2016), archived at <http://perma.cc/6E9Y-V3SG>.



entitle citizens to work, health, housing, food, water, and social security. Even in the United States, though the federal constitution does not contain social rights, all state constitutions protect some subset of these rights, particularly rights to education.

#### A. Structure

Rights provisions, for reasons we shall explore below, may not be the most significant constitutional intervention for economic inequality. Structural provisions are arguably paramount.<sup>31</sup> Imagine, for instance, legislative quotas or reserved seats for individuals from different income groups, or other constitutional features designed to make the legislature more directly responsive to the poor or the median wage earner.<sup>32</sup> One obvious downside to high levels of economic inequality is their capacity to affect the political process in ways that become self-perpetuating: extreme levels of inequality or wealth and income can give certain individuals and corporations disproportionate influence over electoral politics, and thereby reduce the likelihood of elected officials adopting policies that favor the poor or the middle class. In the United States, for instance, 93 percent of all money contributed to super PACs comes from only 0.001 percent of Americans, and there is clear evidence that Congress tends to be consistently more responsive to the views of these wealthy donors than to those of either the poor or the middle class.<sup>33</sup>

If we are to address, or even just prevent the worsening of, economic inequality, constitutions will therefore need to cabin the role of money in politics. In the United States, some politicians have thus called for a constitutional amendment to reverse *Citizens United v Federal Election Commission*<sup>34</sup> and allow the regulation of super PACs, so as to reduce the disproportionate influence of

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<sup>31</sup> See Roberto Gargarella, *Equality*, in Rosalind Dixon and Tom Ginsburg, eds, *Comparative Constitutional Law in Latin America* 176, 183, 188–94 (Elgar 2017) (arguing that constitutional reforms require more than just more rights to promote equality and must also consider the power structures).

<sup>32</sup> Elliot W. Bulmer, *Constitutional Responses to the Crisis of Representation and Oligarchic Democracy* (unpublished manuscript, 2017) (on file with authors). See also Fishkin and Forbath, 94 *BU L Rev* at 690–96 (cited in note 2) (discussing modern proposed legislative solutions to the problem).

<sup>33</sup> See Samuel Plank, *Campaign Finance after Citizens United* (Harvard Political Review, Oct 26, 2014), archived at <http://perma.cc/QAE9-ZUDW>. See also Mimi Murray Digby Marziani, *Money in Politics after Citizens United: Troubling Trends & Possible Solutions* (Brennan Center for Justice, Apr 18, 2012), archived at <http://perma.cc/5XVT-TABR>.

<sup>34</sup> 558 US 310 (2010).

corporations and wealthy donors in politics.<sup>35</sup> In other countries, such as Canada, there is also ongoing debate about how to reform the electoral system to promote more direct representation of lower income groups.<sup>36</sup> Other structures could increase legislative attention to the needs of the poor. Consider, for example, legislative committees or government agencies with special responsibility for issues of poverty or income inequality.<sup>37</sup> Many existing legislative committee structures have been adapted to create a more sustained and direct focus by subgroups of legislators on issues of poverty and economic inequality. In some countries, such as Ghana, there have also been recent moves to create new initiatives in legislative committees with distinct responsibility for issues of poverty.<sup>38</sup>

Other countries have created independent state bodies responsible for addressing issues of poverty or economic vulnerability. Indeed, it is not uncommon for constitutions to provide for the representation of labor unions and other representatives of vulnerable groups in a formal consultative capacity. Following World War II, the French constitution created the Economic Council as an institution that would support the reestablishment of social democracy.<sup>39</sup> Largely consisting of representatives of organized labor, the Economic Council, which later became the Social and Economic Council, was initially charged with reviewing proposed legislation affecting social and economic policy. As of 2008, the institution is now the Economic, Social, and Environmental Council, and its seats are held not only by union leaders in various sectors, but also by other groups of stakeholders like employers, students' associations and associations of young people,

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<sup>35</sup> See, for example, Daron Acemoglu and James A. Robinson, *Economics versus Politics: Pitfalls of Policy Advice*, 27 *J Econ Persp* 173 (Spring 2013). See also generally Adam Przeworski, *Deliberation and Ideological Domination*, in Jon Elster, ed., *Deliberative Democracy* 140 (Cambridge 1998). See also Fishkin and Forbath, 94 *BU L Rev* at 694–96 (cited in note 2).

<sup>36</sup> See Brian Tanguay and Steven Bittle, *Parliament as a Mirror to the Nation: Promoting Diversity in Representation through Electoral Reform*, *Canadian Issues* 61, 63 (Summer 2005).

<sup>37</sup> See *Call for Papers: Constitutional Responses to the Crisis of Representation and Oligarchic Democracy* (International Institute for Democracy and Electoral Assistance), archived at <http://perma.cc/U3DQ-N2HJ>.

<sup>38</sup> See Ken Sackey and Benjamin Mensah, *Ghana Has No Reliable Agricultural Data—Minister* (Ghana News Agency, June 16, 2016), online at <http://www.ghananewsagency.org/social/ghana-has-no-reliable-agricultural-data-minister-104875> (visited Sept 1, 2017) (Perma archive unavailable).

<sup>39</sup> See *Fr Const* Title XI, Arts 69–71.

professional associations, and environmental groups.<sup>40</sup> Models of this kind could also be expanded, and adapted, so as to even more directly focus on issues of economic equality as well as vulnerability.

Structural changes could also focus on procedural hurdles to the passage of economic reform within the legislature.<sup>41</sup> In many countries, there are legislative proposals to adopt more redistributive economic policies, but those initiatives have been defeated by various legislative and executive veto points. Removing the number of hurdles to successful legislative, or executive, policy change would thus be one logical way of promoting the enactment of policies of this kind. In Italy, for example, a 2016 constitutional amendment proposal would have streamlined the legislative process and allowed a fast-track procedure for a range of legislative reforms.<sup>42</sup> Some proposed reforms aimed at limiting labor rights and government spending, but others had a more redistributive focus and aimed at relieving the tax burden on middle-class families relative to corporations and high-income earners.<sup>43</sup>

Similar changes could also be made to the design of federal or quasi-federal constitutional systems, such as the European Union. In most federal systems, there is significant redistribution of tax revenues across different parts of the federation. There is wide variation, however, in the degree to which redistribution of this kind seeks to achieve formal equality among constituent states versus addressing substantive concerns about spatial inequality.<sup>44</sup> One possible response to problems of rising economic inequality, therefore, would be to attempt to reorient federal tax and transfer policies toward a greater focus on inequality at the individual household level across different geographic areas.<sup>45</sup>

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<sup>40</sup> *ESEC Overview* (Economic, Social and Environmental Council, 2011), archived at <http://perma.cc/9LSA-VJD5>.

<sup>41</sup> See generally, for example, Barbara Bibbo, *Italy Votes for New Constitution amid Political Turmoil* (Al Jazeera, Dec 4, 2016), archived at <http://perma.cc/A93D-JTDU>; J.H., *Why Is Italy's Constitutional Referendum Important?* (The Economist, Sept 28, 2016), archived at <http://perma.cc/59RW-EE9H>.

<sup>42</sup> See Graziella Romeo, *The Italian Constitutional Reform of 2016: An 'Exercise' of Change at the Crossroad between Constitutional Maintenance and Innovation*, Ita L J 31, 32 (Special 2017).

