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THE PUZZLING ABSENCE OF ECONOMIC POWER IN CONSTITUTIONAL THEORY

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Six years after the financial crash, disparities in economic power are at the forefront of popular debate. Political leaders increasingly express a growing popular sentiment that "the system is rigged" to work for wealthy and corporate interests who have the means to buy influence through campaign funding and then sustain their influence with "armies of lobbyists" in Washington. In a battery of studies over the last decade, political scientists have confirmed populist suspicions and demonstrated that economic elites dominate the American political system. Their findings operate across all areas of policy, and they provide systematic empirical evidence that political influence is tilted in favor of the wealthiest members of American society.

With rare exception, however, the power of economic elites—and the empirical evidence for this power—has been largely invisible from macro-level contemporary debates in constitutional theory. Most of the time, constitutional theorists have in mind a more optimistic view of American politics that both undergirds and serves as an aspiration for their approach to constitutional theory and design. Republicans focus on deliberation toward the public good. Pluralists celebrate (or fear) group participation. Some worry about protecting minority rights from majoritarianism; others criticize the undemocratic structures within the constitutional system. And recently, there have been efforts to bring greater political realism to constitutional theory, particularly by focusing on the intersection of partisan affiliation and constitutional structure. What is puzzling, however, is that none of these approaches engage directly or systematically with the power of economic elites in American politics. And yet, none of these approaches

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can be truly successful—even on their own terms—without grappling with the realities of economic power.

Contemporary constitutional theory needs to be rooted in a more realistic description of the American political process. This Article first argues that leading debates in constitutional theory have failed to engage with the reality of elite economic domination and that without taking into account the role economic elites play in American politics, these theories have serious limitations even on their own terms. Second, it shows that any attempt to design institutions to account for the influence of economic power will face persistent, pervasive, and perverse problems. A central task of constitutional theory going forward must be to overcome or at least mitigate these stumbling blocks. Third, it provides a conceptual framework of possible, albeit imperfect, design options for mitigating elite economic domination. There are a variety of design strategies for grappling with economic power, which cover a wide range in both plausibility and efficacy. Given the persistent problems involved in mitigating the influence of economic power, it is not likely there will be any one single "solution." Constitutional theory will instead need to consider a second-best approach in which multiple suboptimal strategies are adopted, in hopes that the system as a whole is relatively desirable.

INTRODUCTION

Six years after the financial crash, disparities in economic power are at the forefront of popular debate. There is widespread concern about rising inequality and the increasing share of wealth going to the top 1% and 0.1% of people.[1] Outrage over the policy of bailouts for Wall Street banks flows from both the Tea Party right and the Occupy Wall Street left.[2] Political leaders increasingly express a growing popular sentiment that "the system is rigged" to work for wealthy and corporate interests, who have the means to buy influence through cam-

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1 *See generally* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (2014) (noting capitalism's tendency to generate wealth inequality and speculating that this trend will continue in the twenty-first century).

2 Conor Friedersdorf, *Why the Tea Party and Occupy Wall Street Should Cooperate*, THE ATLANTIC (Oct. 11, 2011), http://www.theatlantic.com/politics/archive/2011/10/why-the-tea-party-and-occupy-wall-street-should-cooperate/246413/ [https://perma.cc/WX25-ZVS2].

paign funding and then sustain their influence with "an army of lobbyists" in Washington.[3]

These fears are well founded. In a battery of studies over the last decade, political scientists have confirmed populist suspicions and demonstrated that economic elites dominate the American political system.[4] The wealthy participate more at every stage of the political process—from meeting candidates, to donating, to voting.[5] Elite economic interest groups (business and industry) make up the majority of interest groups and spend the most money on lobbying.[6] And the wealthy's preferences diverge significantly from the majority of Americans.[7] When median-wealth Americans' preferences do make it into law, political scientists have shown that this is almost invariably a function of "democracy by coincidence": median-wealth preferences happen to align with those of the wealthy.[8] When preferences diverge, studies show that majority preferences have effectively no impact on policy outcomes, while the preferences of economic elites and elite economic interest groups are strong predictors.[9] These findings operate across all areas of policy,[10] and they provide systematic empirical evidence that political influence is tilted in favor of the wealthiest members of American society.

Despite the rigor, breadth, and relevance of these findings, the power of economic elites—and the empirical evidence for this power—has been largely invisible from contemporary debates in constitutional theory. To the extent economic issues are a central part of the conversation at the macro-level in constitutional law, they are generally raised by libertarians and

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3 *See* Elizabeth Warren, Speech to the Democratic National Convention (Sept. 5, 2012), http://www.huffingtonpost.com/2012/09/05/elizabeth-warren-speech-text_n_1850597.html [https://perma.cc/QM97-SMXX].

4 See *infra* Part I for a full discussion of the issues in this paragraph.

5 *See* KAY LEHMAN SCHLOZMAN, SIDNEY VERBA & HENRY E. BRADY, THE UNHEAVENLY CHORUS 13–21, 117–33 (2012).

6 *See id.* at 404–11.

7 *See generally* Benjamin I. Page, Larry M. Bartels & Jason Seawright, *Democracy and the Policy Preferences of Wealthy Americans*, 11 PERSP. ON POL. 51 (2013) (finding that the top 1% and .01% of U.S. wealth-holders are less supportive than the remaining American public of progressive taxation, economic regulation, and social welfare programs).

8 *See* Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 573 (2014).

9 *See id.* at 571–73.

10 *See generally* MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 97–123 (2012) (demonstrating inequality in government responsiveness to more- and less-affluent Americans on substantive policy issues, such as foreign policy, economic policy, religious policy issues, and, to a lesser extent, social welfare policy issues).

classical liberals,[11] whose central concern is not disparities in economic power. With some notable exceptions,[12] those who are worried about concentrated economic power have focused at the more micro-level within particular constitutional and regulatory arenas, namely the law of democracy (specifically campaign finance reform),[13] property law and takings,[14] corporate First Amendment rights,[15] and union political participation.[16]

At the macro-level, however, contemporary constitutional theory engages with the fact of elite economic domination in politics less frequently. Most of the time, constitutional theorists seem to have in mind a more optimistic view of American politics that both undergirds and serves as an aspiration for their approach to constitutional theory and design. Republicans focus on deliberation toward the public good.[17] Pluralists celebrate (or fear) group participation.[18] Some worry about protecting minority rights from majoritarianism; others criticize the undemocratic structures within the constitutional sys-

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11 *See generally* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION (2014) (offering a libertarian analysis); DAVID E. BERNSTEIN, REHABILITATING *Lochner* (2011) (same); RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION (2014) (offering a classical liberal perspective).

12 *See generally* Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669 (2014) (arguing that the Constitution embodies an anti-oligarchy principle and tracing the evolution of this principle throughout American history); *see also* Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST.. L. 419, 481-87 (2015) (explaining that highly organized wealth undermines the separation of powers rooted within the American constitutional structure); David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 14–19 (2014) (analyzing and criticizing the neoliberal approach to legal issues).

13 The literature is voluminous. *See generally* LAWRENCE LESSIG, REPUBLIC, LOST 89–127 (2011) (describing the corrosive effects of money on democratic government); ZEPHYR TEACHOUT, CORRUPTION IN AMERICA 227–45 (2014) (tracing the history of what constitutes corruption).

14 *See, e.g.*, Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 767–92 (1999) (discussing the relationship between property takings and egalitarian ideals).

15 *See, e.g.*, Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1495–1513 (2015) (describing the Supreme Court's free exercise jurisprudence as supporting *Lochner*-style economic goals). For a recent assessment of First Amendment theory, see generally ROBERT C. POST, CITIZENS DIVIDED (2014) (discussing the Supreme Court's interpretation of the First Amendment in the context of *Citizens United*).

16 *See* Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 YALE L.J. 148, 182–98 (2013) (calling for a separation of unions' collective bargaining and political functions, thereby enabling unions to more actively engage in political organizing and to act as a voice for the lower and middle classes).

17 *See infra* subpart II.A.

18 *See infra* subpart II.A & section II.C.1.

tem.[19] And recently, there have been efforts to bring greater political realism to constitutional theory, particularly by focusing on the intersection of partisan affiliation and constitutional structure.[20]

What is puzzling, however, is that none of these approaches engage directly or systematically with the power of economic elites in American politics. And yet, none of these approaches can be truly successful—even on their own terms—without grappling with the realities of economic power. For example, one can criticize the anti-majoritarian design of the Senate—the allocation of senators by state, instead of population.[21] But even if the Senate shifted to a population-based electoral regime, it is still the case that a small group of economic elites would dominate American politics and policymaking and that outcomes would diverge from majority preferences. That hardly seems to be the kind of "democratic" system that advocates of such populist proposals aspire to achieve. Or consider the powerfully important idea of "separation of parties, not powers."[22] While divided government along party lines might offer a better check than the Madisonian system of institutional checks and balances, the thesis is limited by an elite economic constraint: if economic elites have captured *both* parties, we should not expect divided government to act as a countervailing check on the exercise of power with respect to issues where elites of both parties share similar views. Other theories all face similar problems. Without accounting for elite economic domination in the production of public policy, leading constitutional theories not only limit their own explanatory and normative power but also fail to engage one of the central features of American politics. Economic power seems to be the elephant in constitutional theory's room: everyone knows it is there, but no one acknowledges it.

This Article seeks to shift constitutional theory's agenda. Contemporary constitutional theory needs to be rooted in a more realistic description of the American political process. The Article makes three primary contributions. First, it argues that recent debates in constitutional theory have largely failed

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19 *See infra* section II.C.2.

20 *See infra* section II.C.3.

21 *See* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 50–62 (2006).

22 *See generally* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006) (asserting that inter-branch competition is best viewed not as a product of constitutional structure but rather as a function of whether government is unified or divided along party lines).

to engage with the reality of elite economic domination, and that without taking into account the role economic elites play in American politics, these theories have serious limitations even on their own terms. Second, it shows that any attempt to design institutions to account for the influence of economic power will face persistent, pervasive, and perverse problems. A central task of constitutional theory going forward must be to overcome or at least mitigate these stumbling blocks. Third, it provides a conceptual framework of possible, albeit imperfect, design options for mitigating elite economic domination. The remedy is not so straightforward as "the separation of economic power," with checks and balances against each other akin to the old mixed government theories (though that is one approach discussed). Rather, there are a variety of design strategies for grappling with economic power, which cover a wide range in both plausibility and efficacy. Given the persistent problems involved in mitigating the influence of economic power, it is not likely there will be any one single "solution." Constitutional theory will instead need to consider a second-best approach in which multiple suboptimal strategies are adopted, in hopes that the system as a whole is relatively desirable.

In bringing economic power back to the forefront of debates in constitutional theory, this Article proceeds in four parts. Part I introduces empirical evidence from political science on the dominance of economic elites over American politics. It starts with studies on the various pathways for elite economic influence: individual participation in politics, economic interest group influence, and the composition of officials. These studies demonstrate that elite economic interests have outsized influence over every aspect of the American political system. It then describes the phenomenon of "democracy by coincidence," in which majority preferences are adopted into policy because elite economic opinion happens to align with public preferences writ large. However, in situations where elite and majority preferences diverge, studies indicate that majority preferences have no explanatory power. Finally, Part I introduces research comparing the success rates of different theories of American politics for predicting policy outcomes. This work demonstrates that elite economic domination is the central driver in American public policy.

Part II shows that leading approaches to and debates in contemporary constitutional theory insufficiently account for the role economic power plays in American politics. The imbal-

ance of economic power is relevant to constitutional theory because a variety of constitutional theories—though by no means all of them—are predicated on normative or positive assumptions that make the reality of elite economic domination problematic for the theory on its own terms. These theories cannot succeed without accounting for the influence of economic elites. Part II considers the Madisonian structure and shows that, whether by design or inadvertence, the conventional structural understanding of the Constitution inadequately addresses the possibility of economic elites dominating politics. It then describes some of the most important contemporary debates in constitutional theory over the last quarter century: interest groups and the countermajoritarian problem, the undemocratic constitution and popular constitutionalism, and political parties and partisanship. It shows how these theories and debates ignore (or are at least inadequate in their treatment of) economic power and how this limits the normative and explanatory power of the theories.

The absence of economic power from these recent debates is truly puzzling. Historically, economic power has been a persistent concern in constitutional theory. For two thousand years prior to the eighteenth century, one of the dominant theories of constitutional structure—mixed government—was predicated on the insight that economic classes would oppress each other unless each had a check against the other. During the Progressive Era, Charles Beard penned a famous tract declaring that the Constitution was framed by economic elites bent on preserving (and promoting) their wealth and status.[23] Questions of economic power were also central during the New Deal era, as commentators and reformers revisited the separation of powers to create a regulatory state strong enough to confront the massive economic power of industrial and corporate capitalism.[24]

Perhaps most puzzling is the absence of discussion along these lines given the recent interest in and documented trends on economic inequality. Since the financial crash, increasing disparities in wealth have been at the forefront of public debate, leading to robust discussion on how to address growing inequality. More strikingly, some economists have even argued that rising inequality is the natural state of capitalism and that the relative levels of economic equality in the mid-twentieth

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23 CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

24 *See* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 7, 36, 46, 120 (1938).

century were exceptional, primarily because the two world wars and Great Depression wiped out the holdings of the wealthiest.[25] If economic inequality is an inevitable feature of capitalism, and since the 1970s, increasingly part of our experience, we need to think about how institutions can be designed to account for this reality.[26]

So why have contemporary constitutional theorists not focused on economic power? While a comprehensive answer would require a thorough intellectual history of the last half-century of constitutional scholarship, Part II concludes by identifying the central reasons why economic power has been absent from contemporary constitutional theory. First, with the triumph of the New Deal, a widespread consensus emerged on the constitutionality of regulating the economy. As a result, constitutional scholars in the late twentieth century focused their attention primarily on issues related to race, gender, and civil rights, leaving economic issues to specific subfields like takings and campaign finance. Second, the absence of economic power seems to have been a function of two intellectual trends: the rise of republicanism and its displacement of materialistic approaches to constitutional history, and the dominance of neoliberalism in economic thought. Third, although economic inequality has been growing since the late 1970s, the rise of highly-indebted two-income households helped prop up the middle class until the 2000s. Finally, inequality simply did not become publicly salient until the 2000s, and more specifically, until after the 2008 financial crisis.

To make progress, constitutional theory needs to grapple with the reality of economic power. But that may be easier said than done. As Part III shows, constitutional theory faces a series of pervasive, persistent, and even perverse problems with respect to institutional designs that correct for imbalances in economic power. First, the inside-outside problem suggests that we cannot seek remedies from within a political system that we have diagnosed as opposed to those remedies. Second, the hydraulics of economic influence, a concept from campaign finance reform, suggests that money will inevitably find a way to influence political decisionmaking whatever design strategies are adopted. Third, the paradox of process, a concept from administrative law, holds that as procedural safeguards increase to preserve democratic access or rights, elite economic

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25 *See* PIKETTY, *supra* note 1, at 290–96, 371–76.

26 *See* David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626, 661–67 (2014) (reviewing PIKETTY, *supra* note 1).

interests will perversely be better able to navigate those complexities. Fourth, political theorists have argued that elections are an inherently aristocratic mode of selecting officials, particularly when compared to lottery systems, posing a challenge to any election-based system. Finally, design options that overtly recognize economic inequality might suffer from the hazard of entrenching economic class and thereby undermine attempts to mitigate class-identification. While Part III notes some possible remedies, these persistent problems show that constitutional theory faces significant challenges in addressing economic power.

The unfortunate result is that institutional design solutions to address economic power are likely to be imperfect. Still, there are ways to mitigate the influence of economic power. Part IV provides a four-category conceptual framework for considering strategies that grapple with economic power in politics, and it provides examples of these strategies from law, theory, and history. The framework identifies ways to constrain economic influence, moving downstream from prevention to mitigation to resignation. The first strategy, *countering economic inequality*, seeks to prevent economic inequality in the first place—prior to its having political influence. It includes a re-imagining of the classic precommitment story of Ulysses, reframed around economic inequality. The second, *safeguarding the political process*, seeks to create a firewall that will protect politics from economic influence, whether ex ante or ex post. The third strategy, *incorporating countervailing powers into the political process*, seeks to level the playing field between the economically powerful and the less powerful, either through what I call "the separation of economic powers" or through what scholars have deemed "leveling up" strategies. The fourth strategy, *bypassing the political process*, attempts to establish institutions such as political parties or the bureaucratic state, which are outside the traditional separation of powers in hopes of preserving a space free of undue economic influence.

The conceptual framework identifies the different avenues for attacking the problem of disparate influence based on economic power, and it provides a different way of looking at current structures and policies—one that emphasizes their ability to restrict undue economic influence. For some, then, the framework's contribution will be suggestive in framing the possible approaches to design and identifying specific historical and theoretical design alternatives. For others, it will be ana-

lytical, providing an anti-economic-power justification for existing structures and policies. More broadly, the fact that each approach in the framework suffers from some persistent problems suggests that constitutional theorists interested in economic power will need to pursue multiple suboptimal strategies, not a single silver bullet, in order to meet the challenge of economic power.

Before turning to Part I, a few brief caveats are also in order. The argument here is not that elite economic preferences are the only factor that matters in American politics. Rather, it is that empirical evidence shows that they are a factor and often the dominant factor. As with the literature on political parties and constitutional theory, the argument is that ignoring a central driver of American politics leads to systematic skewing of the political and constitutional system. A better approach is to engage with these factors with eyes open, rather than hewing blindly to frameworks and theories that are divorced from reality.

A word also on constitutional method and the role of original intent. If one ascribes to the view that the Constitution was intended to serve the interests of economic elites and that such an original intent should be respected today, then the findings of political scientists outlined here simply confirm that the political system is working as intended. For such adherents, this Article may nonetheless be a relevant and helpful contribution, as it provides a critique of leading constitutional theories on their own terms. In contrast, for anyone who is troubled by economic dominance as a normative matter and believes either that the Constitution was not rigged from the start to enable economic elites to dominate political decisionmaking—or that even if it was, that such an original intent should not control today—the Article's contribution is much broader. It suggests that grappling with the power of economic elites needs to be a central task for American constitutional theory.

I
THE REALITY OF ELITE ECONOMIC DOMINATION

In recent years, political scientists have turned to the question of how much influence those with economic power have over American politics and public policy.[27] This still-emerging

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27 *See* Larry Bartels, *Rich People Rule!*, WASH. POST: MONKEY CAGE, (Apr. 8, 2014), http://www.washingtonpost.com/news/monkey-cage/wp/2014/04/08/rich-people-rule/ [https://perma.cc/BT8Q-SZKQ] (noting that this turn in political science is relatively recent). The catalyst, or at least a focal point, for this

but already voluminous literature confirms empirically what the famed political scientist E.E. Schattschneider noted in 1975: in politics, "the heavenly chorus sings with a strong upper-class accent."[28] This Part presents findings from the political science literature on economic elites and the political process. The data show that there are stark differences between economic elites and everyone else in the population. The preferences of economic elites diverge from the rest of the population, and economic elites participate in politics and policymaking to a far greater degree than the rest of the population. Perhaps more troubling is the disparity of influence between economic elites and everyone else. Some political scientists have called our system "democracy by coincidence"[29] because the majority only gets its way when, by coincidence, their preferences happen to align with the views of economic elites.

A few brief methodological notes: First, the political science studies in this area sometimes use different metrics for identifying economic elites. Because a number of important studies use the top 10% income bracket as their metric,[30] I will use that as an unstated default throughout this Part when referring to the "wealthy" or "economic elites." When a study uses a different metric to define "wealthy" or "economic elites," I will specify the study's metric. Second, although the studies cited here are from leading political scientists, widely recognized as some of the most distinguished in their field, some might have questions about their methodologies. As with all interdisciplinary scholarship, I cannot explain or defend every methodolog-

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newfound attention was Larry Jacobs and Theda Skocpol's 2003 to 2005 American Political Science Association Task Force on Inequality and American Democracy. *See* INEQUALITY AND AMERICAN DEMOCRACY ix (Lawrence R. Jacobs & Theda Skocpol eds., 2005). But some scholars had been toiling on this issue for many years prior. *See, e.g.*, G. WILLIAM DOMHOFF, WHO RULES AMERICA? 1–4 (3d ed. 1998); THOMAS FERGUSON, GOLDEN RULE: THE INVESTMENT THEORY OF PARTY COMPETITION AND THE LOGIC OF MONEY-DRIVEN POLITICAL SYSTEMS 8 (1995).