<sup>43</sup> See, for example, Stephanie Kirchgaessner, *Renzi Due to Formally Submit Resignation as Italy Ponders What Next* (The Guardian, Dec 5, 2016), archived at <http://perma.cc/7BZC-NC7A>; Cèsar Colino, Maurizio Cotta, and Roman Maruhn, *Italy Report* \*6-9 (Sustainable Governance Indicators, 2016), archived at <http://perma.cc/D2WT-VRMD>.

<sup>44</sup> See, for example, Ran Hirschl, *Constitutional Law & Economic Inequality: Some Skeptical Thoughts* (unpublished manuscript, 2017) (on file with author).

<sup>45</sup> See id.

Finally, structural reforms might focus on popular constitutional mechanisms or mechanisms of direct democracy, designed to force legislative attention to certain questions.<sup>46</sup> In some US states, for instance, voters have used such mechanisms to adopt amendments that mandate a certain level of minimum expenditure by state legislatures in certain key areas, such as education. Perhaps most notably, California adopted a ballot initiative in 1988 requiring the state to spend a certain minimum percentage of its budget on K–12 education every year. The state has met its minimum funding requirement for each year since then.<sup>47</sup> In Europe, Switzerland has adopted limitations on the construction and ownership of second homes through legislation limiting the percentage of nonprimary residences to 20 percent of the residential zones in every district.<sup>48</sup> This legislation was also enacted in response to a popular initiative, inserting a constitutional limitation on the ownership of second homes.<sup>49</sup> And in Ecuador in 2017, voters approved a referendum to amend their constitution to ban public officials from holding assets in tax havens. Ecuador’s foreign minister also explicitly linked the aim of the relevant amendment to attempts to address economic inequality, suggesting that its aim was to “increase transparency and increase tax revenue for development, while also cracking down on corruption and bringing down inequality.”<sup>50</sup>

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<sup>46</sup> See, for example, Elisabeth R. Gerber, *Legislative Response to the Threat of Popular Initiatives*, 40 *Am J Polit Sci* 99, 100 (1996); Daniel A. Smith and Caroline J. Tolbert, *Educated by Initiative: The Effects of Direct Democracy on Citizens and Political Organizations in the American States* xi–xii (Michigan 2004). See also, for example, Colin Burgon, et al, *Let’s Follow Ecuador in Holding a Referendum on Tax Havens* (The Guardian, Feb 17, 2017), archived at <http://perma.cc/A34E-PXGN>.

<sup>47</sup> See Mac Taylor, *A Historical Review of Proposition 98 \*5–7* (Legislative Analyst’s Office, Jan 2017), archived at <http://perma.cc/595R-S365>. Note, however, that the effect of the amendment was suspended for the fiscal year 2017–2018. See Troy Flint, *Revised 2017–18 Budget Suspends Proposition 98* (California School Boards Association, May 11, 2017), archived at <http://perma.cc/S8QT-A938>; California School Boards Association, *Details on Prop 98 Suspension, Delay of One-Time Funds in May Revision* (Public, May 15, 2017), archived at <http://perma.cc/9LNW-XB7K>; Mac Taylor, *The 2017–18 Budget: Analysis of the May Revision Education Proposals \*2* (Legislative Analyst’s Office, May 15, 2017), archived at <http://perma.cc/65YT-HVW5> (noting that despite the suspension there was in fact an increase in spending of 4.5 percent for year 2017–2018).

<sup>48</sup> See John Heilprin, *Parliament Works Out Kinks in Second Homes Law* (Swiss Info, Mar 12, 2015), archived at <http://perma.cc/XA9T-72HZ>.

<sup>49</sup> See *id.* See also Andrea Watson, *At Home in the Alps* (Gulf News, Nov 8, 2015), archived at <http://perma.cc/6NZZ-YFTG>.

<sup>50</sup> Alessio Perrone, *Ecuador Votes to Bar Politicians from Having Assets in Tax Havens* (New Internationalist, Feb 20, 2017), archived at <http://perma.cc/4RX8-6MM3>.

We do not suggest that all, or any, of these examples have been effective as responses to problems of inequality in wealth or income or have come without downsides.<sup>51</sup> We simply note them as evidence of the legal and political plausibility of various forms of structural response.

## B. Constitutional Equality Guarantees

Constitutional guarantees of equality, or equal protection, could also be expanded to more directly address inequality of income and wealth. By definition, constitutional guarantees of equality, or nondiscrimination, are focused on notions of relative, rather than absolute, deprivation. They thus provide a logical way for courts or other constitutional actors to approach the disparity between the poor, the middle class, and the wealthiest citizens within a polity.

Some formal guarantee of equality is a nearly universal feature of democratic constitutions worldwide, one that is certainly even more pervasive than guarantees of socioeconomic rights. Constitutional guarantees of equality, or nondiscrimination, have also expanded in recent decades to cover an increasingly long list of characteristics and dimensions of individual and group identity. Many of these characteristics also intersect with poverty or wealth and income.<sup>52</sup>

International human-rights law has long recognized the intersecting nature of commitments to social, political, and economic equality. In guaranteeing a broad range of social rights, the International Covenant on Economic, Social and Cultural Rights<sup>53</sup> (ICESCR) explicitly prohibits discrimination by states on a range of grounds, including “social origin, property, [and] birth.”<sup>54</sup> The UN Committee on Economic, Social and Cultural

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<sup>51</sup> See Taylor, *A Historical Review of Proposition 98* at \*21–28 (cited in note 47) (noting possible limitations on California’s minimum educational budget provision). But see John G. Matsusaka, *Direct Democracy and Fiscal Gridlock: Have Voter Initiatives Paralyzed the California Budget?*, 5 *St Polit & Pol Q* 248, 249–50 (2005) (concluding that “direct democracy [in California] cannot be blamed for causing [California’s] fiscal gridlock”).

<sup>52</sup> See Beth Goldblatt, *Intersectionality in International Anti-discrimination Law: Addressing Poverty in its Complexity*, 21 *Australian J Hum Rts* 47, 47–48 (Oct 2015); Eduardo S. Bustelo, *Expansion of Citizenship and Democratic Construction*, in Willem van Genugten and Camilo Perez-Bustillo, eds, *The Poverty of Rights: Human Rights and the Eradication of Poverty* 3, 4–5 (Zed 2001).

<sup>53</sup> 993 UNTS 3 (Dec 16, 1966, entered into force Jan 3, 1976).

<sup>54</sup> ICESCR Art 2(2), 993 UNTS at 5.

Rights has also interpreted the concept of “social origin” to encompass a person’s economic and social status, the concept of “property” as extending to a range of personal property including income, and “birth” as including any inherited status, and thus potentially a person’s wealth.<sup>55</sup> The International Labor Organization (ILO) Convention explicitly prohibits discrimination in employment based on social origin.<sup>56</sup>

Both international and European human-rights bodies have also increasingly given express recognition to socioeconomic status as a prohibited ground of discrimination. The Committee on the Elimination of Discrimination against Women (CEDAW), for instance, has recognized the intersection between sex, ethnicity, and socioeconomic background as prohibited grounds of discrimination in respect of the rights protected by CEDAW.<sup>57</sup> The Council of Europe has recognized social origin as a prohibited ground of discrimination in its revised European Social Charter.<sup>58</sup> The European Union has recognized social origin and property as prohibited grounds of discrimination under Article 21 of the Charter of Fundamental Rights of the European Union.<sup>59</sup> And the European Court of Human Rights, in certain contexts, has recognized socioeconomic status as a prohibited ground of discrimination.<sup>60</sup>

Some recent constitutions also adopt similar constitutional understandings of equality; for example, South Africa and Kenya include “social origin” and “birth” as grounds of discrimination expressly prohibited by their constitutions.<sup>61</sup> The 2008 Ecuadorian

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<sup>55</sup> *General Comment No. 20: Non-discrimination in Economic, Social and Cultural Rights*, UN Economic and Social Council, 42d sess (July 2, 2009), UN Doc E/C.12/GC/20/7–8. For discussion of General Comment No 20, see Tamas Kadar, *An Analysis of the Introduction of Socio-economic Status as a Discrimination Ground* \*8 (Equality and Rights Alliance, 2016), archived at <http://perma.cc/ZC9D-B78B>.

<sup>56</sup> C111—Discrimination (Employment and Occupation) Convention Art 1(1)(a) (June 25, 1958, entered into force June 15, 1960).

<sup>57</sup> *Communication No. 17/2008*, Convention on the Elimination of All Forms of Discrimination against Women, 49th sess (July 25, 2011), UN Doc CEDAW/C/49/D/17/2008/20–21 (acting under Optional Protocol Art 7, ¶ 3).

<sup>58</sup> European Social Charter Art E, 2151 UNTS 277, 294 (Oct 18, 1961, entered into force Feb 26, 1965, revised May 5, 1996).

<sup>59</sup> Charter of Fundamental Rights of the European Union Art 21(1), 55 J EU C326 391, 400 (2012).

<sup>60</sup> See *Garib v The Netherlands*, App No 43494/09, 30 at ¶ 2, 34 at ¶ 18, 35–36 at ¶ 24 (ECtHR 2016) (López Guerra and Keller dissenting) (criticizing a government measure for limiting a person’s right to her residence on the basis of being “socioeconomically underprivileged”); *Soares de Melo v Portugal*, App No 72850/14 (ECtHR 2016) (protecting the parental rights of those in poverty).

<sup>61</sup> S Afr Const Ch 2, Art 9(3); Kenya Const Ch 4, Art 27(4).

constitution prohibits discrimination based on “socio-economic condition,”<sup>62</sup> and the 2009 Bolivian constitution on “economic or social condition.”<sup>63</sup> The Jamaican constitution lists “social class” as a ground of discrimination prohibited by the 2011 Charter of Fundamental Rights and Freedoms;<sup>64</sup> and the 2013 Zimbabwean constitution prohibits discrimination based on “*economic* or social status.”<sup>65</sup> In Europe, Cyprus also now lists “social descent,” “wealth,” and “social class” as prohibited grounds of discrimination in a constitutional context.<sup>66</sup>

Courts in various countries have also relied on guarantees of equality, either generally or specific to economic equality, so as to prompt legislatures to adopt policies that are cognizant of the needs of the poor—and in some cases also the middle class, in the face of issues of relative deprivation. The German Constitutional Court, for instance, has for decades scrutinized the legislature’s higher-education policies to ensure that admissions requirements do not unnecessarily or disproportionately exclude those from nonwealthy backgrounds.

In a series of cases on higher education since the 1970s, the German Federal Constitutional Court declared that some forms of social inequality are incompatible with the constitutional order. Legislative reforms and demographic changes in the 1960s and 1970s significantly increased the number of students, particularly from modest social backgrounds, who obtained higher education in public universities.<sup>67</sup> In response, some universities placed limits on the number of students admitted to certain elite fields of study, such as law and medicine.<sup>68</sup> In two decisions in the 1970s, known as *Numerus Clausus I*<sup>69</sup> and *Numerus Clausus II*,<sup>70</sup> the West German Federal Constitutional Court invalidated these limits, invoking three constitutional sources: the right to freely choose an occupation, which it read to include educational opportunities (Article 12(1)); equality before the law (Article 3(1)); and

<sup>62</sup> Ecuador Const Ch 1, Art 11(2).

<sup>63</sup> Bolivia Const Title II, Ch 1, Art 14(II).

<sup>64</sup> Jamaica Const Ch III, Art 13(3)(i)(ii).

<sup>65</sup> Zimbabwe Const Ch 4, Pt 2, Art 56(3) (emphasis added).

<sup>66</sup> Cyprus Const Pt II, Art 28(2).

<sup>67</sup> See Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* 678–79 (Duke 3d ed 2012). In Germany at this time, many students from low-income backgrounds attended secondary schools oriented toward vocational training rather than higher education. *Id.* at 679.

<sup>68</sup> *Id.* at 678–79.

<sup>69</sup> 33 BVerfGE 303 (W Ger Fed Const Ct 1972).

<sup>70</sup> 43 BVerfGE 34 (W Ger Fed Const Ct 1977).

the social-state principle.<sup>71</sup> In *Numerus Clausus I*, the court explicitly declared, “In a social and constitutional state one cannot leave it to the limited discretion of governmental agencies to determine the circle of beneficiaries and to exclude some citizens from these privileges, especially since this would result in the government steering the choice of a profession.”<sup>72</sup> The court’s decision led to a series of reforms, both at the university level and by federal legislative action, to reform admissions procedures to accommodate more students.<sup>73</sup>

The German higher-education cases highlight the extent and limits of constitutional equality as a normative source for leveling up the lower and middle classes. As these cases illustrate, it is not equality alone, but equality taken together with substantive social rights to freely choose an occupation, that the court has read to include the broader social right to higher education. As is well known, in the United States, efforts by civil rights advocates in the late 1960s and early 1970s to equalize education funding by way of the federal Equal Protection Clause failed. In *San Antonio Independent School District v Rodriguez*,<sup>74</sup> the US Supreme Court held that policies disadvantaging children residing in neighborhoods with low property values did not violate the Equal Protection Clause.<sup>75</sup> In *Rodriguez*, the Court found that education was not a fundamental right under the federal constitution.<sup>76</sup> The Court declined to obligate state legislatures to address unequal education when it resulted from purported distinctions of wealth.

### C. Social and Economic Rights

While the US Constitution famously does not include any express guarantee of social rights, an overwhelming majority of constitutions worldwide adopt a long list of social rights guarantees: they protect rights to education, work, health, housing, food, water, and social security.<sup>77</sup> They also frequently adopt a range of

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<sup>71</sup> See generally *Numerus Clausus I*, 33 BVerfGE 303, reprinted in Kommers and Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* at 680–81 (cited in note 67).

<sup>72</sup> Kommers and Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* at 681 (cited in note 67).

<sup>73</sup> *Id.* at 684.

<sup>74</sup> 411 US 1 (1973).

<sup>75</sup> *Id.* at 54–55.

<sup>76</sup> *Id.* at 37.

<sup>77</sup> Mila Versteeg and Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U Chi L Rev 1641, 1681–82 (2014).



labor-rights provisions, including rights to organize, to strike, and even to fair terms and conditions. In the United States itself, state constitutions also frequently protect some subset of these rights, particularly rights to education.<sup>78</sup>

Courts around the world have also interpreted these provisions to be judicially enforceable in a range of contexts.<sup>79</sup> In some cases, this has simply involved enforcing relevant rights as a form of “shield”—supplying an additional reason to uphold government action that, while impinging other rights (such as the right to property or contract), actively furthers or upholds the principles underlying a social right.<sup>80</sup> In others, it has meant giving effect to such rights as protection for individuals against the threat of government interference—such as through actions removing people from land or informal housing, or excluding people from social security or welfare entitlements.<sup>81</sup> But, in some cases, it has also involved courts giving effect to these rights in a more affirmative way, as a basis for requiring additional government action aimed at implementing relevant rights.