28 E. E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE 34–35 (1975).

29 Gilens & Page, *supra* note 8, at 573.

30 *See, e.g.*, GILENS, *supra* note 10, at 77; Martin Gilens, *Policy Consequences of Representational Inequality*, *in* WHO GETS REPRESENTED? 247 (Peter K. Enns & Christopher Wlezien eds., 2011) [hereinafter Gilens, *Policy Consequences*]; Martin Gilens, *Preference Gaps and Inequality in Representation*, PS: POL. SCI. & POL. 335, 337–40 (2009) [hereinafter Gilens, *Preference Gaps*]; Martin Gilens, *Inequality and Democratic Responsiveness*, 69 PUB. OPINION Q. 778, 783–93 (2005) [hereinafter Gilens, *Democratic Responsiveness*]; *see also* ANDREW GELMAN ET AL., RED STATE, BLUE STATE, RICH STATE, POOR STATE: WHY AMERICANS VOTE THE WAY THEY DO (2008); BENJAMIN I. PAGE & LAWRENCE R. JACOBS, CLASS WAR? WHAT AMERICANS REALLY THINK ABOUT ECONOMIC INEQUALITY 14 (2009); Jeffrey A. Winters & Benjamin I. Page, *Oligarchy in the United States?*, 7 PERSP. ON POL. 731 (2009).

ical choice without repeating a decade's worth of books and articles. Even with the data's inevitable limitations in each study, a consistent pattern emerges across them all. Economic elites have disproportionate influence over American public policy.

A. Preferences and Participation

Average citizens' views do not always align with those of the economic elites. When political scientists have compared the preferences of the wealthiest Americans—the top 1% and 0.1%—to the general public, they find stark differences.[31] As people get wealthier, they become more opposed to regulation and more interested in cutting domestic social programs like Social Security, education, food stamps, and jobs programs.[32] The wealthy think deficits are one of the most important problems facing the country, compared to the general public, which is more worried about unemployment and education.[33] The wealthiest Americans tend to be far less supportive of increasing the Earned Income Tax Credit or making sure that the minimum wage can keep workers above the poverty line.[34] By significant majorities, the general public strongly supports spending whatever is necessary to have good public schools, and they want to make sure everyone who wants to attend college can do so; only a minority of the wealthiest Americans agree with these goals.[35] The general public is also far more supportive of efforts to regulate Wall Street, oil companies, and big corporations than are the wealthiest Americans.[36]

Divergences in policy preferences extend to the individuals and interest groups that participate in politics as well. According to a study of the economic backgrounds of elected officials, lawmakers who are from different economic backgrounds "tend to think, vote, and advocate differently on economic issues."[37]

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31 *See generally* Page, Bartels & Seawright, *supra* note 7. The rest of the citations in this paragraph are all based on comparisons to the top 1% and 0.1% in income.

32 *Id.* at 64–65.

33 *Id.* at 55.

34 *Id.* at 57.

35 *Id.*

36 *Id.* at 61.

37 NICHOLAS CARNES, WHITE-COLLAR GOVERNMENT: THE HIDDEN ROLE OF CLASS IN ECONOMIC POLICY MAKING 3 (2013). In order to determine a legislator's class, Carnes focused on occupational background rather than on income, education, wealth, or other factors. He categorized occupation prior to elected office into ten categories and also grouped occupations into broader blue-collar and white-collar categories. *Id.* at 17–21.

Similarly, political scientists have shown that views on economic issues diverge between those who are inactive, those who vote, those who volunteer on campaigns, and those who donate to campaigns.[38] With greater participation (which correlates with economic class), people become more hostile to economic and social policies that benefit the working class. Interest group preferences also diverge substantially from the views of the general public.[39] Studies conclude that interest group views are almost totally uncorrelated to the preferences of average citizens and business groups' preferences have a negative correlation.[40]

Still, divergent preferences between economic elites and everyone else might not matter much to political outcomes if those who participate in politics are drawn from the general public. But here too political scientists have demonstrated that participation is skewed toward elites. Those with a higher socioeconomic status are more likely to vote, engage in political activities, and especially donate to political campaigns.[41] At the top 1%, levels of access and participation are particularly notable, with more than half of this group contributing to campaigns and contacting government officials.[42] Wealth-based political inequality holds even when a variety of other factors are taken into account. For example, stratification by wealth occurs even when controlling for participation in non-political social activities (e.g., religion),[43] cohort, generational, and life cycle effects, and race.[44] It turns out that the median voter is not the same as the "median campaign volunteer, the median campaign donor, or—because contributors give such different amounts—the person giving the median dollar."[45]

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38 *See* SCHLOZMAN, VERBA & BRADY, *supra* note 5, at 126–33.

39 *See* FRANK R. BAUMGARTNER ET AL., LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY 16 (2009).

40 *See* Gilens & Page, *supra* note 8, at 570–71, 574. Indeed, preferences of individual economic elites and business groups are even misaligned: the former often want less government action, whereas the latter sometimes seek support from the government for their industry. *Id.* at 571.

41 *See* SCHLOZMAN, VERBA & BRADY, *supra* note 5, at 122–26, 152–59. Schlozman, Verba, and Brady use socioeconomic status, for which they created their own measure, giving equal weight to family income and education level. *Id.* at 123 n.9. They explicitly note the similarities of their findings with other measures, particularly those that consider the relationship between income and voting. *Id.* at 156 n.16.

42 Page, Bartels & Seawright, *supra* note 7, at 54.

43 *See* SCHLOZMAN, VERBA & BRADY, *supra* note 5, at 165–66. These authors rely on socioeconomic status. *See id.* at 123 n.9

44 *See id.* at 199, 224, 228, 579.

45 *Id.* at 233.

These disparities in participation also extend to interest groups. Under the classic political science approach to interest group politics,[46] the barriers to entry into politics are sufficiently low that the interest group environment is fluid. Interests spring up easily, entering and exiting politics as relevant policy debates come to the fore. Early challengers to this rosy view of interest group theory suggested that the interest group ecosystem was biased in favor of businesses and the well-to-do,[47] and more broadly, pointed out that collective action problems make it difficult for diffuse groups to organize themselves and participate.[48]

Looking empirically at tens of thousands of lobbying organizations in Washington, D.C., over a thirty-year period, Professors Kay Schlozman, Sidney Verba, and Henry Brady have demonstrated that Schattschneider was right: the interest group environment is, in their play on his classic phrase, an "unheavenly chorus," skewed toward business and other elite economic interests. More than half of organizations that are active in Washington represent business interests.[49] Only about one in eight organizations are voluntary associations made up of individuals.[50] Very few—less than 1%—of organizations are focused on the poor and social welfare.[51] Looking within categories, the playing field remains tilted. Blue-collar workers make up 24% of the population but only 6.9% of membership organizations and 1.1% of all economic organizations.[52] In contrast, executives (a category they separate from professionals and general white-collar workers) make up 9.6% of the population but are represented by 13.9% of membership organizations and a whopping 73.9% of all economic organiza-

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46 I follow Schlozman, Verba, and Brady, *id.* at 267–77, in presenting the classic approach with broad strokes. For precise statements of the theory, see ARTHUR F. BENTLEY, THE PROCESS OF GOVERNMENT 218 (1908) (describing interest groups as being "all knit together in a system" because they "brace each other up, hold each together, move forward by their interactions, and in general are in a state of continuous pressure upon one another"); ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 145 (1956) ("I define[ ] the 'normal' American political process as one in which there is a high probability that an active and legitimate group in the population can make itself heard effectively at some crucial stage in the process of decision."); DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS 503–16 (1951) (describing the prevalence of and interactions amongst both unorganized and organized political interest groups).

47 *See* SCHATTSCHNEIDER, *supra* note 28, at 35.

48 MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION (1965).

49 SCHLOZMAN, VERBA & BRADY, *supra* note 5, at 322.

50 *Id.* at 319.

51 *Id.* at 331.

52 *Id.* at 329. Schlozman, Verba, and Brady use census data to categorize occupations within the broader population. *Id.* at 328.

tions.[53] Breaking up the categories by sector leads to similar results. In higher education, for example, 50% of research universities that award doctoral degrees are represented in Washington, compared to 2% of two-year schools.[54] This is not due to two-year schools having no stake in public policy: two-year schools rely heavily on the Federal Pell Grant Program, just as research universities rely on federal research dollars. Other studies have shown that even *within* groups that advocate for the disadvantaged, more emphasis is placed on supporting the sub-groups that are better off rather than those that are worse off.[55]

What about elected officials themselves? If they are drawn from the people, rather than the economic elites, then perhaps they will advocate for turning average Americans' preferences into public policy. Unfortunately, the data does not support this hypothesis. Less than 2% of members of Congress themselves had working-class jobs before entering public life, and only 20% were raised in working-class households.[56] As of 2014, the median net worth of members of Congress is above a million dollars.[57] In contrast, in 2013, the median net worth of an American household was $56,335.[58] The data look better at the state and local level but not by much. Only 3% of state legislators are blue-collar workers themselves and only 9% of city council members.[59] This is nothing new. As Nicholas Carnes concludes in his study of legislators, "working-class Americans—who have made up more than 50 percent of the labor force for at least the last hundred years—have never made up more than 2 percent of Congress."[60]

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53 *Id.* at 329.

54 *Id.* at 372.

55 DARA Z. STROLOVITCH, AFFIRMATIVE ADVOCACY: RACE, CLASS, AND GENDER IN INTEREST GROUP POLITICS 80–96 (2007).

56 CARNES, *supra* note 37, at 5. For a discussion of Carnes's methodology, see *id.* at 17–21.

57 Russ Choma, *Millionaires' Club: For First Time, Most Lawmakers Are Worth $1 Million-Plus*, CTR. FOR RESPONSIVE POLS. (Jan. 9, 2014), http://www.opensecrets.org/news/2014/01/millionaires-club-for-first-time-most-lawmakers-are-worth-1-million-plus/ [https://perma.cc/7PH3-4L9Q].

58 Fabian T. Pfeffer, Sheldon Danziger & Robert F. Schoeni, *Wealth Levels, Wealth Inequality, and the Great Recession*, RUSSELL SAGE FOUND., June 2014, http://web.stanford.edu/group/scspi/_media/working_papers/pfeffer-danziger-schoeni_wealth-levels.pdf [https://perma.cc/5PMF-FHL8]; Anna Bernasek, *The Typical Household, Now Worth a Third Less*, N.Y. TIMES, July 27, 2014, at 6.

59 CARNES, *supra* note 37, at 5.

60 *Id.* at 7 (citations omitted). For a discussion of Carnes's methodology, see *id.* at 17–21.

Political scientists continue to debate whether participation is a causal factor in shaping policy outcomes,[61] but they share the view that the composition of those who participate is skewed. As the leading study concludes, "the evidence indicates unambiguously that neither active individuals nor active organizations represent all politically relevant segments of society equally."[62]

B. "Democracy by Coincidence"

Even with divergent preferences and differences in participation, it might be the case that there are no disparities in influence between economic elites and the general public. That is, even when there are divergent preferences and economic elites advocate for their preferred policies, representatives might nonetheless follow the will of the majority when there are disagreements. Political scientists have tested this possibility—and the results are not encouraging. In a well-known study of voting patterns in the Senate, Larry Bartels finds that senators were more responsive to affluent constituents than to constituents of modest means, and strikingly, that the views of constituents in the bottom third of the income distribution had almost no impact whatsoever on the senators' behavior.[63]

Martin Gilens has conducted the most comprehensive study of the relationship between wealth and political influence, based on an analysis of public policy over two decades. He finds that government policy across all policy areas reflects the policy preferences of the affluent but is unaffected by the views of the poor and middle class.[64] Gilens assessed the preferences of people at the tenth, fiftieth, and ninetieth percentiles in the income distribution in comparison to policy outcomes in government. As the divergence of preferences increases between the tenth and ninetieth percentile, there are massive drops in the link between constituent preferences and policy

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61 *Compare* LARRY M. BARTELS, UNEQUAL DEMOCRACY 275 (2008) ("Income-related disparities in turnout simply do not seem large enough to provide a plausible explanation for the income-related disparities in responsiveness documented here.") *with* SCHLOZMAN, VERBA & BRADY, *supra* note 5, at 118 ("[A]ctivity by both citizens and organized interests makes a difference for public policy, and, if anything, public officials are disproportionately responsive to the affluent and well-educated members of their constituencies.").

62 SCHLOZMAN, VERBA & BRADY, *supra* note 5, at 118.

63 BARTELS, *supra* note 61, at 253–54. Bartels used National Election Studies data and, to correct for underrepresentation that is common in telephone surveys, post-stratified the sample. *See id.* at 254 n.9.

64 GILENS, *supra* note 10 and accompanying text; Gilens, *Policy Consequences*, *supra* note 30, at 247.

outcomes for those who are not wealthy. When the gap in preferences between rich and poor increases from less than five percentage points to more than ten percentage points, the poor essentially lose all of their influence over policy, whereas the wealthy retain their influence.[65] One might think this is just majoritarianism at work: the poor, after all, could be outvoted by the wealthy and middle class. But the same effect operates for those at the fiftieth income percentile and those at the seventieth income percentile.[66] Gilens even tested coalitions in which the preferences of the poor and middle class are aligned against those of the wealthy, and he still found that policy was unresponsive to the lower-income groups' combined power.[67] Gilens's findings operate across all areas of policy: foreign policy,[68] economic and tax policy, religious/values issues, and social welfare policy, though the effects vary somewhat by area.[69] Interestingly, the data looks the same even when taking education into account. As the level of education goes up, so too does policy responsiveness, but increases in income far outstrip the gains from education. Someone at the ninetieth percentile in income and tenth percentile in education has about the same influence as someone at the ninetieth percentile for both income and education; but a person at the ninetieth percentile in education and tenth percentile in income has about half as much policy influence.[70]

Policy responsiveness to the general public also changes based on the proximity of presidential elections, but elections do not fully counteract the influence of economic elites. During presidential election years, policies are more consistent with the views of all Americans than in years without a presidential election—but they are still the *most* responsive to the views of

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65 GILENS, *supra* note 10, at 79–81; Gilens, *Policy Consequences*, *supra* note 30, at 250–52.

66 GILENS, *supra* note 10, at 79–81; Gilens, *Policy Consequences*, *supra* note 30, at 250–53.

67 *See* GILENS, *supra* note 10, at 83–84.

68 Scholars have researched foreign policy issues in detail and found similar effects. *See* BENJAMIN I. PAGE & MARSHALL M. BOUTON, THE FOREIGN POLICY DISCONNECT: WHAT AMERICANS WANT FROM OUR LEADERS BUT DON'T GET 170–73, 219–20 (2006); Lawrence R. Jacobs & Benjamin I. Page, *Who Influences U.S. Foreign Policy?*, 99 AM. POL. SCI. REV. 107, 114–17 (2005). For evidence of a divergence between leaders and ordinary Americans in foreign policy preferences, see generally Benjamin I. Page & Jason Barabas, *Foreign Policy Gaps Between Citizens and Leaders*, 44 INT'L STUD. Q. 339 (2000).

69 *See* Gilens, *Policy Consequences*, *supra* note 30, at 256–73; *supra* note 10 and accompanying text.

70 *See* GILENS, *supra* note 10, at 93–95.

the affluent.[71] In midterm election years, however, there is no such effect.[72] While this finding might be somewhat promising, suggesting that elections are a check on the influence of the wealthy, policies that are adopted during presidential election years are more likely to be cut over time than those adopted during years without a presidential election.[73] In other words, policies most likely to align with the preferences of non-affluent voters are first on the chopping block when non-affluent voters lose the influence that comes from an imminent presidential election.

Scholars have suggested that male representatives' views on women's issues are shaped by whether they have daughters, and recent work in political science has now tested whether economic class shapes legislators' views.[74] In the most extensive study on the topic, Nicholas Carnes concludes that "[o]n the important economic issues of the day, members of Congress routinely vote with class."[75] Controlling for party, age, race, gender, religion, constituent demographics, ideology, donor base, and margins of victory, Carnes shows that class is significant—making a bigger difference than even race, income differences in constituents, gender, and union membership among constituents.[76] Only partisan affiliation is more significant. Had Congress truly been representative of the class background of the people, Carnes finds, major economic legislation passed between 1999 and 2008 would have failed, including the 2001 Bush tax cuts, laws limiting liability for business from the Y2K problem, and the Gulf of Mexico oil drilling legislation.[77]

Carnes's data raise the possibility that partisanship might mitigate class-bias. It is a reasonable hypothesis that American politics features two parties, one that aligns itself with the wealthy and one with the middle class. Political scientists have

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71 *Id.* at 163.

72 *Id.* at 171–72.

73 *See id.* at 173–74, 196 n.24 (describing findings based on data from Christopher R. Berry, Barry C. Burden & William G. Howell, *After Enactment: The Lives and Deaths of Federal Programs*, 54 AM. J. POL. SCI. 1 (2010)).

74 *See* Ebonya L. Washington, *Female Socialization: How Daughters Affect Their Legislator Fathers' Voting on Women's Issues*, 98 Am. Econ. Rev. 311, 319–28 (2008) (finding that legislators with daughters have a greater propensity to vote to support women's rights, particularly reproductive rights). The same effect has been found with smokers and pro-tobacco voting records. *See* BARRY C. BURDEN, PERSONAL ROOTS OF REPRESENTATION 62–64 (2007).

75 CARNES, *supra* note 37, at 27. For a discussion of Carnes's methodology, see *id.* at 17–21.

76 *Id.* at 36–38.

77 *Id.* at 113–20.

considered the relationship between wealth and party, and while there is some truth to this hypothesis, it is incomplete. In their study of the top 1%, Page, Bartels, and Seawright found that wealth had an effect on preferences independent of party and that wealthy Democrats were "more conservative than Democrats in the general population."[78] When it comes to policy responsiveness, political scientists have found that *both* parties are more responsive to the wealthy than to ordinary Americans, but Republicans are even more responsive to the affluent than are Democrats.[79] In fact, a shift in affluent preferences can completely neutralize the effects of partisanship.[80]

Surprisingly, sometimes partisan power is linked to a *reduction* in responsiveness to all groups. Gilens finds that the larger the Senate seat majority for a party, the lower the link between policy preferences and policy outcomes of constituents (though the affluent still benefit more than middle income people).[81] When either party controls during unified government, responsiveness plummets.[82] It appears that when parties gain complete control, they unmoor themselves from constituent preferences and increasingly work to advance the party's own goals. This does not mean that divided government corrects for the effects of wealth. Party polarization combined with gridlock from divided government is more responsive to the general public, but only at the cost of blocking a substantial amount of policy change because only policies that are uncontroversial can run the legislative gauntlet.[83] Moreover, when partisan gridlock combines with divergent preferences, the ninetieth income percentile *still* has the most influence over outcomes.[84]

"[U]nder most circumstances," Martin Gilens concludes, "the preferences of the vast majority of Americans appear to have essentially no impact on which policies the government does or doesn't adopt."[85] Rather, "for Americans below the top of the income distribution, any association between prefer-

78 Page, Bartels & Seawright, *supra* note 7, at 66.

79 *See* BARTELS *supra* note 61, at 268–69 ("Republican senators were about twice as responsive as Democrats to the views of high-income constituents."); GILENS, *supra* note 10, at 181 ("[T]he preference/policy link under maximum Republican control is about twice as strong as under maximum Democratic control.").

80 *See* BARTELS *supra* note 61, at 264.

81 *See* GILENS, *supra* note 10, at 215–17.

82 *See id.* at 229.

83 *See id.* at 194, 211.

84 *Id.* at 212–13.