In South Africa, for instance, the Constitutional Court of South Africa (CCSA) has interpreted the government’s constitutional duty, under §§ 26(2) and 27(2), to provide access to housing

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<sup>78</sup> *Id.* at 1683–85.

<sup>79</sup> For discussion, see Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* 142–57 (Princeton 2008).

<sup>80</sup> See, for example, *Minister of Public Works v Kyalami Ridge Environmental Association*, [2001] 3 S Afr 1151, ¶¶ 107–08 (CC) (citing the constitutional right to housing in upholding the government’s decision to use a government-owned prison farm to house flood victims, even when it adversely affected neighboring residents’ property values).

<sup>81</sup> See, for example, *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*, [2011] 2 S Afr 104, 133–34 at ¶ 97 (CC) (striking the City of Johannesburg’s housing policy for excluding evicted people from its temporary housing program); *South Africa v Modderklip Boerdery (Pty) Ltd*, [2005] 5 S Afr 3, 22–23 at ¶¶ 45–49, 28 at ¶ 68 (CC) (ordering that tens of thousands of occupiers may continue to occupy private property until the government provides alternative accommodation); *Occupiers of Skurweplaas v PPC Aggregate Quarries (Pty) Ltd*, [2011] 4 BCLR 382, ¶ 3 (S Afr CC) (ordering that the City of Tshwane must provide occupiers with alternative accommodation); *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd*, [2011] 2 S Afr 337, 345 at ¶ 21 (CC) (ordering the City of Tshwane to take certain steps when evicting occupiers, including documenting effects on occupiers and providing alternative accommodation). See also generally *Olga Tellis v Bombay Municipal Corp.*, [1985] 3 SCC 545 (India 1985) (holding that the right to livelihood is included in the right to life and delaying the eviction of persons living in the slums of Bombay); Jo Griffin, *Brazilian Supreme Court Upholds Rights of Indigenous People* (The Guardian, Aug 17, 2017), archived at <http://perma.cc/5CVZ-RY94> (reporting on recent Brazilian Supreme Court cases upholding indigenous land rights).

and health care as requiring the government to show that its actions implementing this obligation are objectively *reasonable*.<sup>82</sup> The CCSA also found that, by failing to take active steps to provide for the needs of the homeless and pregnant mothers with HIV outside certain pilot sites, the government had acted unreasonably and, thus, contrary to its obligations under §§ 26(2) and 27(2).<sup>83</sup> The CCSA has also interpreted socioeconomic-rights guarantees as intersecting with broader commitments to substantive equality, so that in *Khosa v Minister of Social Development*,<sup>84</sup> the CCSA found the exclusion of permanent residents from certain parental and other social grants was unreasonable in terms of both § 27(2) and the guarantee of equality in § 9 of the constitution.<sup>85</sup>

In the United States, for almost five decades since *Rodriguez*, several state supreme courts have been invalidating some property-tax-based funding formulas for public education based on state constitutions.<sup>86</sup> While state constitutional guarantees of equality are frequently invoked in this litigation, the focus has been on substantive guarantees in state constitutions of education rights, or, more precisely, constitutional clauses declaring the state's responsibility for providing education. These education guarantees have led courts to recognize every child's entitlement to a minimally adequate education. Yet, ensuring that the least advantaged members of society can access a minimally adequate education does not necessarily reduce relative advantages of the wealthy. As noted earlier, the new populist politics grows not only out of the deprivations sustained by the undereducated and underemployed, but also the resentment of governing elites whose relative advantage is growing. The enforcement of social rights thus speaks only partially to the threats arising from economic inequality. There is a need to focus beyond the least advantaged, toward investing in a stable working middle class.

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<sup>82</sup> See *South Africa v Grootboom*, [2000] 1 S Afr 46, 67–69 at ¶¶ 38–44 (CC), quoting S Afr Const § 26(2); *Minister of Health v Treatment Action Campaign*, [2002] 5 S Afr 721, 738 at ¶ 30 (CC), quoting S Afr Const § 27(2).

<sup>83</sup> See *Grootboom*, [2000] 1 S Afr at 87 at ¶ 99; *Treatment Action Campaign*, [2002] 5 S Afr at 764–66 at ¶ 135.

<sup>84</sup> [2004] 6 S Afr 505 (CC).

<sup>85</sup> *Id.* at 529–40 at ¶¶ 48–85, citing S Afr Const §§ 9, 27(2).

<sup>86</sup> See, for example, *Serrano v Priest*, 487 P2d 1241, 1244 (Cal 1971); *Abbott v Burke*, 575 A2d 359, 363 (NJ 1990); *Horton v Meskill*, 376 A2d 359, 374–75 (Conn 1977); *Edgewood Independent School District v Kirby*, 777 SW2d 391, 397 (Tex 1989); *Gannon v Kansas*, 319 P3d 1196, 1251 (Kan 2014). But see *Campaign for Fiscal Equity v State*, 655 NE2d 661, 665–66 (NY 1995) (holding that, although school funding inequalities are not unconstitutional, students are entitled to “the opportunity of a sound basic education”).

Take a decision like *South Africa v Grootboom*,<sup>87</sup> which found that it was unreasonable for the South African government to fail to provide any form of emergency relief to those homeless as a result of eviction or other circumstances.<sup>88</sup> A decision of this kind had a very clear capacity to address the needs of the poor, but at the potential expense of low-income workers: if the government chose to fund increased access to emergency housing out of the existing housing budget, this would necessarily mean fewer dollars available for the construction of affordable housing. To address ordinary wage earners' needs, therefore, a decision like *Grootboom* could not simply focus on the needs of the poorest, most vulnerable citizens.<sup>89</sup> It would also need to include a notion of what was minimally adequate to address the needs of ordinary wage earners unable to access affordable housing via the market. This would also have required a distinctly *broad*, more maximalist approach to defining the scope of relevant rights than the court actually adopted in *Grootboom*—for example, stipulating that increased access to emergency housing could not come at the expense of an increased backlog in access to affordable formal housing.

An example of this kind of pro-middle-class housing-rights jurisprudence can also be found in a range of existing contexts. In Colombia, for instance, the constitutional court has delivered several important opinions protecting the middle class from punitive mortgage interest rate increases and from barriers to access to certain forms of healthcare.<sup>90</sup> These decisions have simply turned on a generous understanding of the “social state” principle. Similarly, in Hungary, the constitutional court has delivered a range of decisions protecting the middle class from a sudden drop in social welfare benefits by relying on a generous approach to the principle of legal certainty.<sup>91</sup>

### III. OBSTACLES AND CHALLENGES

In this final Part, we assess the failures of these constitutional responses to disrupt the economic inequalities that are

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<sup>87</sup> [2000] 1 S Afr 46 (CC).

<sup>88</sup> See *id.* at 87 at ¶ 99.

<sup>89</sup> See *id.* at 53 at ¶¶ 2–3.

<sup>90</sup> See David Landau and Rosalind Dixon, *Constitutional Non-transformation? Socioeconomic Rights beyond the Poor* \*10, 13 (working paper, 2017) (on file with authors).

<sup>91</sup> See Laszlo Solyom, *The Hungarian Constitutional Court and Social Change*, 19 Yale J Intl L 223, 233 (1994).

threatening the survival of liberal constitutional democracies. First, the enforcement of equality and nondiscrimination rights raises difficulties regarding the definition of the classes or categories worthy of constitutional protection. Second, the enforcement of social and economic rights tends to focus on alleviating poverty or helping the poor, and therefore insufficiently addresses the destabilizing dynamics resulting from wealth that is perceived to be excessive. Third, the structural and procedural interventions, intended to loosen specific barriers to social or economic reform at one particular historical moment, may work at a different historical moment to facilitate altogether different reform agendas by leaders with authoritarian or antidemocratic tendencies. Finally, all three of these limits point to the fact that significant reductions in economic inequality require the disruption of incumbent power and wealth. Institutional path dependence is difficult to overcome, and the fear of incumbents' resistance and backlash may deter the efforts of those desirous of change. Overlaid with these distinct obstacles are also arguably two interrelated challenges: (1) the challenge posed by "neoliberal" ideology and (2) its commitment to an unmodified form of market-based legal ordering and forces of legal and economic globalization, which often amplify this ideological approach. We do not believe that globalization is inevitably in tension with commitments to economic equality; indeed, there have been notable proposals in recent years to respond to inequality in truly global ways, which necessarily depend on the infrastructure and interconnections created by globalization.<sup>92</sup> But it does pose potential obstacles to change in ways that suggest that constitutional responses to

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<sup>92</sup> For a discussion on proposals to implement a global universal basic income, see, for example, Abhijit Banerjee, et al, *Basic Income Could Transform Society. But First, It Needs to Be Tested* (Poverty Action Lab, May 27, 2017), archived at <http://perma.cc/9VFD-CCZD>; Annie Lowrey, *The Future of Not Working* (NY Times Mag, Feb 23, 2017), online at <http://www.nytimes.com/2017/02/23/magazine/universal-income-global-inequality.html?mcubz=0> (visited Oct 18, 2017) (Perma archive unavailable) (describing the beta test of basic income in Kenya); Michael Faye and Paul Niehaus, *What If We Just Gave Poor People a Basic Income for Life? That's What We're about to Test* (Slate, Apr 14, 2016), archived at <http://perma.cc/3UUA-QJKC> (discussing the testing of basic incomes in Finland and Canada). See also David Noonan, *Is Guaranteed Income for All the Answer to Joblessness and Poverty?* (Scientific American, July 18, 2017), archived at <http://perma.cc/2L5P-Y2PC>.

inequality cannot be divorced from broader legal-economic responses—including in the design of international trade and investment agreements.<sup>93</sup>

#### A. Challenges of Definition

The difficulty of defining the grounds and manifestations of discrimination is familiar from the rich bodies of antidiscrimination doctrine around sex and race inequality. Similarly, even if we agree that a constitutional guarantee of equality should prohibit socioeconomic discrimination, we can expect a wide range of views as to what that would mean. Would it include only policies that explicitly denigrated persons on the basis of their wealth or income? Or would it also include policies that had a disparate impact on those who had less money than others? Would we measure socioeconomic status by the amount of income, or also by wealth? Wealth held by the individual or also by the immediate family? What about education levels and the future potential for earnings growth in a particular job? And so forth. In *Rodriguez*, the US Supreme Court rejected the proposal to make wealth a suspect classification to trigger strict scrutiny for Equal Protection Clause purposes.<sup>94</sup> There, the litigants argued that the policy of basing school funding on local property taxes violated the Equal Protection Clause because it discriminated against the poor.<sup>95</sup> The Court raised doubts about whether the lower levels of funding for schools in neighborhoods with low property values necessarily caused disadvantage to the poor, noting that residing in a geographic zone with low property values does not necessarily make the resident poor.<sup>96</sup> The *Rodriguez* Court's grappling with the definition of wealth discrimination is a vivid illustration of the potential for disagreement about which forms and dynamics of socioeconomic inequality should be constitutionally targeted.

Indeed, liberal political theorists who describe themselves as egalitarian have long disagreed about what to equalize and how to do it. In *A Theory of Justice*, political theorist John Rawls proposed the “difference principle,” which holds that distributive

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<sup>93</sup> See, for example, David Schneiderman, *Constitution or Model Treaty? Struggling over the Interpretive Authority of NAFTA*, in Sujit Choudhry, ed., *The Migration of Constitutional Ideas* 294, 295–96 (Cambridge 2006) (criticizing NAFTA as subverting constitutional self-government, especially forms that are progressive in character).

<sup>94</sup> *Rodriguez*, 411 US at 28–29.

<sup>95</sup> See id at 22–25.

<sup>96</sup> See id at 22–23.

inequalities can be justified only if they make the least advantaged members of society better off than they would be under a strictly equal distribution.<sup>97</sup> Philosopher Ronald Dworkin has argued for equalizing resources,<sup>98</sup> rather than welfare, and others have proposed a norm of equal opportunity for welfare.<sup>99</sup> Economist Amartya Sen and Professor Martha Nussbaum have developed the notion that human capabilities must be optimized through equalization efforts.<sup>100</sup> The “currency” of egalitarian justice can include money, other resources, welfare, or other metrics.

This potential for disagreement is exemplified also by the range of approaches found in statutory regimes that attempt to prohibit some form of economic discrimination. International human-rights law recognizes birth (for example, wealth), property (income), and social origin (or social class or economic status) as potentially prohibited grounds of discrimination. Latin American, African, and Caribbean countries take a variety of approaches to defining relevant forms of constitutional equality protection. And national statutes that prohibit discrimination based on economic status adopt a variety of definitional approaches: a survey of the laws of thirty-five European countries in this context found that ten countries use the concept of “social origin”; thirteen prohibit discrimination based on social “status,” “position,” “condition,” or “class,” and sixteen on either “wealth, income, property, economic situation or financial status.”<sup>101</sup>

## B. Leveling Up or Leveling Down?

Even when constitutional courts enforce equality rights—for example, the right to equal educational opportunity—there is a strong emphasis on leveling up the poor or most disadvantaged members of society to a minimum standard. Once all relevant persons can access that minimum level, it appears coherent to say

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<sup>97</sup> See John Rawls, *A Theory of Justice* 75–80 (Belknap 1971). See also Murray Wesson, *The Limits of Constitutional Justice* (unpublished manuscript, 2017) (on file with authors).

<sup>98</sup> See Ronald Dworkin, *What Is Equality? Part 1: Equality of Welfare*, 10 *Phil & Pub Affairs* 185, 188 (1981). See also Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 *Phil & Pub Affairs* 283, 284–88 (1981).

<sup>99</sup> See, for example, Richard J. Arneson, *Equality and Equal Opportunity for Welfare*, 56 *Philosophical Stud* 77, 77–78 (1989).

<sup>100</sup> See Amartya Sen, *Development as Freedom* 87–90 (Knopf 1999); Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach* 17–20 (Belknap 2011).

<sup>101</sup> See Kadar, *Socio-economic Status as a Discrimination Ground* at \*11 (cited in note 55).

that equal opportunity has been achieved. There are disagreements about what that minimum level is, especially in the context of education. Should it be measured by the amount of money spent per pupil, academic achievement on standardized tests, or a qualitative evaluation of the curriculum and teachers? Even if we were to overcome these disagreements about how the minimum should be defined, another very significant problem is that leveling up the poor to a minimum standard inadequately addresses the destabilizing dynamics of growing economic inequality. As noted earlier, the problem consists not only of growing poverty rates and economic insecurity associated with poverty, but also the decline of the middle class. The problem is not only that the working class is poor, but that there is a growing gap between the working class and the wealthy elite, with diminishing prospects for upward social mobility. In many countries, one of the drivers of rising economic inequality is the massive increase in the share of income and wealth enjoyed by the top 1 percent of income earners. The thorny question then arises as to whether a commitment to reducing economic inequality should focus on leveling down as well as leveling up.