85 *Id.* at 1.

ences and policy outcomes is likely to reflect the extent to which their preferences coincide with those of the affluent."[86]

C. Theories of American Politics

What does all this data mean for how we envision American politics? Traditionally, political science has been divided into four basic theories, two focused on individuals and two on interest groups.[87] Majoritarian Electoral Democracy focuses on the will of average citizens, including median voter theory and majoritarian democratic theorists.[88] Economic Elite Domination suggests that people with high wealth (or on some theories, high socioeconomic status[89]) are the primary driver of American public policy.[90] Majoritarian Pluralism takes the optimistic view of interest group activity, suggesting that the "wants or needs of the average citizen tend to be reasonably well served by the outcomes of interest-group struggle"[91] in part because there are many interest groups, they can enter and exit politics, and the winners of this interest group struggle are not always the same. Finally, Biased Pluralism takes the pessimistic view of interest group politics, arguing that politics is dominated by business and elite economic interest groups.[92]

In an important article, Gilens and Page tested these four theories to see how well they explain policy outcomes across a twenty-year period.[93] Unlike most previous work, which compares a single theory to policy outcomes, Gilens and Page use a new dataset and multivariate analysis to test the theories against each other. Their conclusion: "economic elites and organized groups representing business interests have substantial independent impacts on U.S. government policy, while mass-based interest groups and average citizens have little or no independent influence."[94]

In particular, the chances of policy change are "nearly the same . . . whether a tiny minority or a large majority of average citizens favor a proposed policy change."[95] Indeed, Gilens and

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86 *Id.* at 83.
87 Gilens & Page, *supra* note 8, at 564.
88 *See id.* at 565–66.
89 *See* C. WRIGHT MILLS, THE POWER ELITE 11–15 (1956) (describing these individuals as "people of the higher circles").
90 Gilens & Page, *supra* note 8, at 566.
91 *Id.* at 567. For the classics from a majoritarian pluralist perspective, see *supra* note 46 and accompanying text.
92 *See* Gilens & Page, *supra* note 8, at 567–68.
93 The dataset covered from 1981–2002. *Id.* at 568.
94 *Id.* at 565.
95 *Id.* at 572.

Page note that their findings cannot test the influence of different levels of economic elites because they test wealth only at the ninetieth income percentile, rather than all the way to the ninety-ninth percentile.[96] With respect to interest groups, they find that while business and non-business groups have about the same influence on a group for group basis, business groups have "numerical dominance and relative cohesion."[97] Their power is largely a function of their numerical dominance.[98]

While many in political science and law view majoritarian electoral democracy or majoritarian pluralism as their archetypical image of American politics,[99] the data suggest that that economic elites—individuals and business interest groups—dominate. Elites' preferences diverge from those of the average American (and the majority of Americans), they participate at much greater rates in all aspects of politics, and their preferences—not those of average Americans—have an impact on policy change.

To be sure, this does not mean that the wealthy *always* get their preferences enacted into law. Given the barriers to making policy, there is a status quo bias in seeking policy change,[100] and it is often the case that the wealthy and business interest groups may seek to preserve the status quo by blocking reform rather than to advance policy change.[101] But the fundamental reality of our system is that it is not best characterized by majority rule but rather by the dominance of economic elites.

II
THE PUZZLING ABSENCE OF ECONOMIC POWER IN CONTEMPORARY CONSTITUTIONAL THEORY

Despite the empirical evidence, contemporary debates in constitutional theory have largely been silent as to the role of economic power. This absence is at once puzzling and problematic. Without accounting for the influence of economic elites over policymaking, leading constitutional theories in some cases are incomplete, and in other cases, fail to achieve their stated goals. Economic power is relevant to constitutional theory because constitutional theory inevitably relies on nor-

96 *See id.* at 574.
97 *Id.* at 575.
98 *See id.*
99 For a discussion of the legal literature, *see infra* Part III.
100 *See* GILENS, *supra* note 10, at 73–74.
101 *See* BAUMGARTNER ET AL., *supra* note 39, at 7; GILENS, *supra* note 10, at 133.

mative assumptions to guide design. My aim here is not to adopt or advocate for a normative theory and then argue that the empirical evidence of elite economic domination runs counter to that theory. Rather, my argument is that elite economic domination is a problem for a *variety* of constitutional theories *on their own terms.* In other words, the normative and positive foundations of many constitutional theories are inconsistent with a regime in which economic elites in fact dominate politics.

This Part opens by noting how economic power disparities pose a significant problem for many (but not all) of the prominent normative theories that undergird constitutional structure. It then turns to the Madisonian theory of the Constitution. Madisonian theory claims to prevent the dominance of factions. But whether by design or inadvertence, it is inadequately attentive to the possible ways in which minority factions—particularly economic elites—can capture government power. Finally, this Part considers contemporary debates in constitutional theory: interest group politics, the countermajoritarian difficulty and the undemocratic constitutional structure, political party and partisan theories, and popular constitutionalism. These theories, which often have both explanatory and aspirational goals, are likewise inattentive to the possibility of political dominance by economic elites. But without attention to the role economic power plays in modern politics, these theories are either incomplete or fail on their own terms.

A. The Relevance of Economic Power for Constitutional Theory

Why is economic power relevant to debates in constitutional theory? Constitutional theory is inevitably based on some set of normative assumptions, a theory about how the constitutional structure should be designed. For many—but certainly not all—of these theories, the reality of elite economic domination in American politics is problematic. To be successful, these theories (and any debate or proposal rooted in them) must at least grapple with the problem of elite economic domination. My purpose here is not to adopt any one of these normative theories as my baseline. Rather, it is to point out that each of these theories suffers from limitations and flaws because it ignores the reality of economic power.

Consider a few of the leading normative theories undergirding American constitutional design. Republicanism has a

number of adherents, with variations along dialogic,[102] pluralist,[103] Aristotelian and communitarian,[104] and non-domination[105] lines. Despite these variations, the broad theory, derived from seventeenth and eighteenth century political thought,[106] focuses on representatives engaging in reasoning about the common good. Republican leaders are meant to be "disinterested," a term that in republican theory denotes that they are "free of interested ties and paid by no masters."[107] On this theory, legislators who act to serve the economic elites (or to serve their own elite economic interests) corrupt republican government.[108] Republicans must therefore be deeply concerned about the problem of economic elites dominating government, particularly when it serves interests that diverge from the public good.

Economic domination is also a problem for majoritarian, democratic, and optimistic pluralist theories. If the aspiration for the constitutional system is that it reflects popular will, either by aligning with majority preferences as some populist theories suggest,[109] or by means of equal political participation as some democratic theories argue,[110] then a system that only reflects the preferences of a limited number of economic elites is obviously problematic. If a small minority's preferences dominate policy outcomes, then the structure is hardly majoritarian or democratic under these theories. Optimistic pluralist theories assume that interest group pluralism leads not to consistent dominance of one group, but rather to the

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102 *See* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1524–32 (1988). For the foundational statement of Michelman's views on Republicanism, see generally Frank I. Michelman, *The Supreme Court, 1985 Term-Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

103 *See* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 32–35 (1985).

104 *See, e.g.*, LIBERALISM AND ITS CRITICS 5–7 (Michael J. Sandel ed., 1984) (broadly describing the communitarian critique of rights-based liberalism).

105 *See* PHILIP PETTIT, ON THE PEOPLE'S TERMS 69–74 (2012) (describing the concept of "non-domination" and suggesting that it bolsters the legitimacy of republican governance); PHILIP PETTIT, REPUBLICANISM 65–73, 92–97 (1997).

106 *See generally* J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT (1975) (describing the development of republicanism in the history of political thought); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 46–90 (1969) (tracing the development of American republicanism).

107 GORDON S. WOOD, REVOLUTIONARY CHARACTERS 16 (2006).

108 *See* Gordon S. Wood, *Interests and Disinterestedness in the Making of the Constitution*, *in* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 69, 77–81, 103–09 (Richard Beeman et al. eds., 1987).

109 *See generally* RICHARD D. PARKER, HERE, THE PEOPLE RULE 93–115 (1994) (advocating a populist approach to constitutionalism).

110 The literature on democratic theory is huge. But for the most relevant, recent legal contribution, see LEVINSON, *supra* note 21, at 50–62.

public good either via rotating victors or deliberative compromise.[111] Here too, the difficulties of elite dominance are evident: if one small faction consistently dominates, then the constitutional system looks more like oligarchy than pluralism.

Theories of representation fare little better. Political theorists have offered a variety of ways to understand representation,[112] but since the goal here is not an extended normative defense of any particular theory, just consider the two major theories of representation in Hanna Pitkin's influential typology.[113] First, representation can mean "standing for" the one who is represented, such that the representatives describe or resemble those who are represented.[114] Thus, John Adams wrote in 1776 that the legislature "should be an exact portrait, in miniature, of the people at large, as it should think, feel, reason, and act like them."[115] James Wilson had a similar view during the Constitutional Convention, reportedly saying that the "Legislature ought to be the most exact transcript of the whole Society."[116] The reality of elite economic rule is self-evidently a problem for those who support a descriptive theory of representation. When the representatives are disproportionately taken from the economic elites, they simply cannot be said to resemble those they represent in the manner that this approach suggests.

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111 *See* DAHL, *supra* note 46, at 145–46; TRUMAN, *supra* 46, at 503–16. In the legal literature, see generally Sunstein, *supra* note 103, for a discussion of both interest group theory and republicanism.

112 For the most influential account, *see generally* HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 60–143 (1967) (distinguishing between representation as "standing for" and "acting for"). For other typologies, see Philip Pettit, *Varieties of Public Representation*, *in* POLITICAL REPRESENTATION 61, 65 (Ian Shapiro et al. eds., 2009) (arguing that representation can be indicative, directed, and interpretive); MÓNICA BRITO VIEIRA & DAVID RUNCIMAN, REPRESENTATION, at x (2008) (defining three types of representation: where representatives are told what to do, decide what to do, or copy what to do); Quentin Skinner, *Hobbes on Representation*, 13 EUR. J. PHIL. 155, 156–57, 168–69, 172–74 (2005) (classifying representation as juridical, theatrical, and pictorial).

113 Pitkin creates subcategories within her two categories. Standing for representation can be descriptive or symbolic; acting for representation can be independent or mandated. Within these, she also discusses a range of hypothetical situations and nuances. For simplicity, my focus here is only on the ideal types. Some nuance is lost, but the underlying point becomes clear without an extended philosophical discussion of representation. *See* PITKIN, *supra* note 112 and accompanying text.

114 PITKIN, *supra* note 112, at 60–61.

115 John Adams, Letter to John Penn, Jan. 1776, *in* IV THE WORKS OF JOHN ADAMS 203, 205 (Charles Francis Adams ed., 1851).

116 James Wilson, Comments on June 6, 1787, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 74 (Adrienne Koch ed., 1984).

Representation can also mean "acting for" the represented.[117] There are many versions of this approach, and they lie on a spectrum from being a trustee that makes independent decisions to being a transmission belt for the represented person's preferences.[118] In addition "acting for" can range from acting for a person's broad, "unattached" interests to her narrow, specific interests.[119] In general, elite economic power is less of a problem for the "acting for" theory than the "standing for" theory. To the extent representatives are supposed to be closely linked to the people—that is, that they are less independent in their choices and have a narrow view of the people's interests—we would need evidence that elites are following the people's directives to show that elite rule is not problematic. On the other hand, to the extent that one believes representatives have independence from the people (for example, on a Burkean theory, representatives should act in the people's broad interests but not necessarily according to their preferences[120]), we would need evidence that the representatives' substantive actions are in fact in the interest of the people, not simply in their own interests. Given that the data show preference divergences between the wealthy and everyone else, particularly on economic issues that seem to benefit the wealthy or harm everyone else, adherents to Burkean approaches would need to rebut the hypothesis that economic elites are simply serving their own interests. If they cannot, then they must justify why representatives should be able to serve their own interests.

To be sure, for some normative theories, elite economic domination is simply not a problem. Libertarians and classical liberals might be less concerned because their focus is on restricting government action in favor of private ordering.[121] Other theorists might affirmatively prefer a constitutional system in which economic elites dominate.[122] Still other theorists recognize that constitutional design has a variety of goals, there are tradeoffs between these goals, and second-best solu-

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117 PITKIN, *supra* note 112, at 112–43.

118 *See id.* at 144–50.

119 *See id.* at 156–67.

120 Edmund Burke, Speech at Mr. Burke's Arrival in Bristol, *in* THE PORTABLE EDMUND BURKE 155, 156 (Isaac Kramnick ed., 1999).

121 *See supra* note 11 and accompanying text.

122 As an example, see generally JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (3d ed. 1950) (arguing for elite-rule with only formal democratic selection mechanisms).

tions are inevitable.[123] While these latter theorists often do not explicitly discuss economic power,[124] economic domination might fit comfortably within their frameworks.

One other note: depending on one's underlying theory, the remedy for addressing the disproportionate power of economic elites might differ. Adherents to "standing for" representation will seek different remedies from those who support "acting for" representation. Those who support a strong form of majoritarianism will pursue a different course than republicans. Part IV explores the variety of solutions that adherents to any of these theories might consider.

B. Economic Power and the Madisonian Design

Constitutional law is traditionally divided into structure and rights, separating "the institutional framework of democratic government" from "limits on what that government is permitted to do."[125] While much of the discussion about economic inequality focuses on the rights side of the equation,[126] outside of constitutional theory related to campaign finance reform, there is comparatively less attention to the structural side. This emphasis misses one of the core features of American constitutional theory: that structure can protect rights.[127] Madison and the Framers believed that constitutional rights would be ineffective because they would fail to prevent the exercise of government power.[128] As a result, they attempted to design the government in a manner that would protect rights through the political process.[129]

While some scholars have argued that the Framers of the Constitution had majoritarian commitments,[130] it is hard to

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123 *See* ADRIAN VERMEULE, THE CONSTITUTION OF RISK 3–19 (2014); ADRIAN VERMEULE, THE SYSTEM OF THE CONSTITUTION 9–13 (2011).

124 *But see* Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. 673, 678–83 (2015) (recognizing the power of private actors).

125 Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1288, 1293 (2012).

126 For a discussion of constitutionalizing socioeconomic or welfare rights, see *infra* notes 371–73 and accompanying text.

127 *See* Levinson, *supra* note 125, at 1293.

128 *See id.* at 1293–95.

129 *See id.*

130 *See* 1 BRUCE ACKERMAN, WE THE PEOPLE 10–24 (1991); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1047–60 (1988); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 481–86 (1994). For critiques of these scholars' views, see Michael J. Klarman, *Constitutional Fact / Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 778–92 (1992) (criticizing Ackerman); Henry Paul

argue that the founding generation was truly populist or democratic in the contemporary sense. The Framers created a variety of structural elements that would prevent ordinary people from exercising control over government, and they were fearful of the "excess of democracy."[131] Indeed, the accomplishment of *Federalist 10* is a political theory that elevates to power "a chosen body of citizens."[132] The point here is not to take sides in the debate over how "democratic" or "elitist" the Founders were. Regardless of how the historical evidence comes out, the Madisonian structure[133]—the well-accepted modern understanding of how the Constitution was supposed to work—inadequately addresses the role that powerful economic minorities might play in society and how their power would intersect with the constitutional structure.

Consider Madison's treatment of factions. With respect to majority factions, Madison famously argued in *Federalist 10* that in an enlarged republic, there would be a multiplicity of interests, which should protect against majority tyranny. Speaking directly to questions of property and economic power, he identified debtors and creditors' interests but also noted that "[a] landed interest, a manufacturing interest a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views."[134] He offered the same theory in *Federalist 51*: "In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good . . . ."[135]

Monaghan, We the People[s], Original Understanding, and Constitutional Amendment, 96 COLUM. L. REV. 121, 157–76 (1996) (criticizing Amar).

131 *See* 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 48 (Elbridge Gerry) (Max Farrand ed., 1911).

132 THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961).

133 For recent scholarship discussing and critiquing the Madisonian structure, see Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 438–47 (2012); Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 950–64 (2005); Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 716–33 (2011) [hereinafter Levinson, *Parchment and Politics*]; Levinson & Pildes, *supra* note 22, at 2347–67; Eric A. Posner & Adrian Vermeule, *The Credible Executive*, 74 U. CHI. L. REV. 865, 883–94 (2007).

134 THE FEDERALIST NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961).

135 THE FEDERALIST NO. 51, at 325 (James Madison) (Clinton Rossiter ed., 1961).

Madison's explanation for why these various interests would prevent majority tyranny seems to have been based on both structural and political economy factors. As a structural matter, Madison argued in *Federalist 10* that in a large society there will be a numerically greater number of interests than in a small society, which means that it will be harder for those interests to coalesce into a majority and that even if they do coalesce into a majority, harder for that majority to dominate politics on a repeat basis.[136] As a result, self-interested factions would cancel each other out, enabling the rise of leaders who were committed to the wider public interest.[137] Historians have also argued that Madison's politics were intertwined with his economic views: that the emerging republic featured comparative economic equality vis-à-vis European nations. Madison (and even more prominently, Jefferson) assumed that the new republic would be composed largely of hard-working yeoman farmers, leading to relative equality within the population.[138] In contrast to the Old World, the widespread availability of land allowed for the growth and expansion of an agrarian republic, without the vices that came with commercial development.[139] The political economy of the late eighteenth century thus formed the backdrop for Madison's "variety of interests" theory.

The trouble with the "variety of interests" theory, however, is that it does not align with the reality of our current political system. *Federalist 10* is often heralded as presaging the majoritarian interest group pluralism theories of the 1950s,[140] but the empirical evidence suggests that those theories simply do not describe political outcomes. It turns out that business and industry interest groups are not only more involved in politics but also that their preferences better explain outcomes than the views of other interest groups. Political scientists have also shown that when compared to elite economic domination and biased pluralism, the "majoritarian pluralism" theory of American politics has no explanatory power over political

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136 *See* THE FEDERALIST NO. 10, 77–84 (James Madison) (Clinton Rossiter ed., 1961).

137 *See id.*; Book Note, *The Relevance and Irrelevance of the Founders*, 120 HARV. L. REV. 619, 624–25 (2006) (summarizing Madison's argument about factions).

138 *See* DREW R. MCCOY, THE ELUSIVE REPUBLIC 13–15 (1980).

139 *See id.*

140 *See* STEPHEN MILLER, SPECIAL INTEREST GROUPS IN AMERICAN POLITICS 48 (1983) (discussing the influence of *Federalist 10* on David Truman, a leading political scientist associated with 1950s interest group theory).

outcomes.[141] The evidence suggests that the same groups do in fact consistently dominate politics.

More pertinently, Madison also addressed the issue of minority faction. Here, his response is even more severely undertheorized. Madison dispatches with the problem of minority factions in a single sentence: "relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote."[142] While this answer is intuitive, it is at best woefully incomplete and at worst empirically false. In cases of "democracy by coincidence," majority preferences are enacted (or not enacted as the case may be) into law. But when preferences diverge between the affluent and everyone else, the preferences of the majority of Americans are insignificant in explaining policy outcomes—and the preferences of a wealthy minority remain just as robust as when they align with the majority. If policy is responsive to the affluent minority's preferences, even when the majority of Americans disagrees with the policy, then Madison's "republican principle" is hardly a safeguard against a minority faction's "sinister views."

The minority power problem is compounded by the composition of elected officials. In *Federalist 57*, Madison responded to charges that the House of Representatives would be made up of elites, not from the "mass of the people."[143] He responded by noting that voters would be drawn from "the great body of the people," and "[n]ot the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune."[144] Similarly, candidates would emerge from the whole population, as "[n]o qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people."[145] Once in office, members of Congress would be kept faithful to the people because of "[d]uty, gratitude, interest,

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141 *See supra* text accompanying notes 87–100.

142 THE FEDERALIST NO. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961).

143 THE FEDERALIST NO. 57, at 350 (James Madison) (Clinton Rossiter ed., 1961). In *Federalist 39*, Madison makes a similar comment: "It is *essential* to [a republican] government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans and claim for their government the honorable title of republic." THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961).