We noted earlier that the authoritarian tendencies growing out of populist politics is partially a consequence of economic inequality. Economic inequality is fueling an illiberal populist-nationalist politics of resentment against liberal elites. The resentment grows not only out of dissatisfaction with a life of deprivation, but also out of a sense that those with wealth and privilege control the public institutions without being adversely affected by their failure.<sup>102</sup> It may be necessary to reduce the wealth and privilege of the wealthiest, perhaps to make them more invested in the fate of the democratic nation that their money and social background enable them to control, to adequately address the real threat of economic inequality to liberal constitutional democracy. When a healthy majority of people are well educated, stably employed, and dependent on the public institutions of a democracy, in which they have a meaningful voice, we reach the point at which we would cease to worry about the threat of economic inequality to liberal-democratic constitutionalism. A growing literature is exploring and defending a stable middle class as a necessary feature of sustainably stable liberal

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<sup>102</sup> See Part I.

constitutional democracies.<sup>103</sup> In addition to leveling up the poor, some degree of leveling down the wealthy governing elites is probably necessary to restore faith in the public institutions of democracy.

Consider, for example, recent efforts to equalize school funding in Kansas through state constitutional litigation. In a line of decisions starting in 2014, the Kansas Supreme Court has invalidated various funding formulas adopted by the state legislature, both on grounds of equality and on grounds of adequate education.<sup>104</sup> The dynamic at issue in these cases is that, when the state cuts funding across the board, districts inhabited by low-income families are more adversely impacted because school districts with wealthier inhabitants can (and did) raise local tax revenues to make up for the decreases. In such situations, the Kansas Supreme Court took the view that, under the two relevant constitutional provisions, “[s]chool districts must have reasonably equal access to substantially similar educational opportunity through similar tax effort.”<sup>105</sup> One of the problems that the Kansas courts grappled with was the inequity that resulted from wealthy districts’ freedom to spend more money on their own children.

Similarly, in California, policy debates are ongoing with regard to the extent to which public school parent associations should be permitted to engage in fundraising for their own schools.<sup>106</sup> In wealthy areas, fundraising by parents raises sufficient funds to pay for assistant teachers and arts programs, particularly when state budget cuts propose cutting these expenditures. Some districts have imposed the requirement that all funds raised by parent fundraising be shared by the district, so as to benefit schools within the district that are largely attended by

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<sup>103</sup> See generally Temin, *The Vanishing Middle Class* (cited in note 1); Hacker and Pierson, *Winner-Take-All Politics* (cited in note 1); Sitaraman, *The Crisis of the Middle-Class Constitution* (cited in note 2); David Madland, *Growth and the Middle Class* (Democracy, Spring 2011), archived at <http://perma.cc/WXA9-ZU52>; Nancy Birdsall, *Middle-Class Heroes: The Best Guarantee of Good Governance* (Foreign Aff, Mar–Apr 2016), archived at <http://perma.cc/4H9B-ZDHT>; Francis Fukuyama, *The Future of History: Can Liberal Democracy Survive the Decline of the Middle Class?*, 91 *Foreign Aff* 53 (2012).

<sup>104</sup> See *Gannon v Kansas*, 319 P3d 1196, 1251 (Kan 2014). See also generally *Gannon v State*, 368 P3d 1024 (Kan 2016); *Gannon v State*, 372 P3d 1181 (Kan 2016); *Gannon v State*, 390 P3d 461 (Kan 2017); *Gannon v State*, 402 P3d 513 (2017).

<sup>105</sup> *Gannon*, 368 P3d at 1043, quoting *Gannon*, 319 P3d at 1175.

<sup>106</sup> See Laura McKenna, *How Rich Parents Can Exacerbate School Inequality* (The Atlantic, Jan 28, 2016), archived at <http://perma.cc/929V-CWEU>.



low-income families.<sup>107</sup> Such rules have led to resistance and opposition by wealthy parents, who understandably want their fundraising efforts to directly benefit their own children's schools.<sup>108</sup> Even in the absence of overt resistance, such rules have had the effect of decreasing the funds donated by parents and available to be shared district-wide. Leveling down is not only resisted, but in some situations, it appears counterproductive because it can lead to lower levels of investment in public institutions than would be made if the wealthy were subject to fewer leveling-down demands, which in turn can worsen the quality of those institutions for the least advantaged.<sup>109</sup>

### C. Unintended Consequences and Counterproductive Consequences

This brings us to a related barrier, which is that efforts to amend or reinterpret constitutions to address economic inequality may be counterproductive to remedying inequality. Popular-initiative procedures, for instance, have in fact often been used to create constitutional changes that impose active barriers to meaningful economic redistribution—by depriving states of the funds necessary actually to achieve relevant reforms. This, for example, has arguably been one consequence of a range of balanced budget amendments adopted by way of popular initiative in various US states.

In addition, by expanding social-rights or equality guarantees and imposing strong, horizontal effects without altering the current market-based distribution of wealth, income, and employment, the enforcement of equality may also have distinctly counterproductive effects. US courts' efforts to achieve racial integration of schools on constitutional equality grounds have not been consistently successful, and some commentators have suggested that they have been counterproductive.<sup>110</sup> After a series of school

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<sup>107</sup> See Dana Goldstein, *PTA Gift for Someone Else's Child? A Touchy Subject in California* (NY Times, Apr 8, 2017), online at <http://www.nytimes.com/2017/04/08/us/california-pta-fundraising-inequality.html?mcubz=0> (visited Sept 5, 2017) (Perma archive unavailable).

<sup>108</sup> See *id.*

<sup>109</sup> See McKenna, *How Rich Parents Can Exacerbate School Inequality* (cited in note 106).

<sup>110</sup> See, for example, Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 346–58 (Oxford 2004); Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 74, 88–91 (Chicago 2d ed 2008).

desegregation cases that established courts' strong powers to order remedies like busing to integrate schools, whites reacted, first with violent resistance,<sup>111</sup> and then by flight to the suburbs.<sup>112</sup> The Supreme Court reacted to this resistance through a line of cases, including *Rodriguez*, in which it retreated from its earlier strong normative view that the Constitution required racial integration. Distinguishing between integration and desegregation, the Court began to say that constitutional equal protection required only desegregation, and not full integration.<sup>113</sup> Building on this notion, the Court declined to hold that the Constitution required any integration across the boundaries between school districts established in suburbs and cities,<sup>114</sup> in which whites and blacks lived as separately as they had during the era of legally mandated segregation.

One might argue that the strong efforts by courts to integrate schools were counterproductive because they led to forms of resistance that further cemented segregation on the ground, which courts then blessed as consistent with constitutional equality. Today, public schools are still not racially or socioeconomically integrated in the United States, and one may wonder whether we would have achieved greater integration over the last sixty years if the federal courts had exercised weaker forms of judicial review initially.

Another example of a counterproductive consequence is found in one of the most common forms of discrimination complaint in countries that do prohibit discrimination based on economic status: complaints by tenants that a landlord has discriminated against them based on socioeconomic status.<sup>115</sup>

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<sup>111</sup> See Brent J. Aucoin, *The Southern Manifesto and Southern Opposition to Desegregation*, 55 Ark Hist Q 173, 178–80 (1996). See also *The Decision the Supreme Court in the School Cases—Declaration of Constitutional Principles*, 84th Cong, 2d Sess, in 102 Cong Rec 4459–61 (Mar 9, 1956) (statement of Sen George) (delivering the Southern Manifesto). Efforts to integrate a high school in 1957 in Little Rock, Arkansas, required armed intervention. See *President Sends Troops to Little Rock, Federalizes Arkansas National Guard; Tells Nation He Acted to Avoid Anarchy* (NY Times, Sept 25, 1957), archived at <http://perma.cc/5PU4-GKF3>.

<sup>112</sup> See James E. Ryan, *Five Miles Away, a World Apart: One City, Two Schools, and the Story of Educational Opportunity in Modern America* 58–59 (Oxford 2010).

<sup>113</sup> See, for example, *Swann v Charlotte-Mecklenburg Board of Education*, 402 US 1, 22–28 (1971).

<sup>114</sup> See *Milliken v Bradley*, 418 US 717, 745 (1974).

<sup>115</sup> See, for example, Kadar, *Socio-economic Status as a Discrimination Ground* at \*16–17 (cited in note 55) (noting that in Québec “the majority of social condition complaints concern the field of housing”). In British Columbia, the scope of the relevant prohibition is in

Discrimination in this context could take two forms: it could involve direct discrimination against low-income groups based on stereotypical assumptions about the likelihood that individuals from that group will prove desirable and responsible tenants, or indirect discrimination based on a preference for tenants with higher earnings (and thus statistical likelihood of being able to meet minimum rental obligations). If a constitution prohibits *indirect* discrimination of this kind in a market economy, this may also lead to distinctly counterproductive results.

If landlords are required by law to lease to a lower-income tenant, when an otherwise identical high-income tenant is available, in most market contexts this will lead landlords to pass on the increased costs (or decrease in expected rental returns) via an increase in average rents.<sup>116</sup> As law-and-economics scholars have long argued, an increase of this kind will also disproportionately harm those that equality law is seeking to help: it will mean that low-income tenants, or those who can least afford an increase, will face higher rental prices in ways that often effectively price them out of the market.<sup>117</sup> State actors, in contrast, have the option of *not* passing on the costs of a nondiscrimination mandate to low-income consumers or workers by drawing on consolidated revenue to meet its constitutional obligations (including in a way that involves giving targeted subsidies or other forms of relief to low-income tenants).

If constitutional norms have horizontal application in a market-based context, this may also mean that court decisions that attempt to redistribute economic resources are actually affirmatively counterproductive. Instead of helping redistribute resources from the wealthy to the poor or middle class, they may end up simply increasing the cost of access to basic services for low-income individuals and households, who can least afford to bear such a cost increase.

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fact directed solely to this kind of case: § 10 of the Human Rights Code prohibits discrimination on the ground of “lawful source of income” in tenancy premises. Ireland recently introduced legislation specific to the housing-law context; the Equality (Miscellaneous Provisions) Act 2015 cements housing assistance as a ground of prohibited discrimination in the Equal Status Act 2000. See *id.* at \*14–16.

<sup>116</sup> This is true in a market with excess demand for rental properties, though not necessarily in one with excess supply.

<sup>117</sup> See Werner Z. Hirsch, *Habitability Laws and the Welfare of Indigent Tenants*, 63 *Rev Econ & Stat* 263, 274 (1981). See also Richard A. Posner, *Some Uses and Abuses of Economics in Law*, 46 *U Chi L Rev* 281, 305–06 (1979); Richard A. Posner, *The Economic Approach to Law*, 53 *Tex L Rev* 757, 763–65 (1975).

#### D. Institutional Path Dependence

Recent work by comparative constitutional scholars notes that some constitutional design choices are “sticky” and resistant to change.<sup>118</sup> On one level, voters’ behavioral biases, including endowment effects, may make them reluctant to support constitutional change. But beyond irrational voter preferences, existing constitutional structures effectively give formal veto powers to certain democratic actors, enabling the systematic frustration of efforts to reform these structures by formal constitutional amendment. The structure of the US Senate is a good example. Article V of the US Constitution makes the equal representation of each state in the Senate effectively unamendable.<sup>119</sup> Thus, an excess of legislative power is disproportionately allocated to smaller states because Article V would require any state whose representation would become unequal to consent to the amendment. Giving smaller states such veto power over the structure of the Senate entrenches their disproportionate power over federal lawmaking.

Even in the absence of formal veto powers allocated by constitutional text, informal features of various constitutional regimes may also prevent any meaningful constitutionalization of economic equality. Legislative efforts at the state and federal level to reform campaign finance, to regulate elections, and to reduce the power of wealthy voters are often stymied by the incumbent power of the wealthy to influence legislative and electoral processes. Corporations and wealthy elites spend vast amounts to defeat legislative and regulatory proposals that might otherwise limit their future influence over electoral politics or their right to spend even more money in the political domain in the future. In the United States, for instance, Congress has thus far failed to approve even quite modest attempts to limit the effective disclosure and reporting requirements.<sup>120</sup> Various super PACs have also

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<sup>118</sup> See Zaria Gorvett, *The Hidden Psychology of Voting* (BBC, May 6, 2015), archived at <http://perma.cc/T4U9-YZQD>; Elizabeth Kolbert, *Why Facts Don't Change Our Minds* (New Yorker, Feb 27, 2017), archived at <http://perma.cc/2AXH-UVWV>. See also generally James R. Zink and Christopher T. Dawes, *The Dead Hand of the Past? Toward an Understanding of “Constitutional Veneration,”* 38 *Polit Behav* 535 (2016).

<sup>119</sup> US Const Art V (stating that “no state, *without its consent*, shall be deprived of its equal suffrage in the Senate”) (emphasis added).

<sup>120</sup> See R. Sam Garrett, *The State of Campaign Finance Policy: Recent Developments and Issues for Congress* \*6 (Congressional Research Service, June 23, 2016), archived at <http://perma.cc/CA45-HZHZ>; Senator Sheldon Whitehouse, *Senators Reintroduce DISCLOSE Act on Anniversary of Citizens United Decision* (Jan 21, 2015), archived at <http://perma.cc/6HQ5-DR8E>.

run public campaigns against these proposals and their congressional sponsors.<sup>121</sup>

Finally, the institutional path dependence of courts enforcing constitutional rights can itself be a barrier to meaningful constitutional change in favor of economic inequality. First, courts may simply lack the capacity to decide cases in ways that bring about inclusive growth and effective redistribution. Courts' efforts to use their traditional strong remedial powers—injunctions ordering redistribution, integration, or other significant institutional change, and high damage awards—have historically been met with resistance and avoidance by those affected by the remedies flowing from constitutional equality pronouncements.<sup>122</sup> Furthermore, reducing economic inequalities in ways that mitigate the threats they engender requires levels of expertise and policy judgment that the judiciary may not have. Reducing economic inequality involves the regulation of zoning, transportation, infrastructure, environmental impacts, access to credit markets, and evaluating social services like education at an astonishingly micro level—including teacher retention policies and pedagogical philosophies in curricula.<sup>123</sup> These are clearly questions well beyond the expertise of most constitutional judges. Compared to legislatures and the executive branch, courts are generally not structured to make broad use of adequate policy experts on these types of questions. Thus, courts' efforts to intervene strongly in these policy problems risk perceptions of incompetence and illegitimacy.