144 THE FEDERALIST NO. 57, at 351 (James Madison) (Clinton Rossiter ed., 1961).

145 *Id.*

ambition itself," and he noted the special importance of frequent elections in keeping them faithful.[146]

In reality, Madison's point about the disciplining effect of elections is the only element borne out by the data. Not only has the American experience with access to the ballot and candidacy been fiercely contested and hardly universal,[147] but even assuming formal equality in access to voting and candidacy, the functional reality is that there are significant disparities in who votes, and beyond that, who participates in politics—and these disparities all favor the wealthy.[148] In particular, the poorest Americans are least likely to use their political voice through the ballot.[149] As for the officeholders selected, as Nicholas Carnes has shown, almost no legislators at the city, state, or federal level come from blue-collar backgrounds themselves, and only a relatively small percentage come from blue-collar families.[150] Madison may have been right as a matter of formal accessibility, but functionally, the composition of elected representatives is skewed in an affluent direction. The best that can be said for Madison's argument is that political scientists show that there are disciplining effects to elections that reduce slightly the power of the affluent over policy positions during elections years; but even then, the effects are only significant in presidential election years and the policies adopted during those years are the most likely to be rolled back in subsequent years.[151]

Madison's undertheorized approach to minority faction also extends one step further: to indirect forms of minority capture. Madison believed first-order protection of rights would merely be "parchment" barriers because those rights could be overturned through the political process.[152] Hence, he focused on second-order structural protections.[153] But Madison does not account for private interests seeking broader

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146 *Id.* at 353.

147 *See generally* ALEXANDER KEYSSAR, THE RIGHT TO VOTE (2000) (tracing the evolution of the right to vote throughout American history and highlighting the struggle in reaching universal suffrage).

148 *See supra* subpart I.A.

149 *See* Daniel Weeks, Democracy in Poverty: A View from Below 9–11 (Edmond J. Safra Ctr. for Ethics, Working Paper No. 10, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2264877 [https://perma.cc/KYM7-5N2S].

150 *See supra* text accompanying note 56.

151 *See supra* notes 71–74 and accompanying text.

152 THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

153 *See generally* Levinson, *Parchment and Politics*, *supra* note 133 (outlining this argument).

societal capture. In *Federalist 10*, Madison notes that one option for preventing tyranny is to create a society with homogenous views, but he dismisses this idea as "impracticable" and "unwise."[154] While it might be "unwise" for society, it is a powerful strategy for an economically advantaged minority that seeks a more robust popular foundation for its policies. By spreading its ideology through well-funded academic research, think tanks, media outlets, and organizing structures, a minority can expand its power in the political process by shaping the views of the most influential members of society.[155] This type of capture—sometimes called cognitive, epistemic, or cultural capture[156]—is not fanciful. Starting in the 1970s, conservatives built a well-funded conservative legal and political infrastructure to advance their ideological goals.[157] In the early 2000s, progressives realized they were decades behind in this Gramscian race for ideological hegemony and their financiers attempted to create a countervailing progressive political infrastructure.[158] Of course, this kind of capture is complex to evaluate. On the one hand, if the people genuinely adopt an ideology, the influence of economic power in that decision might be less concerning. On the other, it might be more pernicious if there is not a fierce contest of ideas leading to the people adopting those views.

In sum, the Madisonian design largely fails to grapple sufficiently with the possibility that economic elites will end up dominating American politics. Whether this was intentional because Madison was hoping for elite rule or inadvertent because he could not imagine broad disparities of wealth is largely irrelevant if the reality of elite economic domination is normatively troubling. Constitutional theory needs an answer to the inadequacies of the Madisonian structure.

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154 THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

155 For a political science theory that predicts precisely this practice, see FERGUSON, *supra* note 27, at 35–37 (noting that investment theory predicts (unlike median voter theory) that efforts will be made to move the public's views toward the views of investors, rather than the other way around).

156 *See* James Kwak, *Cultural Capture and the Financial Crisis*, PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 78–79 (Daniel Carpenter & David Moss eds., 2014); *see also* David Freeman Engstrom, *Corralling Capture*, 36 HARV. J.L. PUB. POL'Y 31, 32 (2013).

157 *See* MICHAEL AVERY & DANIELLE MCLAUGHLIN, THE FEDERALIST SOCIETY 7–10 (2013); STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 2–3 (2008).

158 MATT BAI, THE ARGUMENT: BILLIONAIRES, BLOGGERS, AND THE BATTLE TO REMAKE DEMOCRATIC POLITICS 6–21 (2007).

C. Contemporary Constitutional Theory

Madison's lack of engagement on the issue of economic power can be explained away by elitism or myopia, but what is more puzzling is that contemporary constitutional theory has not been seriously engaged with the problem of economic power. In an effort to make constitutional theory more realistic, theorists have explored the role of interest group politics and political parties in our political and constitutional system. Theorists have also spent considerable energy on more normative questions tied to majority and minority power, in particular focusing on the countermajoritarian difficulty and the undemocratic structures outlined in the Constitution. Yet these prominent debates, debates that have occupied the field for decades, either are incomplete, require qualification, or fail on their own terms because they do not engage with the reality of elite economic domination in American politics.

1. *Interest Groups and the Countermajoritarian Difficulty*

For much of the mid to late twentieth century, constitutional theorists focused on the "countermajoritarian difficulty," that unelected judges strike down legislation supported by democratic majorities.[159] The standard response to this problem was that countermajoritarian actions can be a "virtue" because the Court protects minority rights from oppressive majorities.[160] Other scholars criticized the countermajoritarian obsession as an "academic illusion."[161] In addition to contextualizing the debate over the countermajoritarian problem in the particular historical circumstances of the Warren Court,[162] these revisionists criticized countermajoritarian theorists for taking an overly simplistic and unrealistic view of

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159 *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (1962); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002) ("For decades, legal academics have struggled with the 'countermajoritarian difficulty': the problem of justifying the exercise of judicial review by unelected and ostensibly unaccountable judges in what we otherwise deem to be a political democracy."); *see also* Amar, *supra* note 130, at 495 (discussing preoccupation with the countermajoritarian difficulty); Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1709 (1998) ("Contemporary constitutional law is preoccupied with the antidemocratic nature of judicial review.").

160 Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 492 (1997).

161 Levinson & Pildes, *supra* note 22, at 2364–65.

162 *See* Friedman, *supra* note 159, at 159.

American government.[163] First, they argued that judicial review is not countermajoritarian because judicial actions are restrained by the bounds of public opinion and the political branches.[164] Second, they held that enacted legislation is not necessarily "majoritarian."

The idea that legislation was not majoritarian focused largely on the role of interest groups in the legislative process. In response to the rise of public choice theory in economics and political science in the 1970s and 1980s,[165] legal scholars increasingly applied public choice theory to public law.[166] On this approach, legislators do not necessarily act in the public interest or in accordance with majority preferences but rather respond to organized interest group pressure. Because diffuse groups of people face collective action and free rider problems, it is harder for them to organize and participate in politics than it is for specific interest groups. Interest groups pursue a number of pathways for influence in Congress, ranging from campaign contributions to lobbying efforts, and legislators respond to their efforts.

The theory led to a burst of legal scholarship on how judicial review could address the problem of interest group power. Some scholars argued that because legislative decisionmaking is skewed in favor of interest groups, courts should review legislation with heightened scrutiny to prevent legislation driven by interest group power.[167] Others focused on antitrust princi-

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163 *Id.* at 165; Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEX. L. REV. 1881, 1921 (1991) ("Of course, the democratic objection to judicial review has never really depended on a candid assessment of the actual practices of democracy."). There are other arguments. For example, how we define the relevant majority when a state law is at issue will shape whether a decision is majoritarian or not, Friedman, *supra* note 159, at 173–74. In addition, courts often invalidate administrative actions and the actions of police officials, neither of which are self-evidently "majoritarian." *See id.* at 175.

164 MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 3–7 (2004); *see also* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 775–76 (1991) [hereinafter Klarman, *Puzzling Resistance*]; Levinson & Pildes, *supra* note 22, at 2365 nn.237 & 239.

165 *See, e.g.*, DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 1–9 (1974); Gary Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 371 (1983); George J. Stigler, *Free Riders and Collective Action: An Appendix to Theories of Economic Regulations*, 5 BELL J. ECON. & MGMT. SCI. 359, 359–65 (1974); George Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971).

166 *See infra* notes 179–184 and accompanying text.

167 *See* RICHARD A. EPSTEIN, TAKINGS (1985); BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 265–303 (1980); Erwin Chemerinsky, *The Supreme Court, 1988 Term-Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 46–47, 78, 80–81 (1989); Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 705–17 (1984); Jerry L. Mashaw, *Constitu-*

ples to prevent interest group capture.[168] Still others argued that the same goals could be accomplished if judges engaged in narrower statutory interpretation when interest group benefits were at stake.[169] The common thread was that interest groups had "captured" the legislature and that judicial review can undo the ill-effects of interest group skewed-legislation. Judicial review could serve as a majoritarian check on a countermajoritarian legislative process.[170]

The problem with these proposals was highlighted in an important and persuasive article in which Professor Einer Elhauge argues against heightened judicial review as a response to interest group theory.[171] Elhauge's primary argument is that it is impossible to condemn interest group influence as "disproportionate" without an uncontroversial normative baseline from which to evaluate the "appropriate" degree of influence for an interest group.[172] Such considerations turn on the underlying substantive arguments about the moral, policy, or political issues at stake, not on the fact of interest group influence itself. Thus, "condemning the political process because of interest group influence is indistinguishable from condemning the political process for producing outcomes the condemner dislikes on independent normative grounds. The condemnation of the political process draws any

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tional Deregulation: Notes Toward a Public, Public Law, 54 TUL. L. REV. 849, 874–75 (1980); Sunstein, *supra* note 103, 56–57; Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1699–1700 (1984).

168 *See* William H. Page, *Antitrust, Federalism, and the Regulatory Process*, 61 B.U. L. REV. 1099, 1109–15, 1122–25 (1981); John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 743–44 (1986).

169 Versions include Frank H. Easterbrook, *The Supreme Court, 1983 Term-Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 14–18 (1984); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 279, 298–99, 303–09, 324–25 (1988); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation*, 86 COLUM. L. REV. 223, 228 n.29, 252 (1986); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 471, 486 (1989).

170 Klarman, *supra* note 160, at 495–97.

171 Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991).

172 *Id.* at 48. Elhauge also had other arguments, but this is the central one—and one echoed in the literature. *See, e.g.*, Klarman, *Puzzling Resistance*, *supra* note 164, at 768–69 (noting that theories of constitutional adjudication need to be "susceptible to 'objective' implementation . . . [so] judges of different political predisposition to generally derive consistent results"). For a statement of the argument prior to Elhauge, in the context of political process theory, see Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1072–76 (1980) (describing the problem of deciding which groups should win in the legislative process).

persuasiveness it has from the underlying normative theory rather than from interest group theory."[173] In other words, whether a minority has too much influence in the political process requires some preexisting view about which groups should win.[174] He also argued that even if one adopted a "majoritarian baseline," that baseline would not account for intensity of preferences, which, independently of organizational advantage, might be a desirable reason for minority interest groups to succeed in the policy process.[175]

The trouble with the debate over interest groups—including with Elhauge's powerful argument—is that it does not reflect the empirical reality of American politics. First, the original interest group theories were not empirical, and Elhauge himself explicitly stayed away from entering into a debate on empirical evidence as to what factors influenced political decisionmaking.[176] While the earlier generation of constitutional scholars recognized that legislation might not be majoritarian, they did not have the benefit of data describing exactly *how* legislation diverges from majority preferences.[177] Indeed, the absence of actual evidence on public preferences and policy outcomes led Barry Friedman to end his magisterial work on the countermajoritarian difficulty with a call for greater empiricism.[178] Now we have considerable empirical evidence about political influence and outcomes.

Second, because of the lack of empirical evidence, the argument that legislation is not majoritarian traditionally focused on abstract versions of public choice theory, such as the Arrow Theorem,[179] or on the collective action problems inherent in organizing interest groups.[180] Scholars in this area, as a result, not only focused more on interest group *formation* (and

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173 Elhauge, *supra* note 171, at 49.

174 *Id.* at 51 n.86; Tribe, *supra* note 172, at 1072–76 (criticizing process theory on these grounds).

175 Elhauge, *supra* note 171, at 50, 58–59, 64.

176 *Id.* at 43–44.

177 *See, e.g.*, Chemerinsky, *supra* note 167, at 78–79 (describing nonmajoritarian factors that influence the legislative process, including lack of overlap between voting population and total population, interest group influence, personal preferences of elected officials, logrolling, and other factors). Only recently have legal scholars started applying that data to legal doctrines on group power. *See generally* Nicholas O. Stephanopoulos, *Political Powerlessnes*, 90 N.Y.U. L. REV. 1527 (2015) (assessing group power for purposes of the equal protection doctrine).

178 *See* Friedman, *supra* note 159, at 257.

179 *See, e.g.*, Chemerinsky, *supra* note 167, at 80; Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 639–42 (1993).

180 *See, e.g.*, Easterbrook, *supra* note 169, at 9–10.

tended to assume influence over the policy process) but also assumed that there would not be consistent winners and losers in political decisionmaking, beyond those suggested by neutral organizational factors.[181] Elhauge's critique, in turn, relied largely on the *variety* of possible (and contested) normative baselines.[182] But here too, the political science evidence weakens the argument: the majoritarian pluralism theory of American politics simply does not have empirical support in explaining policy outcomes.

Political scientists have now shown that the political process is best explained by theories of elite economic domination, and this data provides a new way of understanding the scope of the countermajoritarian difficulty.[183] In cases of "democracy by coincidence," the legislative process leads to majoritarian outcomes. Judicial review in these situations can be supported or criticized based on standard arguments about countermajoritarian judicial overreach versus minority protection. But when preferences between the wealthy and everyone else diverge, the data shows that the preferences of the majority are insignificant to the point of being irrelevant. Because the legislative process results in countermajoritarian outcomes, there is an opportunity for judicial review to take on a majoritarian flavor. The empirical research establishes *how* exactly the legislative process is systematically countermajoritarian.[184]

Importantly, with this new data, the normative baseline argument is far less problematic. The political science data allow us to craft an *empirical baseline*, rather than relying on a

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181 Indeed, for good reason. There was not data on the actual winners and losers from the political process.

182 Elhauge, *supra* note 171, at 58–59 (citing wealth maximization, utility maximization, distributive justice as different options). It is also important to note that the empirical evidence suggests that Elhauge's argument about the strength of preferences does not justify a non-majoritarian position. Gilens argues that when Americans express policy preferences, high-income Americans do not feel more strongly about those expressed preferences. GILENS, *supra* note 10, at 91. For example, the 2004 American National Election Study followed each policy question with an inquiry into the importance of the policy issue to the respondent. Though the strength of respondents' feelings differed across issues, on average "low-, middle-, and high-income respondents expressed nearly identical levels of importance." *Id.* Furthermore, a subset of Gilens's data measured both direction and strength of preference. This data demonstrates "no difference across income levels in the propensity of respondents to say they 'strongly' as opposed to 'somewhat' favor or oppose a given policy." *Id.*

183 *See* Friedman, *supra* note 159, at 159 (arguing that the problem was only relevant in its specific historical context).

184 *Cf.* Klarman, *supra* note 160, at 495–97 (arguing that judicial review can be majoritarian when there are electoral entrenchment problems akin to self-dealing).

variety of theoretically possible baselines. The question is thus whether the current empirical baseline is normatively preferable to a reformed system that involves heightened judicial scrutiny directed against the dominance of economic elites. Elhauge's conclusion—that the "general judgment that the political process is pervasively distorted by interest group influence is effectively no different than a judgment that the results of the political process are pervasively undesirable"[185]—remains essentially correct. But the follow-on question is far less complex because the political process is consistently skewed in a single direction. While it is not my goal here to argue for heightened judicial review, the empirics suggest a possibility that is more about the direction of review rather than advancing an absolute, normative vision of a "good" legislative process. In light of the evidence, the normative debate is between those who support the current empirical baseline—political outcomes that favor the wealthy's preferences—and those who oppose it and seek a judicial review remedy to correct for that power imbalance. Advocates for heightened scrutiny need not adopt a first-best normative view of the world—only argue that an anti-elite domination approach is normatively better than the empirical baseline of today's status quo. This does not totally get around Elhauge's theoretical argument, but it narrows the terms of the debate considerably.

2. *The Undemocratic Constitution and Popular Constitutionalism*

One of the most prominent approaches to contemporary constitutional theory can be characterized as democratic or populist, including popular constitutionalism and democratic design theories. This family of theories is united by its desire to ensure that power and influence of the American people, writ large, in our constitutional system. Surprisingly, however, these theories have completely ignored the role that economic power plays in crafting public policy and constitutional meaning.

Take Professor Sandy Levinson's recent and thorough critique of the "undemocratic Constitution."[186] Levinson argues that it is "increasingly difficult to construct a theory of democratic constitutionalism, applying our own twenty-first-century norms, that vindicates the Constitution under which we are

185 Elhauge, *supra* note 171, at 63.

186 LEVINSON, *supra* note 21.

governed today."[187] He then argues that a wide variety of constitutional structures are fundamentally undemocratic—gerrymandered districts, bicameralism, the presidential veto, the allocation of Senators by state rather than population, the electoral college, and life tenure for Supreme Court justices.[188]

Levinson's objections are wide-ranging and persuasive. But the trouble is that even if we were to imagine a constitution that remedied Levinson's criticisms, it would *still* not be "democratic" or "majoritarian" along the lines Levinson desires. Suppose, for example, that a new constitutional convention revised the current Constitution to either eliminate the Senate (addressing both Levinson's bicameralism and Senatorial allocation concerns) or to allocate Senators by population (addressing only the Senate structure issue), and removed the presidential veto, chose presidents by popular vote, and ended life tenure for federal judges. This new, more democratic system would look much more like rule by the current House of Representatives. But given divergent preferences between the affluent and everyone else, unequal rates of participation, the elite composition of legislators, and responsiveness to the affluent rather than average Americans, it is not clear why we should expect this new structure to be genuinely "democratic" or "majoritarian." Unless Levinson only means "democratic" to have the thinnest possible definition, limited effectively to one person, one vote (and it is not clear from his book), it hardly seems democratic or majoritarian for a small minority of affluent Americans' views to drive policy, when those views diverge from that of the majority of Americans. Yet neither Levinson nor *any* of the many scholars and commentators who reviewed and criticized his book from a range of positions even references the power of economic elites over politics.[189] Without

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187 *Id.* at 6 (emphasis omitted).

188 *Id.* at 28 (gerrymandering), 29–38 (bicameralism), 38–48 (presidential veto), 49–62 (Senate structure), 81–97 (electoral college), 123–39 (life tenure for Justices).

189 Levinson's book was widely reviewed and sparked considerable discussion. *See* Constitutional Law Symposium: *Our Undemocratic Constitution*, 55 DRAKE L. REV. 855 (2007) (including contributions from Mark Kende, Tom Vilsack, Sai Prakash, Heather Gerken, Donald Horowitz, and Ilya Somin and Neal Devins); Randy E. Barnett, *Constitutional Conventions: A Review of* Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It), 7 CLAREMONT REV. BOOKS 52 (2007); Michael C. Dorf, *Book Review:* Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It), 122 POL. SCI. Q. 663 (2007); Matthew J. Franck, *Books We Decide Not to Read*, NAT'L REV. (Oct. 20, 2006), http://www.nationalreview.com/node/52064/print [https://perma.cc/W2TW-R7WD]; Ronald Goldfarb, *Books in the Law:* Our Undemocratic Constitution: Where the Constitution Goes

addressing this issue head on, it seems unlikely that Levinson's reforms will make American government "democratic," in the manner he envisions.

As a second example within the "democratic" family of constitutional theory, consider the debates over popular constitutionalism.[190] Popular constitutionalists oppose judicial supremacy (and some even object to judicial review[191]), in favor of popular control "over the interpretation and enforcement of constitutional law."[192] Popular constitutionalism comes in a variety of forms.[193] "Robust" versions focus on the people's authority to trump judicial power.[194] More "modest" versions stress the role of non-judicial actors in shaping constitutional

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Wrong (And How We the People Can Correct It), WASH. LAW. (Feb. 2007); Mark A. Graber, The Constitution in 2020 *edited by Jack M. Balkin and Reva D. Siegel;* Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It) *by Sanford Levinson;* A Constitution of Many Minds: Why the Founding Document Doesn't Mean What It Meant Before *by Cass Sunstein*, 8 PERSP. ON POL. 677 (2010); Stephen M. Griffin, *Levinson and Constitutional Reform: Some Notes*, 67 MD. L. REV. 14 (2007); Charles D. Kelso & R. Randall Kelso, *O*f Cabbages and Kings: A Review of Our Undemocratic Constitution *by Sanford Levinson*, 86 TEX. L. REV. 1263 (2008); Barney Frank & Robert C. Post, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)*, 60 BULL. AM. ACAD. ARTS & SCI. 31 (2007); Robert Justin Lipkin, *Book Review:* Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It), 17 L. & POL. BOOK REV. 33 (2007), http://www.lawcourts.org/LPBR/reviews/levinson0107.htm [https://perma.cc/24NC-T9R5]; W. Richard Merriman Jr., *Book Review:* Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It), 83 INT'L SOC. SCI. REV. 97 (2008); Suzanna Sherry, Democracy Uncaged (Feb. 4, 2009), Vanderbilt Public Law Research Paper No. 09-04; Cass R. Sunstein, *It Could Be Worse*, NEW REPUBLIC (Oct. 16, 2006), http://www.newrepublic.com/article/64516/it-could-be-worse [https://perma.cc/WHA7-X7RF]; Kenneth D. Ward, *A Turn to Politics: Sanford Levinson's* Our Undemocratic Constitution *and Debates in Contemporary Constitutional Theory*, 29 N. ILL. U. L. REV. 311 (2009).

190 David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2048 (2010) ("Few schools of constitutional thought have commanded more attention in recent years . . . .").

191 MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 174–76 (1999).

192 Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CAL. L. REV. 959, 959 (2004) [hereinafter Kramer, 2004]; *see also* LARRY KRAMER, THE PEOPLE THEMSELVES 30–31 (2004) (tracing popular constitutionalism throughout history); TUSHNET, TAKING THE CONSTITUTION, *supra* note 191, at 194 ("The populist constitutionalist believes that the public generally should participate in shaping constitutional law more directly and openly.").

193 Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1616 (2005) (describing the range of possibilities for what popular constitutionalism is).

194 *See* Pozen, *supra* note 190, at 2061–62 (describing robust popular constitutionalism).

norms,[195] argue for a dialectical relationship between judicial authority and popular interpretation,[196] or note that judges are responsive to public opinion.[197] Popular constitutionalism has both descriptive and normative elements.[198] Descriptively, popular constitutionalists argue that popular views have historically and do presently shape constitutional development (albeit to different degrees at different times).[199] Normatively, they argue that popular constitutionalism is desirable and that judicial supremacists see "democratic politics as scary and threatening" and are therefore effectively engaged in "High Federalism redux."[200]

Despite its prominence, popular constitutionalism suffers from definitional ambiguity—particularly around how it would be implemented.[201] Proponents and critics alike recognized this fact and argued that the agenda for popular constitutionalism was figuring out "what kind of institutions we can construct to make popular constitutionalism work."[202] To this end, some scholars focused on departmentalism,[203] including legislative constitutionalism[204] and presidential popular con-

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195 *See id.* at 2060–61 (describing modest popular constitutionalism).

196 *See* Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027, 1029 (2004); *see also* Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991, 997 (2006) (discussing dialogic accounts).

197 Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2599 (2003) (describing "mediated popular constitutionalism" along these lines).

198 Mark Tushnet, *Popular Constitutionalism and Political Organization*, 18 ROGER WILLIAMS U. L. REV. 1, 1 (2013).

199 *See* KRAMER, THE PEOPLE THEMSELVES, *supra* note 192 (telling the history of the ebb and flow of popular constitutionalism); Tushnet, *supra* note 198, at 1.

200 Kramer, *Popular Constitutionalism*, *supra* note 192, at 1003.

201 *See* Alexander & Solum, *supra* note 193, at 1602 ("Kramer's conception of popular constitutionalism is deeply ambiguous at best and deeply confused at worst."); *id.* at 1616 (describing the many options for what popular constitutionalism might be); Suzanna Sherry, *Putting the Law Back in Constitutional Law*, 25 CONST. COMMENT. 461, 463 (2009) ("It is hard to know how popular constitutionalism would work, since few (if any) of its advocates make any concrete suggestions about how to implement popular constitutional interpretation.").

202 Larry Kramer, *Response*, 81 CHI.-KENT L. REV. 1173, 1182 (2006); *see also* Alexander & Solum, *supra* note 193, at 1623 ("The people themselves cannot act with legal authority in a corporate capacity without institutions.").

203 *See* Post & Siegel, *supra* note 196, at 1031; *see also* Pozen, *supra* note 190, at 2063–64 (connecting departmentalism to popular constitutionalism).

204 Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 33 (2003); *see also* Robert C. Post & Reva B. Siegel, *Equal Protection By Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 515–22 (2000); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1951–52 (2003).

stitutionalism.[205] Others have argued that social movements can dialectically shape constitutional meaning through changing social norms that influence judges or through the selection of judges with different preferences.[206] And still others have suggested that judicial elections at the state level are the most obvious and self-evident instantiation of popular constitutionalism.[207]

As much ink as has been spilled debating popular constitutionalism, scholars have not focused on the relationship between elite economic domination in politics and popular constitutionalism. In short, the theory's normative force is limited by the fact that the institutional vehicles needed to realize popular constitutionalism are subject to elite economic capture. Departmentalism, whether legislative or executive, is obviously subject to elite economic domination, and judicial elections fare little better. The amount of money spent in such races is substantial and growing and has a demonstrable effect on judicial behavior.[208] Judicial elections also suffer from a variety of aristocratic biases (described *infra*) that afflict elections generally.

Social movements are a more promising vehicle for popular constitutionalism, but it is far from obvious that social movements are a manifestation of the will of "the people themselves" in any representative sense.[209] Some sociologists argue that social movement theory has been distorted by the outsized influence of 1960s social movements in shaping perceptions of "social movements" more broadly. The movements of the 1960s involved disruptive protest in public settings, loosely coordinated national struggles over political issues, urban/

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205 Jedediah Purdy, *Presidential Popular Constitutionalism*, 77 FORDHAM L. REV. 1837, 1843–44 (2009).

206 *See, e.g.*, Robert C. Post, *The Supreme Court 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 6–11 (2003); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 192–95 (2008); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 299–301 (2001); Tushnet, *Political Law*, *supra* note 196, at 998–99.

207 Pozen, *supra* note 190, at 2064–66.

208 Joanna Shepherd & Michael S. Kang, *Skewed Justice* (2014), http://skewedjustice.org/ [https://perma.cc/7WKH-UXPU]; Joanna Shepherd, *Justice at Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, Am. Const. Soc. (June 2013), http://www.acslaw.org/ACS%20Justice%20at%20Risk%20(FINAL)%206_10_13.pdf [https://perma.cc/6DGP-VGUK].

209 The literature on social movements and the law is voluminous. For a review of some of the insights from social movement theory and a forward-looking research agenda for legal scholarship, see Douglas NeJaime, *Constitutional Change, Courts, and Social Movements*, 111 MICH. L. REV. 877 (2013).

campus based protest, and claims by disadvantaged minorities.[210] These factors described protests accurately circa 1970. But by the year 2000, most protests were driven by well-off white suburbanites.[211] The recent Tea Party movement, for example, consists of a complex mélange of grassroots organizing among largely older, white, male Republicans, with heavy funding by long-established, billionaire-funded political action committees and advocacy groups.[212] FreedomWorks, one of these organizations, started organizing the Tea Party the day after Rick Santelli's famous rant on CNBC that called for the creation of a modern tea party[213] and the organization's influence can be seen in the stated policies of Tea Party groups, some of which are disconnected from grassroots supporters' priorities.[214] Looking back at history beyond the 1960s, social movements were equally varied in their composition. The Boston Tea Party was an elite-driven protest, and "gentlemen of property and standing" organized the Jacksonian riots against abolitionism.[215] Recent work in sociology has also documented in fascinating detail that there have been a variety of organized "Rich People's Movements"[216] throughout American history. These movements have been organized by the wealthy to support the financial interests of the wealthy.

The consequence is that popular constitutionalism, as with other democratic theories, is necessarily more limited than the optimistic story that its proponents tell about "the people themselves" wresting constitutional meaning from "High Federalist" judiciary-loving elites in some kind of democratic, populist expression of the public will. If popular constitutionalism's aim is simply to get *more* people involved in shaping constitutional norms, then as a matter of comparative institutional choice it obviously accomplishes that goal vis-à-vis the numerically small judiciary. But if the aim is that constitutional meaning will in some sense capture the will of "the people,"

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210 Doug McAdam et al., *"There Will be Fighting in the Streets": The Distorting Lens of Social Movement Theory*, 10 MOBILIZATION 1, 2, 16 (2005).

211 *Id.* at 16.

212 THEDA SKOCPOL & VANESSA WILLIAMSON, THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATIVISM 9–12, 23 (2012).

213 *Id.* at 104–05.

214 Skocpol and Williamson point out that Tea Party Patriots, one of the leading Tea Party organizations, is supported by FreedomWorks and prominently declares its opposition to net neutrality, even though Skocpol and Williamson never once heard reference to the policy in their research. *Id.* at 108.

215 Tushnet, *Political Organization*, *supra* note 198, at 2.

216 ISAAC WILLIAM MARTIN, RICH PEOPLE'S MOVEMENTS: GRASSROOTS CAMPAIGNS TO UNTAX THE ONE PERCENT 1–8 (2013).

understood as even vaguely representative of the whole people, then it simply is not obvious that the institutions through which popular constitutionalism operates will accomplish that goal. Formal institutions like Congress or judicial elections can be captured in ways that are utterly familiar. Informal populist movements are not always mass movements or representative, and while popular constitutionalists are not explicit on this point, it seems unlikely that most advocates for the theory would embrace "High Federalists" engaging in social movements and protest to shape constitutional meaning that are designed to favor the interests of the wealthy.

Of course, this does not mean that popular constitutionalism fails as a descriptive or as a normative matter. Rather, the point here is simply that popular constitutionalism has been wholly inattentive to the realities of elite economic domination in politics—and as a result, that its happy story of the grassroots shaping of constitutional meaning needs to be tempered.

3. *Political Parties and Partisanship Theories*

One of the most interesting research agendas in constitutional theory in recent years has been incorporating political parties into structural constitutional theory.[217] The Madisonian design notably has no formal role for political parties, instead relying on institutional structures to provide checks and balances. On this theory, the division of power between the executive and the two houses of the legislature, would give "those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[218] As long as officials' interests aligned with their institutional homes, each institution could provide a check against the others. Similarly, structural division of power between the states and federal government is supposed to provide a check on the accumulation of federal power.[219]

However, scholars argue that it is unlikely that elected officials will pursue policies that advance the power of their particular branch of government, rather than policies that further

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217 The leading articles in this area are Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014); Levinson & Pildes, *supra* note 22; Jide Nzelibe, *Our Partisan Foreign Affairs Constitution*, 97 MINN. L. REV. 838 (2013).

218 THE FEDERALIST NO. 51, at 321–22 (James Madison) (Clinton Rossiter ed., 1961).

219 *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 544–46 (1954).

their policy goals and benefit them politically.[220] Professors Levinson and Pildes show that partisan affiliation "often dominates . . . the constitutional distinction between the branches in predicting and explaining interbranch political dynamics."[221] As a result, they suggest focusing on the "practical distinction between party-divided and party-unified government" for explaining interbranch dynamics.[222] Achieving, or at least approximating, the Madisonian goal of divided power and checks on power requires the separation of parties.[223] Other scholars have taken a similar approach to debates in federalism and foreign affairs law. Professor Jessica Bulman-Pozen points out that when states' political affiliation clashes with that of the federal government, they "check the federal government by channeling partisan conflict through federalism's institutional framework."[224] At the same time, federalism serves as a laboratory of partisanship, enabling state political parties to compete and develop new policies.[225] Federalism-driven policy innovation, she argues, is largely a function of partisan conflict. In a recent article, Professor Jide Nzelibe has argued that the foreign affairs constitution has also been shaped by partisan dynamics.[226] Because foreign affairs issues can be unbundled, he argues, partisans can advocate for shaping constitutional powers, such as war powers or treaty ratification, based on their policy preferences.[227]

In an era of increasing political polarization,[228] some scholars have argued that legal reforms should seek to *strengthen* political parties.[229] Professor Richard Pildes, for example, has argued that one of the fundamental problems in the contemporary political system is political fragmentation, which has resulted in the "external diffusion of political power away from the political parties as a whole and the internal diffusion of power away from the party leadership."[230] What is necessary, Pildes argues, is to strengthen political parties, particularly vis-

220 Levinson, *Empire-Building*, *supra* note 133, at 929.
221 Levinson & Pildes, *supra* note 22, at 2315.
222 *Id.*
223 *Id.*
224 Bulman-Pozen, *supra* note 217, at 1081.
225 *Id.* at 1081.
226 Nzelibe, *supra* note 217, at 839–45.
227 *Id.* at 841–42.
228 *See* Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 275 (2011).
229 *See* Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 809–10 (2014).
230 *Id.* at 809.

à-vis minority factions, so that leadership can push members of the party toward compromises.[231] Pildes thus advocates for allowing parties and candidates to coordinate spending, increasing donation limits to parties, and creating a public financing system that operates through parties.[232]

While attention to partisanship provides a necessary and realistic corrective to the existing structural theories, partisan theorists have been silent on the role of economic power within American politics.[233] Yet inequalities in economic power interact with partisanship in significant ways. In some cases, affluence dominates partisanship as a driver of policy preferences. Affluent Democrats and Republicans tend to prefer deregulatory policies and oppose social spending at much greater rates that the general public.[234] The divergence in preferences is particularly important because both Democrats and Republicans are more responsive to affluent constituents than to median or low-income constituents.[235] Divided government mitigates this phenomenon somewhat, by producing gridlock that reduces the overall amount of policy change. But recall that even in situations of partisan-induced gridlock, policymakers are *still* most responsive to the wealthy.[236]

The consequence is that we should not expect the "separation of parties" approach to work effectively for policy issues in which both parties are captured by economic elites. Nor should we expect states to serve as a location for federal policy contestation—or as a source of policy innovation—on issues in which economic elites have captured both parties. Similarly, in foreign affairs, we should expect a consistently more neoliberal international economic policy than would be produced by a competitive system of genuinely opposing beliefs. When it comes to remedying political fragmentation, strengthening parties might in fact make it *easier* for economic elites to dominate

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231 *Id.* at 809–10.

232 *Id.* at 838–41.

233 Levinson and Pildes note that policy positions do not always align with party affiliation, and they do mention that interest group preferences, along with geographic, temporal, branch, and other considerations may be drivers of this cleavage. Levinson & Pildes, *supra* note 22, at 2324–25. But they do not focus on affluence or develop the interest group influence argument. Nzelibe discusses trade agreements in a limited fashion. Nzelibe, *supra* note 217, at 858. A notable—and quite recent—exception is Andrias, *supra* note 12, at 1–7 who explicitly discusses the findings on economic power in light of partisanship and the separation of powers.

234 Page, Bartels & Seawright, *supra* note 7, 64–66.

235 *See supra* subpart I.B.

236 *See supra* subpart I.B.

politics because elites only have to ensure that they have influence with the two parties—not every single candidate or official.[237] In each case, the domination of economic elites means that policy preferences will be systematically skewed—regardless of the party in power or divided party government. While partisan contestation can serve to divide power, check power, and facilitate new ideas, it is less likely to serve these functions when preferences between most Americans and the wealthiest diverge.

D. The Historical Origins of Economic Power's Absence

Why haven't contemporary constitutional theorists paid greater attention to economic power? A comprehensive answer would require an intellectual history of the last half-century of constitutional scholarship that is beyond the scope of this Article, but it is possible to identify some of the central reasons for the absence of theorizing on the problem of economic power.

First, with the triumph of the New Deal, a widespread consensus emerged on the constitutionality of regulating the economy.[238] Since that time legal scholars have generally accepted that economic regulation is subject to a lower standard of judicial review, per *Carolene Products*'[239] famous footnote. The New Deal consensus seems to have been so strongly entrenched that, as Professor Suzanna Sherry has persuasively shown, this foundational proposition of modern constitutional law has never been thoroughly defended.[240] The breadth of the consensus is also visible when it comes to the Commerce Clause. Many commentators—perhaps even most—would likely have thought it unthinkable that Congress did not have the power to regulate health insurance under the Commerce

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237 Pildes does note that this is a possibility. Pildes, *Romanticizing*, *supra* note 229, at 841. For a thorough discussion of how parties might become corrupted, see Michael S. Kang, *Party-Based Corruption and* McCutcheon v. FEC, 108 NW. U. L. REV. ONLINE 240 (2014).

238 *See, e.g.*, BRUCE ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS 279–311 (discussing the constitutional significance of the New Deal). LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 13–59 (1996) (describing academic views toward judicial review in the generation after the New Deal); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231–32 (1994) (arguing that the post-New Deal administrative state is unconstitutional and that its features have been "taken as unchallengeable postulates by virtually all players in the legal and political worlds, including the Reagan and Bush administrations").

239 United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

240 Suzanna Sherry, *Property is the New Privacy: The Coming Constitutional Revolution*, 128 HARV. L. REV. 1452, 1468–75 (2015).

Clause.[241] That debate was settled during the New Deal.[242] The fact that debates over the Commerce Clause are of recent provenance and that the Court's shift from the New Deal consensus is referred to as a revolution is evidence itself of the strength of the post-World War II consensus.[243]

As a corollary, for two generations after the Second World War, the most salient constitutional issues focused largely on race, gender, and civil rights issues and then on the culture wars.[244] As Fred Schauer has documented, the Supreme Court's agenda in constitutional law does not necessarily track the most salient policy issues for most Americans (which are often economic).[245] This was true during the Warren Court, with its focus on civil rights and criminal justice, and during the 1990s and early 2000s when the culture wars were central topics of conversation in constitutional law.[246] Constitutional theorists were simply focused on a different set of issues during this time. Indeed, the success of the New Deal consensus seems to have made economic issues less salient as a matter of constitutional law.[247] To be sure, there were some exceptions, most notably proposals for establishing constitutional welfare rights.[248] But these proposals were focused on the well-being of the poor, rather than the dominance of economic elites.[249]

Two intellectual trends further contributed to the absence of debates about economic power: the rise of republicanism in

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241 *See, e.g.*, Jamal Greene, *What the New Deal Settled*, 15 U. PA. J. CONST. L. 265, 266 (2012) (the commerce clause challenge "bordered on frivolous"); Jeffrey Rosen, *Economic Freedoms and the Constitution*, 35 HARV. J.L. & PUB. POL'Y 13, 22 (2012) (arguing that overturning the Affordable Care Act would mean a "return to a pre-New Deal understanding of the Commerce Clause").

242 And yet five Justices disagree. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

243 *See, e.g.*, Erwin Chemerinsky, *Keynote Address: Rehnquist Court's Federalism Revolution*, 41 WILLAMETTE L. REV. 827, 827–29 (2005); Erwin Chemerinsky, *The Rehnquist Revolution*, 2 PIERCE L. REV. 1, 1–2 (2004).

244 For a discussion of the intellectual and culture history of these issues generally, *see* DANIEL T. RODGERS, AGE OF FRACTURE 111–79 (2011). It is also worth noting that the lessons of constitutional efforts to bring greater equality in the racial and gender context might be helpful to thinking about economic equality. But such a task must be left to another day.

245 Frederick Schauer, *The Supreme Court 2005 Term Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 7–9, 40 (2006).

246 *Id.* at 36–46 (discussing the Warren Court era); *id.* at 14–31 (discussing the 1990s and 2000s).

247 For an intriguing historical account of post-War attempts to turn rights issues into economic issues, see Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism* (draft on file with author).