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<sup>121</sup> See Rick Newman, *Big Business Thinks Small on DISCLOSE Act* (US News & World Report, July 17, 2012), archived at <http://perma.cc/4K7L-7GTY>; Josh Harkinson, *GOP Blocks Campaign Finance Bill* (Mother Jones, July 28, 2010), archived at <http://perma.cc/AYM9-9TPY>; Justin Miller, *Charles Koch Bemoans Money in Politics but Lobbies against Reform* (American Prospect, Apr 27, 2016), archived at <http://perma.cc/PD7T-9BMW>; Byron Tau, *Burr to Lead McCarthy Coalitions Effort—Kochs Lobbying on Campaign Finance—Widder, Thompson Launch New Science Lobbying Firm* (Politico, June 9, 2014), archived at <http://perma.cc/AS2B-RQJE>.

<sup>122</sup> See Rosalind Dixon, *Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited*, 5 *Intl J Const L* 391, 406–08 (2007).

<sup>123</sup> Note that, in recent years, constitutional litigation at the state level to enforce rights to adequate education and equal access to education has focused not only on legislative funding formulas, but on a wide range of policies, such as teacher tenure, limits on the number of charter schools, and curriculum. See, for example, *Vergara v California*, 246 Cal App 4th 619, 627 (2016) (reversing a trial-court decision that held that teacher tenure policies in California violated the state constitution's guarantee of free public education). See also generally *Connecticut Coalition for Justice in Education, Inc v Rell*, 2016 WL 4922730 (Conn Super) (striking down a range of state education policies regarding, among other things, teacher pay and training, citing the unconstitutional inequality between poor and rich students resulting from these policies).

Of course, the structure and procedures of constitutional courts are not fixed. One can imagine strengthening formal opportunities for policy experts to weigh in beyond the existing framework of amicus briefs. In addition, the objection to courts' role in reducing economic inequality is most persuasive when assuming courts engage in strong forms of judicial review, combining unequal norm pronouncements and aggressive remedies. However, a growing literature documents the work of many constitutional courts that engage in weaker forms of review, which seek to nudge legislators and other actors to take progressive steps toward the realization of constitutional rights.

In some constitutional systems, the constitution expressly empowers courts to engage in weak forms of review of this kind. It may thus seem relatively unproblematic, in such systems, for courts to play an important role in influencing questions of social and economic policy. In other systems, by contrast, judges and lawyers might assume, consistent with the prevailing understanding, that judicial review, if exercised, must be strong.<sup>124</sup> This, however, is itself a contingent and path-dependent understanding of the appropriate scope and function of the judicial role; courts can always fashion and adopt doctrines that effectively create forms of de facto weak review. Courts can make narrow fact-specific statements of rights, deferred or noncoercive judicial remedies, or weak notions of *stare decisis*.<sup>125</sup>

Therefore, there is nothing stopping courts from engaging in weak forms of enforcement of constitutional equality commitments. Yet whether they do so on the ground may depend on the extent to which the political branches entrust them to do so, which itself depends on the degree to which they have previously shown a willingness to adopt weak approaches to judicial enforcement. Legislatures might be more willing to create judicially enforceable rights to social and economic equality if they trust judges to respect legislative priorities by, for instance, giving legislatures opportunities to remedy rights violations found by the judiciary before judicial remedies are imposed.

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<sup>124</sup> See Mark Tushnet, *Alternative Forms of Judicial Review*, 101 Mich L Rev 2781, 2781 (2003).

<sup>125</sup> See, for example, Kent Roach, *Dialogic Judicial Review and Its Critics*, 23 S Ct L Rev 49, 55–67 (2004); Dixon, 5 Intl J Const L at 410 (cited in note 122).

## CONCLUSION

The growing concentrations of wealth and middle-class compression threaten liberal-democratic constitutional systems. The forms of economic inequality that are becoming commonplace in advanced liberal democracies erode the people's trust in government and erode the legitimacy of shared public institutions. To date, democratic constitutions have offered limited responses to this threat.

In this Essay, we outlined ways in which a constitutional response to economic inequality could potentially be enhanced or expanded in the future: there is a range of structural changes designed to make it easier and more likely that legislatures will adopt pro-inclusive growth policies, or policies designed to promote economic redistribution and rights-based responses that rely on courts to prod legislators into adopting more inclusive or redistributive government policies. These responses can take a variety of forms based on the particular national context. Structural reforms may involve changes to current models of democratic representation so as to give greater voice to the interests of the poor or middle class, either directly or indirectly; changes to campaign finance that seek to shift the balance between poor, wealthy, and middle-class voters in liberal constitutional systems; and structural reforms that make it easier for legislatures to adopt pro-inclusive growth policies, or policies designed to promote economic redistribution. Rights-based responses could ensue if voters require legislatures to address particular topics—or adopt certain kinds of legislation—by the initiative process, and such responses may also involve the expansion of socioeconomic-rights guarantees.

Yet we also noted a range of important obstacles to constitutional change of this kind: issues of conceptual definition and scope, unintended consequences, and institutional path dependence. Defining who exactly should be protected by an expanded constitutional focus on inequality is difficult conceptually and politically. Particularly in liberal societies committed to background norms of market-based ordering, many definitions will also be substantially overinclusive. Procedures that seek to empower legislatures to address certain issues can themselves also be overinclusive in that they allow legislatures to address a range of other topics, including legislation with distinctly antidemocratic aims. Attempts to expand constitutional law to more directly address

economic equality may also be counterproductive in certain circumstances; they may lead voters to use their newfound powers to hamstring rather than empower legislatures to adopt economically redistributive measures, or they may lead courts to adopt rigid or formalistic understandings of equality that then lead to the invalidation rather than promotion of measures that promote greater economic redistribution and inclusion. Or, if constitutional guarantees of equality are understood to apply horizontally, in an unmodified way, this may end up imposing costs on private providers of key goods and services—such as housing, health care, education—in ways that are then directly passed on to consumers, including most notably low-income and middle-income consumers.

What does this mean for the future of liberal constitutionalism? Clearly there are the intellectual resources within the liberal constitutional tradition for responding to the threat posed to it, from within, by rising economic inequality. Yet, liberal constitutions also contain a range of structural features—and intellectual commitments—that make adopting these responses quite difficult or unlikely.

Optimists might suggest that necessity is the mother of invention and that new economic and political challenges will help overcome long-standing obstacles to change in this area. Recent democratic constitutions certainly show a greater willingness to tackle these questions than older liberal constitutions. New constitutions in the Global South, for instance, have gone further in adopting new legislative committees with special responsibility for poverty and express prohibitions on discrimination based on economic grounds than older constitutions in the Global North.<sup>126</sup> European countries and courts have also gone significantly further than other liberal democracies in the Global North in developing constitutional responses to problems of economic inequality.<sup>127</sup>

Those with a more pessimistic bent, however, may view these developments as limited in both scope and success such that there is no real ground to believe that changes of this kind will be

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<sup>126</sup> On the Global North/South debate in comparative constitutional law, see generally, for example, Daniel Bonilla Maldonado, ed, *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa, and Colombia* (Cambridge 2013); Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford 2014).

<sup>127</sup> For a comparison of European and US courts' approaches to education inequality, with regard to the significance of weak review, see generally Julie C. Suk, *Anti-discrimination Law and the Duty to Integrate*, in Hugh Collins and Tarunabh Khaitan, eds, *Foundations of Indirect Discrimination Law* 223 (Hart 2017).



adopted more broadly among liberal constitutions—at least in the Global North, where the threat to liberal-constitution knowledge is, it seems, at a new peak.

We do not purport to provide an answer to this debate or to offer our own view on the likely trajectory of liberal constitutionalism. Both views seem plausible, based on the available current evidence. Determining which prevails must necessarily be the topic of another symposium like this in the coming decades.