248 For a thorough discussion, *see infra* section IV.B.2.

249 For a treatment of how debates over poverty changed in the 1980s and 1990s, *see* RODGERS, *supra* note 244, at 208–11.

constitutional theory and history, and the emergence of neoliberalism in economic thought. To the extent constitutional theorists focused on quasi-majoritarian ideals, the debate centered on civic republican ideas, largely drawing from the work of intellectual historians Gordon Wood,[250] Bernard Bailyn,[251] and J.G.A. Pocock.[252] The "republican revival" of the 1980s was one of the biggest developments in American constitutional thought.[253] But while law professors may not have been as attentive to the underlying historiographical debates, the republican historians were engaged in a broader conflict within their discipline. For decades, the so-called "progressive" historians had followed Charles Beard in analyzing early American history as driven primarily by materialistic (particularly economic) forces.[254] Ideas and language, on that story, were often just elite propaganda.[255] The republican historians sought to distinguish themselves from the Beardians and brought ideology back into historical analysis as an independent force.[256] By drawing on the republican historians, constitutional theorists necessarily adopted the historians' preference for ideological, rather than economic, analysis.

During the same period, neoliberalism—a set of ideas and policies that promote "capitalist imperatives against countervailing democratic ones"—rose to prominence.[257] In response to the economic crisis of the 1970s,[258] neoliberalism emerged as a dominant policymaking framework with the elections of Margaret Thatcher and Ronald Reagan,[259] but it also found favor with political liberals who sought to improve their political fortunes.[260] With a market, rather than Marxian, frame-

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250 WOOD, *supra* note 106.

251 BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967).

252 POCOCK, *supra* note 106.

253 For a discussion of the republican revival and its relationship to the countermajoritarian problem, originalism, and other intellectual trends and debates in the legal academy, see generally KALMAN, *supra* note 238.

254 *See id.* at 171–72; Jonathan Gienapp, *Using Beard to Overcome Beardianism: Charles Beard's Forgotten Historicism and the Ideas-Interests Dichotomy*, 29 CONST. COMMENT. 367, 367–70 (2014).

255 *See* KALMAN, *supra* note 238, at 171.

256 *See id.* at 171–72; Gienapp, *supra* note 254, at 367–70.

257 David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 6 (2014).

258 *See generally* RODGERS, *supra* note 244, at 41–76 (detailing the economic crisis of the 1970s).

259 For a discussion, see DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM (2005).

260 *See* KENNETH S. BAER, REINVENTING DEMOCRATS: THE POLITICS OF LIBERALISM FROM REAGAN TO CLINTON 80–81 (2000) (noting that in the 1980s, the centrist

work for understanding forces in society, neoliberalism further pushed theorists away from class-based analysis.[261]

Finally, the trends in economic inequality themselves helped contribute to the absence of debate on economic power in constitutional discourse. From the end of World War II until the 1970s, the median male worker's income continually rose, alongside GDP.[262] From the 1980s onward, wages flattened out for the average American, even as GDP continued to rise.[263] Households with two-working parents, increasing debt, and little savings could keep up, but they found themselves increasingly squeezed by rising expenses.[264] In other words, economic inequality was simply less of a problem in the rising tide era immediately after World War II.[265] In the decades from the 1980s to the Great Recession, inequality grew considerably.[266] Constitutional theorists may have been less attentive to issues of economic power because first, there were lower levels of economic inequality, and then (until the 2008 crash) the trends in economic inequality were simply less publicly salient.

III
THE PERSISTENT PROBLEM OF ECONOMIC POWER IN CONSTITUTIONAL THEORY

Constitutional theory has been surprisingly inattentive to the problem of economic power—and the result is that leading theories are limited in their explanatory and normative power. Addressing the problem of economic power, however, is easier said than done. Any attempt to address economic power in constitutional theory will run headfirst into a series of perva-

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Democratic Leadership Council adopted more pro-business and market policies and was criticized by traditional liberals). For a classic statement of these ideas in the British context, *see* ANTHONY GIDDENS, THE THIRD WAY AND ITS CRITICS (2000).

261 *See* RODGERS, *supra* note 244, at 77–110 (discussing how market ideology led to shifts in understanding power in society).

262 U.S. Census Bureau, Historical Income Tables. Table P-2: Race and Hispanic Origin by Median Income and Sex, http://www.census.gov/hhes/www/income/data/historical/people/ [https://perma.cc/JB2D-CNWS]; St. Louis Federal Reserve Bank, Real Gross Domestic Product, FRED Economic Data, https://research.stlouisfed.org/fred2/series/GDPC1 [https://perma.cc/Y9GE-6Z5F].

263 *Id.*

264 *See generally* ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE (2003) (describing economic pressures on households during this period, including comparisons to the early 1970s).

265 *See* PIKETTY, *supra* note 1, at 237 (asserting that "the two world wars, and the public policies that followed from them, played a central role in reducing inequalities in the twentieth century").

266 *Id.* at 294.

sive, persistent, and even perverse problems. This Part identifies the variety of challenges constitutional theorists will face in grappling with economic power: the inside-outside problem, the hydraulic problem, the paradox of process, the aristocratic character of elections, and the hazards of entrenching economic class. These challenges can be overcome—or at least mitigated—but they are significant stumbling blocks for anyone interested in institutional design to combat economic power.

A. The Inside-Outside Problem

The inside-outside problem exists when theorists use real theory to explain situations (they are outside the system, explaining from an external perspective) and ideal theory to offer remedies (they are inside the system, taking an internal perspective to how officials should act).[267] A simple example will illustrate. One cannot argue that all officials are motivated by ideological goals and then suggest that the remedy is for judges to counteract ideology.[268] The analyst in this example has assumed, without explanation, that judges are not motivated by ideological goals—in direct conflict with the premise of her argument.

Reforms to address elite economic domination suffer from this problem. Take any *ex post* judicial review strategy. Given that the political process is driven by economic elites and that the President and the Senate choose federal judges, it is not clear why judges would interpret laws and statutes in favor of ordinary-income majorities, rather than skewed in the direction of economic elites.[269] Indeed, one of Professor Elhauge's additional critiques of proposals for judicial review of interest group legislation was precisely this: that it was not clear why the judiciary was a "*deus ex machina*" unaffected by the same phenomenon shaping the political process.[270] In a speech criticizing the "corporate capture of the federal courts," Senator Elizabeth Warren recently suggested that the federal courts do in fact suffer from the same kind of elite economic domination that pervades politics.[271] Studies show that federal judges tend to come from corporate law firms, rather than public in-

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267 Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1744 (2013).

268 *See id.* at 1754–63.

269 *See id.* at 1750–53.

270 Elhauge, *supra* note 171, at 67 (emphasis in original).

271 *See* Elizabeth Warren, *The Corporate Capture of the Federal Courts*, Speech to the American Constitution Society, June, 13, 2013, http://www.warren.senate

terest or consumer law.[272] And they also show that the Court is increasingly business friendly.[273] To be sure, it is possible that these problems affect the courts less than the other branches,[274] but the basic challenge to judicial review remains.

Other proposals suffer from this problem as well, albeit to different degrees. Legislative efforts suffer from the inside-outside problem. We should not expect a Congress dominated by economic elites to act against those interests in order to curb the power of economic elites. The inside-outside problem may be slightly mitigated if we think of the bureaucracy as the relevant actor, given civil service protections, but the expansive literature on agency capture suggests that the inside-outside problem operates here too.

Still, the inside-outside problem is not fatal. Obviously, there have been constitutions that incorporate economic power into their design, laws that curb campaign spending, progressive taxes, industry regulation, and the like. So what are the possible ways out of this problem? First, individuals in government may not always be captured by economic elites, or not all be captured to the same degree. Economic influence might be less effective on federal judges, given their insulation from politics and norms of the profession.[275] The political science literature also suggests that Democrats tend to be less solicitous of the wealthy's views than Republicans are.[276] Some people might also be public spirited or have personal characteristics that push them toward opposing elite preferences.[277] In this light, it is possible that actors outside the system—

.gov/files/documents/ACSSpeech_ElizabethWarren.pdf [https://perma.cc/3KGK-Z6EM].

272 Ellen Eardley & Cyrus Mehri, *Defending Twentieth Century Equal Employment Reforms in the Twenty-First Century*, 10 AM. CONST. SOC. 12 (Jan. 2013), https://www.acslaw.org/sites/default/files/Eardley_and_Mehri_-_Defending_Equal_Employment_Reforms.pdf [https://perma.cc/7TA3-N8RB].

273 *See* Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1450–52, 1472–73 (2013) (noting "that five of the ten Justices who . . . have been the most favorable to business are currently serving"); Doug Kendall & Tom Donnelly, *Not So Risky Business: The Chamber of Commerce's Quiet Success Before the Roberts Court—An Early Report for 2012–2013*, CONST. ACCOUNTABILITY CTR., (May 1, 2013), http://theusconstitution.org/text-history/1966/not-so-risky-business-chamber-commerces-quiet-success-roberts-court-early-report [https://perma.cc/FK3K-RDWY].

274 *See* Thomas W. Merrill, *Does Public Choice Theory Justify Judicial Activism After All?*, 21 HARV. J.L. & PUB. POL'Y 219, 224–25 (1997) (arguing that the barriers to entry and costs of litigation are less significant than in other areas).

275 Posner & Vermeule, *supra* note 267, at 1789–90.

276 *See supra* note 79 and accompanying text.

277 *See supra* note 37 and accompanying text.

educators, journalists, and others—can, over a long period of time, push economic elites to hold beliefs that are in greater alignment with the general population.

Second, policy changes might be more likely during emergencies. During emergencies, political leaders might be willing to experiment with policies outside of elite norms simply to address the emergency conditions.[278] In addition, if the wealthy lose much of their wealth, due to a war or emergency, they may have less influence over policy. Thomas Piketty hints at this possibility in his study of inequality since the nineteenth century. He argues that the two World Wars and Great Depression wiped out much of the wealth of western elites and that fact is what lead to the mid-twentieth century's unprecedented levels of economic equality.[279] In America, that period also coincides with new government efforts in economic regulation, expansion of the franchise, and steeply progressive taxation, among other things. A similar argument can be made in the context of environmental disasters and reform legislation: after a crisis, interest groups that would block legislation in normal times might have less influence.[280] Theories of "constitutional moments" might thus suggest that in such extraordinary situations economic elites would have less influence.[281]

Third, mass mobilization or legal fragmentation might lead to conservative reform. Worried about revolt or simply frustrated by popular ferment, economic elites might agree to reforms out of (according to the inside-outside fallacy) an irrational fear that more radical changes might be adopted, or simply to take an issue off the table. In the Progressive Era, for example, the corporate tax came about in part as a way to forestall income taxes.[282] Similarly, legal fragmentation in a federal system might lead economic elites to prefer slightly more regulation at the federal level, instead of a patchwork of

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278 *See, e.g.*, Franklin D. Roosevelt, Address at Oglethorpe Univ. (May 22, 1932) ("[T]he country demands bold, persistent experimentation.").

279 PIKETTY, *supra* note 1, 274–75.

280 *See* Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59, 66–67 (1992) (describing the 1970s "republican moments" in environmental law and noting the exceptional nature of the moment to overcome normal barriers to policymaking); Richard J. Lazarus, *A Different Kind of "Republican Moment" in Environmental Law*, 87 MINN. L. REV. 999, 999 n.3, 1000, 1001 n.8 (2003).

281 *See* BRUCE ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS 4–5 (1998).

282 *See* Reuven S. Avi-Yonah, *Corporations, Society, and the State: A Defense of the Corporate Tax*, 90 VA. L. REV. 1193, 1216–17 (2004).

rules (with the attendant complexity and transaction costs) at the state level.[283]

A final possibility is that institutional design might come from outside the system. While constitutional design is often thought of as a domestic process involving "we the people," historically, this has hardly been true. Occupying powers after wars, for example, can write constitutions for the losers.[284] More interestingly, in the ancient world, foreigners often designed constitutions.[285] While they have less information about the polity, foreign constitutional designers also do not have an incentive to support their own economic class or listen disproportionally to the views of economic elites because they are not repeat players in the community. At the same time, it is not clear why the country's population (particularly the economic elites) would agree to a foreign founder.[286]

B. The Hydraulic Problem

Institutional design attempts to address the influence of economic elites also suffer from what campaign finance scholars call a "hydraulic" problem. In an important article, Professors Issacharoff and Karlan argued that regulatory efforts to restrict the flow of money through one channel of campaign spending would inevitably result in money flowing through other channels.[287] Money, they argued, is like water: it will fill whatever path is open to it. Deregulation, in turn, enables money to return back to the channels that were once blocked.[288]

The hydraulic problem applies not just to campaign finance efforts but to any effort to cabin the influence of money in politics. The most obvious example is regulatory capture. While the attempt to create a professional bureaucracy with

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283 *See* E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 330–31 (1985); Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 573 (2001).

284 *See* RAY A. MOORE & DONALD L. ROBINSON, PARTNERS FOR DEMOCRACY 3 (2002).

285 Adriaan Lanni & Adrian Vermeule, *Constitutional Design in the Ancient World*, 64 STAN. L. REV. 907, 910 (2012).

286 One possibility is that misperception would lead all factions within a polity to simultaneously think that a particular outsider will support their interests. *Id.* at 933–34 (making this point about the selection of Solon in ancient Greece).

287 Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999) ("[P]olitical money, like water, has to go somewhere.").

288 Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 40–52 (2012).

expert civil servants was at least partly an effort to bypass economic influence over policymaking,[289] there is a gigantic literature arguing that regulatory agencies have themselves been captured by economic elites and industry interest groups.[290] Some pathways for capture, like revolving-door personnel, are obvious,[291] but others less so. Consider participation in rulemaking. Administrative law scholars have argued that while the regulatory state has an elaborate system of notice-and-comment rulemaking in order to ensure transparency and public participation, industry influence has simply migrated to pre-proposal influence.[292]

Other institutional design avenues feature the same problem. Political parties, for example, can be captured by wealthy donors, just like individual candidates.[293] Even broader structural solutions suffer from this problem. Imagine the traditional version of mixed government, in which the wealthy exert influence through one chamber and the working classes through another chamber of the legislature. What is to stop the wealthy from seeking to capture the working class chamber through bribes, campaign advertising, lobbying, or less perceptible routes of influence, such as educational trips and events?

Thinking the hydraulic problem is fatal is, however, a mistake. First, while any particular design element might be suboptimal in its ability to limit the influence of economic elites, that does not mean that no attempt at institutional design along these lines would be better. The appropriate comparison is between a system in which certain channels of influence are restricted and a system in which no channels are restricted. It may be that restricting the channels most easily

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289 *See infra* section IV.D.2.

290 The literature is voluminous. For a classic, see George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). For a recent collection on the scope of the problem and how to prevent it, see generally CARPENTER & MOSS, *supra* note 156, at 25–68 (compiling works on regulatory capture).

291 For examples in the financial regulation context, see Arthur E. Wilmarth, Jr., *Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street*, 81 U. CIN. L. REV. 1283, 1406–17 (2013).

292 Kimberly D. Krawiec, *Agency Lobbying and Financial Reform: A Volcker Rule Case Study*, 32 BANKING & FIN. SERVS. POL'Y REP. 15, 20 (2013) (finding that 93.1% of pre-proposal meetings in the Volcker Rule context were with financial institutions, law firms, and financial industry groups, and that only 4.2% were with public interest groups); *see also* Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992) ("Notice-and-comment rulemaking is to public participation what Japanese Kabuki theatre is to human passions—a highly stylized process for displaying the essence of something which in real life takes place in other venues.").

293 Kang, *supra* note 237, at 252.

abused might still be a net positive in improving outcomes, even though such restrictions do not solve all problems. Thus, laws criminalizing bribery may not address campaign spending, but most people concerned about the influence of wealth would still think a system with such laws is superior to one without such laws. Second, even if certain design elements are suboptimal, the system as a whole need not be. As Adrian Vermeule has noted, "[t]he interaction between several nonideal elements can produce an overall system that is as close as possible to the ideal."[294] Thus, a constitutional system might incorporate multiple design strategies that each fail to effectively restrict the influence of wealth over policy but that together do so relatively well. In the context of elite economic influence, it might be that multiple, overlapping strategies create high enough transaction costs and complexity that the hydraulic problem is significantly mitigated.

C. The Paradox of Process

Attempts to address the hydraulic problem run the risk of what administrative law scholars have called "the paradox of process."[295] Put simply, those designing institutions might adopt rules and regulations to increase public participation or prevent capture, but the well-to-do and their associated interest groups will in practice be better suited to navigate those rules and regulations.[296] As a result, increased process might have the perverse consequence of actually exacerbating capture, rather than reducing it.

The paradox of process arises from the ability of an individual or group to overcome the barriers to participation. Wealthy individuals and interest groups, on this theory, can hire lawyers and lobbyists to navigate the political and regulatory process, thereby overcoming the barriers to participation created by procedural hurdles, while members of the public generally cannot. As a result, there are disparities in participation and influence at every stage of the political process.[297] Moreover, when wealthy individuals and interest groups do participate, their input is often more technically sophisticated, which gives them greater influence on the substance of the proposal. For

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294 Adrian Vermeule, *The Supreme Court 2008 Term Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 18 (2009).

295 Kevin M. Stack, *The Paradox of Process in Rulemaking* (manuscript at 2) (forthcoming).

296 *See id.* at 2–3.

297 *See* SCHLOZMAN, VERBA, BRADY, *supra* note 5, at 6–8.

example, in the regulatory context, scholars have shown not only that most public comments come from business groups (which could be the result of interest, not resources)[298] but also that when the general public comments on proposed regulations, their comments tend to be "form comments" rather than sophisticated regulatory analysis.[299] In that context, it is not surprising that studies have found that agencies are often more responsive to regulated industry groups.[300] In this example, the expertise-driven nature of administrative policymaking serves as the barrier to entry for the general public, but not for wealthy and organized elites.

The paradox of process operates not just in lobbying Congress and administrative agencies. Consider access to the Supreme Court. While the United States has developed a variety of interest groups and private law firms that take on constitutional law cases with an eye of bringing them to the Supreme Court, as a default matter, access to the high court requires considerable resources. Litigants have to make it through district court and potentially multiple appeals before they can even file for a writ of certiorari, even in constitutional cases. Or take campaign and election requirements. A well-financed candidate can more easily comply with campaign finance reporting requirements, designed to ensure transparency in the political process, because she can hire campaign professionals to navigate these procedures. A less well-off candidate will have a harder time.

While the paradox of process exists in a variety of areas, it is also not insurmountable. First, in some areas, like litigation, a leveling up strategy—like public defenders or the ecosystem of constitutional lawyers—can help increase the ability of ordinary people to navigate the process. Scholars have argued for greater efforts to increase participation in the regulatory process along these lines.[301] A second option is to reduce the procedural hurdles in the first place. In the regulatory context, for example, commentators have suggested that technology will make rulemaking more democratic by reducing the difficulty of

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298 Jason Webb Yackee & Susan Webb Yackee, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. POL. 128, 133 (2006) (finding 57% of public comments from 4 agencies came from businesses).

299 *See* Krawiec, *supra* note 292, at 16–17 (noting that 93% of comments on "Volcker Rule" were from private individuals, but that more than half used the identical same form letter and 91% used a variation of that form letter).

300 Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 128 (2011).

301 Stack, *Paradox of Process*, *supra* note 295, at 2.

public participation and comment.[302] Some countries have gone so far as to simply bypass procedural hurdles altogether when they get in the way of access. In India, for example, the Supreme Court can use "epistolary jurisdiction" to grant writ of certiorari—they take a case based on a letter from an individual.[303] While procedural safeguards are likely to restrict access and reinforce inequality, these effects can be mitigated at least in some cases. Any system that seeks to address inequality in influence will need to consider institutional design strategies that mitigate the paradox of process.

D. The Aristocratic Selection Effects of Elections

In an important book, the intellectual historian Bernard Manin once described one of the quickest, most striking changes in the history of constitutional theory: in a matter of decades in the eighteenth century, elections became universally accepted as a strategy for selecting leaders.[304] From ancient Greece until the mid-eighteenth century, lottery was one of the leading methods for selecting officials in republican governments. In Athens, the leading 600 magistrates were chosen by lottery.[305] In Rome, order of voting among the tribes was partly determined by lottery.[306] In renaissance Florence, simple lotteries and multistage mixed lottery-election systems were used to choose leaders.[307] Republican Venice continued to use lottery into the late eighteenth century, when its government finally fell.[308] Harrington, Montesquieu, and Rousseau all devote attention to selection by lottery.[309] And yet, in debates after the American and French Revolutions, lottery is almost completely absent. The disappearance of lottery from constitutional theory, Manin argues, was rooted in a combination of Medieval representation practices from the estates of the realm

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302 COMMITTEE ON THE STATUS AND FUTURE OF FEDERAL E-RULEMAKING, AMERICAN BAR ASSOCIATION, ACHIEVING THE POTENTIAL: THE FUTURE OF FEDERAL E-RULEMAKING 3 (2008). Still, many are skeptical. *See* Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 402 (2011); Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 949 (2006).

303 Carl Baar, *Social Action Litigation in India: The Operation and Limitations of the World's Most Active Judiciary*, 19 POL. STUD. J. 140, 142 (1990).

304 BERNARD MANIN, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT 83 (1997).

305 *Id.* at 11–12; JON ELSTER, SOLOMONIC JUDGMENTS 80 (1989)

306 ANDREW LINTOTT, THE CONSTITUTION OF THE ROMAN REPUBLIC 46 (1999).

307 JOHN P. MCCORMICK, MACHIAVELLIAN DEMOCRACY 108–09 (2011); MANIN, *supra* note 304, at 54–63; ELSTER, *supra* note 305, at 81–85.

308 MANIN, *supra* note 304, at 42, 63.

309 *Id.* at 79.

and the rise of social contract and natural rights theory.[310] With the rise of the idea that government legitimacy was rooted in the consent of the governed, elections gained dominance over lotteries as a method for selecting representatives.[311]

Lost in this transformation was an important argument about economic class. During and prior to the eighteenth century, political philosophers believed that elections were inherently aristocratic selection mechanisms and lotteries inherently democratic.[312] Manin develops the idea and identifies four characteristics that render elections inherently aristocratic. By their very nature, elections feature the unequal treatment of candidates by voters, distinction of candidates because choices must be made, advantages derived from the salience of candidates, and costs of disseminating information.[313] Because all of these factors benefit the aristocratic class, elections will invariably lead to rule by elites.[314] Lottery, in contrast, does not feature this aristocratic bias; it is inherently democratic because it treats and selects people on equal terms. To put it differently, lotteries will lead to a standard distribution in the population serving in government. Elections will lead to a distribution skewed toward the wealthy.

In the debates over the Constitution, both sides understood that elections had an aristocratic character. One of the Anti-federalists' central fears was that representatives would not actually resemble the people. Samuel Chase, for example, worried that "there is no probability of a farmer or planter being chosen . . . only the gentry, the rich, the well born will be elected."[315] Melancton Smith and others shared this fear, that elections would lead to a natural aristocracy that meant that ordinary people would not be represented.[316] The Federalists

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310 *Id.* at 83–85 (social contract and natural rights); *id.* at 86–89 (middle ages); *see also* VIEIRA & RUNCIMAN, *supra* note 112, at 25–26 (describing the radical changes stemming from Hobbes's theory of representation).

311 MANIN, *supra* note 304, at 83–85.

312 *See, e.g.*, MONTESQUIEU, THE SPIRIT OF THE LAWS 13 (Anne M. Cohler et al. trans., 1989) ("[V]oting by *lot* is in the nature of democracy; voting by *choice* is in the nature of aristocracy.").

313 MANIN, *supra* note 304, at 135–45.

314 *Id.* at 132–60 (making this argument thoroughly); *see also* John Ferejohn & Frances Rosenbluth, *Electoral Representation and the Aristocratic Thesis*, *in* POLITICAL REPRESENTATION, *supra* note 112, at 271–72 (laying out various types of "elitist theorists" of democracy).

315 *See* MANIN, *supra* note 304, at 112.

316 Melancton Smith, *Speech at the New York Ratification Convention* (June 21, 1788), *in* XXII THE DOC. HIST. OF THE RATIFICATION OF THE CONST. 1748, 1751 (Kaminski et al., eds.); *see also* Brutus, *Essay III*, II THE COMPLETE ANTI-FEDERALIST 377, 380 (Herbert Storing, ed.).

responded with two sets of arguments. First, Madison argued in *Federalist 57* that the new Constitution had no *formal* requirements that would prefer an economic elite.[317] Notably, neither he nor the other Federalists rebutted the Anti-federalists' *functional* concern that independent of formal requirements, elections favor elites.[318] Second, the Federalists argued that elections' elite effects were in fact desirable because they would result in leaders who had "most wisdom to discern, and most virtue to pursue, the common good of the society."[319] Put aside the obvious conflict between these two arguments and the deeper questions about the goals of representation—in particular, whether the purpose is to select leaders who resemble the population or are independent of them.[320] The critical take away is that both the Federalists and Anti-federalists agreed that elections had aristocratic effects.

In this light, some contemporary attempts to make representation more "democratic" can be interpreted as design strategies that water-down the aristocratic nature of electoral representation. Most directly, in recent years, there has been a revival of interest—and a flood of scholarship—in lotteries as a mode of institutional design. Many scholars have explored the possibility of lotteries to transform democratic political institutions.[321] Others have explored the use of lotteries in legal institutions.[322] While most of these works focus on lottery as a mechanism of democracy, the fact that lottery is a strategy to

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317 THE FEDERALIST NO. 57, at 351-52 (James Madison) (Clinton Rossiter ed., 1961).

318 This may be because the Anti-federalists did not develop their arguments sufficiently well, MANIN, *supra* note 304, at 114, and because the Federalists knew elections would have aristocratic effects, *id.* at 116.

319 THE FEDERALIST NO. 57, at 350 (James Madison) (Clinton Rossiter ed., 1961).

320 *See* PITKIN, *supra* note 112, at 4.

321 *See, e.g.*, PETER STONE, THE LUCK OF THE DRAW vii (2011); LYN CARSON & MARTIN BRIAN, RANDOM SELECTION IN POLITICS 2 (1999); JAMES S. FISHKIN, DEMOCRACY AND DELIBERATION 1 (1991); ELSTER, *supra* note 305, at 27-36; GIL DELANNOI, OLIVER DOWLEN & PETER STONE, THE LOTTERY AS A DEMOCRATIC INSTITUTION 9 (2013), http://www.tcd.ie/policy-institute/assets/pdf/Studies_Policy_28_web.pdf [https://perma.cc/786Q-X479]; Oliver Dowlen, *Sorting out Sortition: A Perspective on the Random Selection of Political Officers*, 57 POL. STUD. 298, 299 (2009); Akhil Reed Amar, Note, *Choosing Representatives By Lottery Voting*, 93 YALE L.J. 1283, 1283 (1984); Brian D. Feinstein, *Congressional Government Rebooted: Randomized Committee Assignments and Legislative Capacity*, 7 HARV. L. & POL'Y REV. 139, 139 (2013); Ethan J. Leib, *Towards a Practice of Deliberative Democracy: A Proposal for a Popular Branch*, 33 RUTGERS L.J. 359, 363–64 (2002).

322 *See, e.g.*, NEIL DUXBURY, RANDOM JUSTICE 4 (1999); BARBARA GOODWIN, JUSTICE BY LOTTERY 164–67 (1992); Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 2 (2009); William Bunting, Note, *Election-By-Lot as a Judicial Selection Mechanism*, 2 N.Y.U. J.L. & LIBERTY 166, 167 (2006).

erode economic power is less frequently discussed.[323] We might also imagine electoral campaigns as a mechanism for watering down the aristocratic character of elections. Campaigns seek to undermine preexisting distinctions between individuals standing for office; by the end of the campaign, in theory, candidates should be equally well-known.[324] At the same time, of course, campaigns require resources, and elites will be more likely to have or better situated to acquire those resources. In sum, *any* system that maintains elections as opposed to lottery, will suffer from an aristocratic bias. This poses a persistent problem for democratic or majoritarian institutional design.

E. The Hazards of Entrenching Economic Class

Some attempts to address economic power could suffer from the problem of entrenching economic class. For example, the mixed government approach to constitutional structure recognized class differences explicitly. Other remedies, such as strategies to give more power to the economically disadvantaged, might similarly recognize class identity. The problem is that if a society is normatively committed to a broad-based middle class and opposed to entrenched class inequality, some institutional design strategies might actually exacerbate class-based divisions and prevent the achievement of a less economically-divided society.

First, at the individual level, explicitly recognizing or designing policies based on economic class could undermine individuals' attempts to move between economic classes. Sociological and psychological theories suggest that perceptions about class status can influence an individual's ability to successfully undertake actions that are outside of the class status. Robert Merton famously identified this as a "self-fulfilling prophecy," which he defined as a "false definition of the situation evoking a new behavior which makes the originally false conception come true."[325] Applying this theory, people who identify as part of a lower economic class might perceive the system overall as hostile to economic mobility (the false definition) and therefore not act in ways that will enable them

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323 For an important exception, see MCCORMICK, *supra* note 307, at 92 ("To avoid the 'aristocratic effect' of election, ancient democracies assigned most magistracies by citizenwide lotteries.").

324 For more on this point, see MANIN, *supra* note 304, at 143.

325 Robert K. Merton, *The Self-Fulfilling Prophecy*, 8 ANTIOCH REV. 193, 195 (1948) (emphasis omitted).

to move up economically (the new behavior), resulting in their remaining in the lower economic class. One prominent example of this phenomenon has been shown to operate in classrooms, in which teachers' expectations influence student performance.[326] Variations on this idea are also common in social psychology literature on behavioral confirmation, in which studies show that incorrect perceptions can trigger responses that confirm those perceptions.[327]

Second, at a societal level, explicit class recognition might entrench class identification, resulting in a society that is stuck with class divisions. A helpful analogy is the dynamics of consociational constitutional design,[328] which involves power sharing and other strategies to mitigate conflict in societies divided along ethnic, religious, language, or other lines. One of the concerns with consociational design is that it can lead to entrenching—and even radicalizing—the groups that caused political or military conflict in the first place.[329] If designs that explicitly recognize economic class will entrench, antagonize, and radicalize members of each class, then such designs might not be desirable because they will perpetuate rather than mitigate economic divisions.

IV
THE IMPERFECT POSSIBILITIES FOR INSTITUTIONAL DESIGN

The political science research shows that the mechanisms by which economic elites dominate policymaking are varied, including participation through volunteering and voting; cam-

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326 The classic is ROBERT ROSENTHAL & LENORE JACOBSON, PYGMALION IN THE CLASSROOM 61–71 (1968) (testing whether "within a given classroom those children from whom the teacher expected greater intellectual growth would show such greater growth").

327 Mark Snyder & William B. Swann, Jr., *Behavioral Confirmation in Social Interaction: From Social Perception to Social Reality*, 14 J. EXPERIMENTAL SOC. PSYCH. 148, 151–52 (1978); Mark Chen & John A. Baugh, *Nonconscious Behavioral Confirmation Processes: The Self-Fulfilling Consequences of Automatic Stereotype Activation*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 541, 545 (1997); Mark Snyder & Olivier Klein, *Construing and Constructing Others: On the Reality and the Generality of the Behavioral Confirmation Scenario*, 6 INTERACTION STUD. 53, 54–55 (2005).

328 For a discussion of consociationalism, see *infra* subpart IV.C.

329 Kirsti Samuels, *Post-Conflict Peace-Building and Constitution-Making*, 6 CHI. J. INT'L L. 663, 675 (2006); KIRSTI SAMUELS & VANESSA HAWKINS WYETH, INT'L PEACE ACADEMY, STATE-BUILDING AND CONSTITUTIONAL DESIGN AFTER CONFLICT 5–7 (2006), http://www.ipinst.org/publication/policy-papers/detail/127-state-building-and-constitutional-design-after-conflict.html [https://perma.cc/Y8XS-3NUV]; *see also* ALLISON MCCULLOCH, POWER-SHARING AND POLITICAL STABILITY IN DEEPLY DIVIDED SOCIETIES 79 (2014) ("Many scholars argue that [in the context of peace negotiations,] consociationalism is more likely to entrench existing divisions, thus leading to further instability.").

paign donations; the economic background of elected officials; and the number and composition of lobbyists and interest groups.[330] However, political scientists have not come to an empirical consensus on *which* pathway or pathways for economic power determine policy outcomes. Some have found, for example, that disparities in voter turnout based on income cannot explain differences in responsiveness.[331] Others have shown that activities do make a difference and that officials are disproportionately responsive to affluent constituents.[332]

Absent empirical research identifying a specific mechanism by which economic power exerts influence, constitutional theorists need to think broadly about the variety of ways in which economic power operates. Indeed, even if political scientists could show that only one mechanism drives policy outcomes, constitutional theorists would likely *still* have to attend to a variety of design options because of the hydraulic problem. Considering a variety of solutions also allows constitutional theorists to tailor solutions to their preferred normative theory. Republicans, majoritarians, and "acting for" representative theorists might prefer different approaches to mitigating the problem of economic power's influence.

This Part provides a conceptual framework of institutional design approaches that can reduce the influence of the economically powerful. The strategies are grouped into four categories: countering economic inequality, safeguarding the political process, incorporating countervailing powers into the political process, and bypassing the political process. The categories follow economic influence from its origins into and through the political system, identifying the points along the way in which economic power can be cabined, restricted, channeled, or countered. These design options cascade downward from prevention to mitigation to resignation, in a sense following Madison's "two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects."[333] In each category, the examples provided cut across a wide spectrum in terms of plausibility and efficacy, and not

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330 *See supra* Part I.

331 BARTELS, *supra* note 61, at 275 ("Income-related disparities in turnout simply do not seem large enough to provide a plausible explanation for the income-related disparities in responsiveness documented here.").

332 SCHLOZMAN, VERBA & BRADY, *supra* note 5, at 118 ("[A]ctivity by both citizens and organized interests makes a difference for public policy, and, if anything, public officials are disproportionately responsive to the affluent and well-educated members of their constituencies.").

333 THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

all of these strategies are focused on the formal constitutional structure. Because they involve the intersection of economic power, political power, and institutional design, some of the design options operate at a small-c constitutional or subconstitutional level.

This framework identifies the range of institutional design options and outlines the costs, benefits, and risks of each option. It also allows constitutional theorists to reimagine existing structures and policies that might potentially serve the function of mitigating economic domination, even if not traditionally justified on those grounds. At the same time, each of the elements in the framework suffers from one or more of the persistent problems of economic power. To avoid repetition, this Part does not restate the persistent problems, but the ultimate consequence of their application is that only a second-best approach is likely to succeed in mitigating elite economic domination.

A. Countering Economic Inequality

1. *Regulation, Taxation, and the Organization of the Economy*

A variety of non-constitutional regulatory strategies can be interpreted as attempting to reshape economic power upstream from the point where it seeks to exert influence over politics. By changing the scope, preferences, and shape of economic power, regulatory strategies can help prevent individuals from gaining too much economic, and therefore political, power in society. Antitrust, corporate governance, taxation, and common law rules of property and contract are all examples of regulatory strategies that might have the effect of preventing the accumulation of extreme economic power, and with it, political influence.

The anti-oligarchy justifications for these regulatory policies were most prominent during the Progressive Era. During that time, antitrust was focused on the fact that "the vast accumulation of wealth in the hands of corporations and individuals . . . [could] oppress individuals and injure the public generally."[334] Louis Brandeis, the most prominent proponent of this approach, thus "opposed monopolies and trusts, not because their market power led to higher consumer prices but because their political power undermined democratic govern-

334 Standard Oil Co. v. United States, 221 U.S. 1, 50 (1911).

ment."[335] Progressives thought about the internal regulation of corporations along similar lines. Walter Lippmann, for example, argued that "[w]ithout democracy in industry . . . there is no such thing as democracy in America."[336] Industrial democracy was essential not only because "[e]mployers are not wise enough to govern their men with unlimited power" but also because self-government depended on democratic control in important aspects of life.[337] Other scholars have pursued these themes in the common law context, showing not only that the common law is itself a regulatory regime that constructs the economy[338] but also arguing that particular types of common law rules are essential for a free and democratic society.[339]

The justification for corporate taxation followed a similar narrative. When President Taft issued his message upon adoption of the first corporate tax in 1909, he focused on corporate power: "While the faculty of assuming a corporate form has been of the utmost utility in the business world, it is also true that substantially all of the abuses and all of the evils which have aroused the public to the necessity of reform were made possible by the use of this very faculty."[340] In recent years, scholars have stressed the importance of taxing individuals' wealth, on largely the same grounds.[341]

More recently, scholars have proposed structural regulation of industry to prevent industry power from capturing government. As Professor Adam Levitin has argued, the structure of the regulated industry, which is itself constructed by regulation, can contribute to the likelihood of legislative and agency capture.[342] Using the financial industry as an example and

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335 MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT 211 (1996).

336 WALTER LIPPMANN, DRIFT AND MASTERY 59 (Mitchell Kennerley 1914) (2015).

337 *Id.* at 59. John Dewey focused on similar themes. "What does democracy mean," he asked, "save that the individual is to have a share in determining the conditions and aims of his own work; and that . . . through the free and mutual harmonizing of different individuals, the work of the world is better done than when planned, arranged, and directed by a few . . . ?" *See* ROBERT B. WESTBROOK, JOHN DEWEY AND AMERICAN DEMOCRACY 107 (1993); *see also id.* at 179, 187, 400.

338 ROBERT L. HALE, FREEDOM THROUGH LAW 1–12 (1952); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 68–93 (1993).

339 *See, e.g.*, Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1046–47 (2009) (arguing that property law has a role to play "in a free and democratic society that treats each person with equal concern and respect.").

340 Avi-Yonah, *supra* note 282, at 1219.

341 PIKETTY, *supra* note 1, at 493–97.

342 Adam Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay,* 127 HARV. L. REV. 1991, 2058–65 (2014).

channeling the pluralist gloss on *Federalist 10*, Levitin argues that when an industry is fragmented—for example, small versus large banks, retail versus financial services—"the influence of the competing groups can be cancelled out, leaving legislators and regulators space for more neutral policy analysis."[343] But his more important point is that regulation itself shapes the interest group environment. The Glass-Steagall regime, for example, separated insurance, investment banking, and depository institutions.[344] The effect was not just to separate these lines of business within the economy, but also to break up "the political power of the financial services industry."[345] Each portion of the industry became rivals, which also allowed members of Congress to support one faction against the other—thereby passing legislation that might not have been viable otherwise.[346]

Whether any of these regulatory measures are desirable is up for debate. It is certainly possible that attempts to curtail the scope of economic power could have detrimental collateral consequences. Burdensome regulations might curtail economic growth and innovation. Badly-designed tax systems might do the same. For those who see the primary goal of institutional design as facilitating economic efficiency or free market libertarianism, these strategies are likely to be not only undesirable but also affirmatively harmful. For those who take a more moderate approach and also recognize that these strategies can have anti-oligarchic effects, the question becomes one of balancing the likely economic costs against the possible benefits to political freedom. The point here is not that these strategies are certainly desirable in the contemporary context as ways to curb economic power, but rather that they are, and have historically been, seen as tools that can be used for this goal.

2. *The Economic Ulysses: Precommitting Against Inequality*

Although a society may be economically equal when its constitution is written, it might not remain economically equal as changes in the economy occur over time. Even if we could therefore design a constitution that is majoritarian at the start, how can constitutional design ensure that democratic majori-

343 *Id.* at 2059.
344 *Id.* at 2060.
345 *Id.* at 2061.
346 *Id.* at 2062.

ties will continue to rule *over time* given changes in the economic background conditions?

One possibility is to adopt rules, *ex ante*, that will prevent extreme forms of economic inequality—and therefore extreme divergences in political power. In doing so, the example of Ulysses tying himself to the mast—a classic of contemporary constitutional theory[347]—could be reimagined in light of the realities of economic power. On this theory, constitutions are a way for people, at time one, to bind themselves to a set of policies that, at time two, they might find hard to maintain. This precommitment strategy allows the people to remain on their predetermined path, even if there are changes in the future.[348]

With precommitment theory as inspiration, one approach to designing around economic power would be for society to bind itself to constitutional policies that prevent the emergence of economic inequality, or at least elite economic domination of policymaking. A few examples will be helpful. Imagine a constitutional provision that required that if wealth inequality (however defined) reached a certain level, extremely high income, wealth, and estate tax rates would immediately take effect for those at the highest wealth echelons. This provision would precommit the society to preventing widespread wealth disparities through this self-correcting policy. Importantly, the proposal accounts for the possibility that at time two, when there is significant wealth inequality, it might not be possible for popular majorities to institute such a policy through ordinary legislative means precisely because wealth inequality has led to economic elites dominating politics. Another possibility would be to structure such a proposal with respect only to political influence. Thus, imagine a provision stating that if wealth inequality reaches a certain level, a variety of politically-

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347 For the classic treatment of this theory, see JON ELSTER, ULYSSES UNBOUND 1–3 (2000).

348 Scholars have, of course, identified situations in which the theory is more or less persuasive. Jon Elster, *Don't Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment*, 81 TEX. L. REV. 1751, 1761 (2003) (some constitutional provisions emerge from a political haggle, not rational choices about the future); JEREMY WALDRON, LAW AND DISAGREEMENT 266–75 (1999) (some provisions involve contestable moral questions that might change or manifest differently over time and with new information and norms); Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 655–60 (2008) (discussing the problem of dead hand preferences dominating the current time). There is also the tricky problem of why any intertemporal commitment holds. For a discussion of this challenging issue, see Levinson, *Parchment and Politics*, *supra* note 133, at 665.

relevant laws would be triggered immediately: laws making unionization easier, campaign finance restrictions, lobbying rules. Again, society would be precommitting itself to restricting the political power of economic elites as the risks of their disproportionate influence grow stronger.

Of course, these economic variations on the Ulysses story have their benefits and drawbacks. On the positive side, precommitment gets around the possibility that rising economic inequality will create a political process failure that makes public policy reforms to advance populist or democratic influence unlikely. At the same time, it is not obvious whether the precommitted design strategies (taxes, campaign finance rules, or what have you) would be responsive to the pathways that economic elites are using to influence politics (at time two) when the precommitment policies are triggered. Still, the economic power approach provides a new twist on this classic of constitutional theory—and in a way that can help theorists consider how to manage the problem of changing economic conditions.

B. Safeguarding the Political Process

A second strategy starts from the premise that economic inequality in society is inevitable (or perhaps even desirable) to some degree—but that it need not influence the political process. Institutional design should therefore protect, or safeguard, the political process from the influence of economic elites. On this approach, the problem is not that there are economic elites in society, but simply that they have outsized influence over legislative outcomes. Insulating politics from economic power addresses this problem. The safeguard strategy appears in ex ante and ex post forms.

1. *Ex Ante: Campaign Finance and Lobbying Restrictions*

The most prominent method for protecting the political process is to attempt, ex ante, to limit the wealthy's influence over the political process. The basic idea is that restrictions on types of participation—most saliently campaign spending and lobbying—can contain disproportionate influence that is a function of wealth inequality.[349] These strategies restrict influence *upstream* from the moment of the political decision.

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[349] Richard Briffault, *Lobbying and Campaign Finance: Separate and Together*, 19 STAN. L. & POL'Y REV. 105, 108 (2008) ("Lobbying and campaign finance, however, also raise common concerns about unequal wealth and improper influence over the political process."); *id.* at 119 ("Prevention of improper influence over

Traditionally, campaign finance reform efforts have followed this strategy. The logic is simple: money corrupts the political process and disparities in money corrupt the political process in a direction that favors the wealthy. Therefore, money must be restricted from politics.[350] This approach has "defined the modern era of campaign finance reform,"[351] and it can be justified based on an analogy to free markets,[352] political incentives and responsiveness to citizens,[353] or transaction costs.[354] The approach is best exemplified by the newly-defunct "undue influence" justification for campaign finance restrictions. Until *Citizens United*[355] and *McCutcheon v. FEC*,[356] the Supreme Court generally recognized two versions of corruption: quid pro quo corruption and its appearance, and undue influence.[357] On the undue influence theory, "the source of corruption was large expenditures capturing the marketplace of political ideas, and the corrupted entities were, at bottom, the voters who could only succumb to the entreaties of money."[358] Thus, in *Austin v. Michigan State Chamber of Commerce*, the Court recognized that special corruption that comes with "immense aggregations of wealth that are accumulated with the help of the corporate form."[359] While focusing there on corporations, the Court's recognition that wealth can distort

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government decision-making is a primary concern for both campaign finance and lobbying regulation.").

350 Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 118 (2010); Heather K. Gerken & Alex Tausanovitch, *A Public Finance Model for Lobbying: Lobbying, Campaign Finance, and the Privatization of Democracy*, 13 ELECTION L.J. 75, 87 (2014)

351 Issacharoff, *supra* note 350, at 118.

352 David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POL'Y REV. 236, 237 (1991).

353 Heather Gerken, *Keynote Address: Lobbying as the New Campaign Finance*, 27 GA. ST. U. L. REV. 1155, 1156 (2011)

354 Kang, *End of Campaign Finance*, *supra* note 288, at 56–57.

355 Citizens United v. FEC, 558 U.S. 310 (2010).

356 134 S. Ct. 1434 (2014).

357 *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 790–92 (1978); Buckley v. Valeo, 424 U.S. 1, 26–28 (1976) (per curiam); *see also* McConnell v. FEC, 540 U.S. 93, 121 (2003) (distinguishing "real" and "apparent" quid pro quo corruption); FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 478 (2007) (plurality opinion) ("This Court has long recognized 'the governmental interest in preventing corruption and the appearance of corruption' in election campaigns."); McConnell v. FEC, 540 U.S. 93, 143–45 (2003) (discussing the importance of prohibiting the appearance of "undue influence"). For a general discussion, see Issacharoff, *supra* note 350, at 121–22.

358 Issacharoff, *supra* note 350, at 122.

359 Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 660 (1990); *see also* Bellotti, 435 U.S. 765, 809 (White, J., dissenting) (arguing that states have an interest in preventing institutions from "using . . . wealth to acquire an unfair advantage in the political process").

political outcomes applies more broadly to wealth inequality generally. The Court's "antidistortion" rationale for campaign finance reform was directly targeted at curbing the influence of the wealthy.

With the Court's decisions in *Citizens United* and *McCutcheon* foreclosing the "undue influence" route to campaign finance reform, a number of scholars have turned instead to restrictions on lobbying.[360] The insight is another version of an ex ante safeguard, just one that operates further downstream in the political process from campaign finance restrictions. Instead of restricting influence in campaigns, these proposals restrict influence in lobbying Congress. Lobbying restrictions, such as anti-revolving-door laws, fundraising restrictions, and restrictions on gifts, are all designed on the theory they that make it harder for individuals or interest groups to purchase influence with lawmakers.[361]

2. *Ex Post: Political Process Theory and Judicial Review*

Safeguarding politics need not take place prior to the political process. Looking further downstream, judicial review could take place after the moment of political decision. Taking an ex postperspective to safeguarding the political process from elite economic domination, one could imagine judges reviewing and giving some form of heightened scrutiny to legislation that either benefits economic elites or harms median-income Americans, when there is not widespread popular consensus on the policy. In other words, judges would let "democracy by coincidence" pass without much scrutiny but give a far closer look at legislation that most Americans oppose and economic elites support. Note also that on this approach the Court would *not* need to give heightened scrutiny to legislation that harms the interests of the wealthy. Because the wealthy have substantial ex anteinfluence over political outcomes, they would not need an after the fact judicial safety net.

This ex post approach is similar to proposals from the 1980s suggesting judicial review of interest group legislation,[362] though it diverges from those approaches in a significant way. The earlier generation of constitutional scholars recognized that legislation might not be majoritarian, but they

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360 Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 197 (2012); Gerken, *supra* note 353, at 1155; Zephyr Teachout, *The Forgotten Law of Lobbying*, 13 ELECTION L.J. 4, 7 (2014).

361 Hasen, *supra* note 360, at 198.

362 *See supra* section II.C.2.

did not have the benefit of data describing exactly *how* legislation diverges from majority preferences.[363] In light of the empirical evidence, heightened judicial review would not be focused on interest groups broadly understood but rather only on the wealthy and on business and corporate interest groups.

In essence, this approach puts an economic power twist on political process theory. On John Hart Ely's theory, drawing from *Carolene Products*'[364] footnote four, judicial review was justified when either particular groups are denied formal participation in the political processes or when "discrete and insular" groups suffer from prejudice despite being enfranchised.[365] Some scholars criticized Ely's theory in much the same way that Elhauge criticized the interest group theories: the theory does not eliminate normative considerations because judgments have to be made about which groups should be protected.[366] Other scholars argued that the second prong of the theory was on particularly weak foundations, as it is more likely that "discrete and insular" groups will have political power, given their ability to overcome collective action problems.[367] In contrast, "anonymous and diffuse" populations are "systematically disadvantaged in a pluralist democracy."[368]

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363 *See, e.g.*, Chemerinsky, *Vanishing Constitution*, *supra* note 167, at 78–79 (describing non-majoritarian factors that influence the legislative process including lack of overlap between voting population and total population, interest group influence, personal preferences of elected officials, logrolling, and other factors).

364 United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

365 JOHN HART ELY, DEMOCRACY AND DISTRUST, 135–36 (1980).

366 *See* Tribe, *Puzzling Persistence*, *supra* note 172, at 1072–76 (making the point that some groups must win); Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1038 (1980) (arguing that Ely's theory violates the principle of value-free adjudication). For a helpful discussion of Ely's recognition of the substantive foundations of his theory and a clear discussion of the distinction between democratic process based theories, like Ely's, and substantive legitimation theories, see generally Frank I. Michelman, *The Not So Puzzling Persistence of the Futile Search: Tribe on Proceduralism in Constitutional Theory*, 42 TULSA L. REV. 891 (2007). Interestingly, scholars using recent data from political scientists have both supported and subverted the conventional approach to protected classes, finding that women, African-Americans, and the poor are powerless in the political process at both the state and federal levels. *See* Stephanopolous, *supra* note 177, 1594–95.

367 Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 724 (1985). For a helpful review of the arguments against the second prong, see Klarman, *Puzzling Resistance*, *supra* note 164, at 784–88. Note that some scholars have argued that campaign finance laws should be struck down on political process grounds because they serve to protect incumbents. Steven G. Calabresi, *The Constitution and Disdain*, 126 HARV. L. REV. F. 13, 18 (2012). *Cf.* Klarman, *Majoritarian*, *supra* note 160, at 497–502 (arguing for judicial review in cases of entrenchment problems).

368 Ackerman, *Beyond Carolene Products*, *supra* note 367, at 724.

In the context of elite economic domination, a reimagined political process approach would put a thumb on the scale in favor of the anonymous and diffuse majority of middle- and low-income Americans who are politically less influential than the elites.[369] "Representation-reinforcement" through judicial review thus shifts from protecting minorities to protecting majorities. Because the political process is broken in consistent ways that favor the wealthy when majority preferences diverge, heightened scrutiny for such legislation can serve as a remedy for the tilted playing field.[370] While this approach still requires a normative judgment in favor of majoritarianism, it is rooted in the empirical baseline of policy outcomes. The normative question thus shifts to whether the status quo (the empirical baseline of the wealthy dominating policy outcomes) is normatively more or less desirable than the reimagined process theory (heightened scrutiny for legislation that, depending on how it is designed, benefits the wealthy or harms the majority).

In this light, it is also worth revisiting conversations about constitutional welfare rights—rights for the poor that scholars have traditionally rooted in either Rawlsian[371] or Walzerian[372] conceptions of justice. The reality of economic power suggests that political process theory might be another tractable source for justifying certain kinds of welfare or social-citizenship rights. Rather than focusing on individualized hearings for in-

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369 Of course, this point diverges substantially from *Carolene Products*, which was based on the premise that economic regulations were presumptively constitutional. Footnote four simply suggested exceptions for when heightened review might be appropriate.

370 Note also that judicial review could operate either through political process failures in the legislature justifying substantive judicial review or the political process failures justifying judicial review of the process itself. For a discussion of both of these approaches, *see* Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B.U. L. REV. 1915, 1959 (2011).

371 The classic statements are Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 14–15 (1969); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 966–67 (1973); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 668–70 (1979). *See also* Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 3 (1987) (advocating "a constitutional right to a 'survival' income"). For an intellectual history of the evolution of constitutional welfare rights, see generally William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821 (2001). For a response, see Frank I. Michelman, *Democracy-Based Resistance to a Constitutional Right of Social Citizenship: A Comment on Forbath*, 69 FORDHAM L. REV. 1893 (2001).

372 Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 209–10 (2008).

dividuals who are denied social programs,[373] this approach would focus instead on political process failures. Judicial review of the legislative process—namely, of legislative choices that adversely affect the majority—would be justified in order to ensure that majority preferences, not the views of economic elites, are instituted into law.[374] While this approach would not cover all welfare rights (those of the poor would be susceptible to legislative revision by the majority), it could protect broad-based or universal economic programs like Social Security.

A related analogy is the *Lochner*-era theory of judicial review for class, or partial, legislation. On the revisionist story of the *Lochner* era, the central issue was not laissez-faire constitutionalism.[375] Rather, courts would evaluate whether regulations issued pursuant to the police power were based on health and public safety justifications and therefore were "general legislation" benefitting the public as a whole, or whether they were in fact intended to benefit only a part of the population and therefore were impermissible as "partial" or "class" legislation."[376] An ex post approach to safeguarding politics from economic elites would not be so different from this model, except that it would seek to enforce "democracy by coincidence" instead of "general legislation." In other words, this approach would be translated into our time as a simple majority-enforcement rule.

Beyond the persistent problems, many of which would apply in this context, the biggest problem with an ex post approach is practical. Judges would have to determine which pieces of legislation had support from the majority.[377] It is not

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373 *See* Goldberg v. Kelly, 397 U.S. 254, 261 (1970) (holding that "due process requires an adequate hearing before termination of welfare benefits"); *see also* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

374 Interestingly, then-Professor Goodwin Liu took a step in this direction, suggesting that the Walzerian approach to welfare rights would focus on judicial review of the legislative process to ensure a connection to evolving democratic norms. Liu, *supra* note 372, at 253–60; *see also* Stephanopolous, *supra* note 177, at 1546–53 (discussing judicial review in the context of groups).

375 There is, of course, the original story of the *Lochner* era, focused on *laissez-faire* and now a counterrevisionist literature on *Lochner* that focuses on unenumerated powers. For the latter, *see generally* David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 12–13 (2003); BERNSTEIN, *supra* note 11.

376 HOWARD GILLMAN, THE CONSTITUTION BESIEGED 10 (1993); G. Edward White, *Revisiting Substantive Due Process and Holmes's* Lochner *Dissent*, 63 BROOK. L. REV. 87, 88–89 (1997).

377 This may be difficult, but it seems that at least Justice Holmes approached constitutional adjudication in something akin to this manner. *See* Adrian

entirely clear whether there is a reliable way for them to do so, given that polling itself can be manipulated. In addition, however, the ex post approach raises significant costs in terms of legal predictability. Frequent legal challenge might create undesirable delays implementation and jeopardize public reliance.

C. Incorporating Countervailing Powers into the Political Process

In the grand sweep of the Western tradition, the conventional strategy for controlling the power of economic elites was to incorporate countervailing powers directly into the political process. This strategy is based on three assumptions. First, it implicitly rejects the notion that economic disparities can be prevented altogether, instead assuming the persistence of economic cleavages (in contrast to the goals of the *countering economic inequality* approach). Second, it implicitly rejects the notion that economic inequality can be prevented from influencing politics, instead assuming the economic power will influence politics (in contrast to the goals of the *safeguarding the political process* approach). Finally, it assumes that economic cleavages correlate with policy preferences across a range of issues. This third assumption—coherence across policy issues within each economic class—is at the core of the countervailing strategy's institutional design remedy. When policy coherence and economic class are in alignment, constitutional engineers can build economic class directly into the constitutional structure.

Incorporating countervailing powers[378] into the structure of government takes two forms. First, *the separation of economic powers* directly incorporates economic class into government structure. This form of design was common in the ancient world, but is implausible (and probably undesirable) in the modern context. Still it offers an analogy (and perhaps even a justification) for understanding contemporary design debates and even some modern institutions such as the jury, public ombudsmen, and perhaps even universal suffrage. Sec-

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Vermeule, *Beard & Holmes on Constitutional Adjudication*, 29 CONST. COMMENT. 457, 465–70 (2014).

378 I take countervailing power from JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM 135–37 (1952). Galbraith argued that "the group that seeks countervailing power is, initially, a numerous and disadvantaged group which seeks organization because it faces, in its market, a much smaller and much more advantaged group," *id.* at 142, and he illustrated the concept with the rise of labor unions, vis-à-vis managers, *id.* at 136–39.

ond, *leveling up strategies* seek to increase the political power of those without wealth, though not in as institutionalized a manner of formal strategies. Labor's political power and campaign finance strategies that seek to inject *more* money into politics are the best examples.

1. *The Separation of Economic Powers*

If we were to revive the tradition of mixed government, our constitutional system would speak less of the "separation of powers" and more of the "separation of economic powers." Aristotle defined constitutional government along these lines, stating that "constitutional government" involved "the admixture of the two elements, that is to say, of the rich and poor."[379]

Historically, there have been a number of strategies along these lines, and we can think of them as legislative, executive, and electoral. The most prominent approach is the legislative: divide power between the two branches of the legislature, while restricting admission to each house of the legislature by wealth. Mixed government theory was thus based on "the belief that the major interests in society must be allowed to take part jointly in the functions of government, so preventing any one interest from being able to impose its will upon the others."[380] Importantly, unlike later Separation of Powers theories, mixed government was rooted in economic class.[381] The Medieval notion of the "estates of the realm" offers one example of this strategy, dividing society into nobles and commons, and entrenching each into the political process.[382] Another example is one of the Florentine Republic's governing bodies, the Signoria, whose members were selected through "occupational-specification and randomization."[383] Two of the six available seats on that body were reserved for members of each of the three major occupational guilds.[384]

Taking a literal approach to translating the legislative approach to mixed government theory into modern practice is

379 ARISTOTLE, POLITICS 124 (Jowett trans., Oxford University Press 1885).

380 M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 37 (2d ed. 2012).

381 *Id.* at 7, 37.

382 The English philosopher, James Harrington, famously argued that the rise of the middle class is what led to the collapse of the Tudor "mixed monarchy" system. *See* JAMES HARRINGTON, THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS 58–60 (J. G. A. Pocock ed., 1992).

383 MCCORMICK, *supra* note 307, at 101.

384 *Id.* at 101. The structure still weighted power to the smaller set of major guilds (or wealthier and higher-status individuals), but it ensured participation from members of the minor guilds. *Id.*

wildly unrealistic. But it is worth considering as a thought experiment, as it is both inherently interesting and helpful in making connections to modern design strategies. Imagine reforms to the qualifications for entrance into the House and Senate. Instead of simply focusing on age requirements,[385] constitutional engineers could focus on wealth requirements—for example, a cap on the wealth of eligible candidates for the House of Representatives. Of course, the Senate has different constitutional powers from the House of Representatives, including the "advise and consent" power with respect to treaties and Executive Branch nominees.[386] Designers inspired by mixed government could therefore think about instituting countervailing powers within the Senate itself. For example, one senator from each state could be required to have below a certain wealth level. Importantly, there would be no need to require that the Senate have a wealth floor: because the wealthy have sufficient ability to protect their interests through elections and political advocacy generally,[387] a special body restricted *only* to the wealthy may not be necessary. As surprising as these proposals sound, variations on these themes have actually been proposed in American history.[388]

While "modern mixed government" might be fanciful, the legislative approach provides a new lens through which to view existing proposals within institutional design. Consider, for example, theories of consociationalism. Consociationalism involves constitutional design for societies divided along social, ethnic, religious, or linguistic lines, and uses entrenched structures such as federalism, power sharing executives, and proportional representation to ensure the representation of different groups.[389] Where consociationalism focuses on ethnic, linguistic, and religious cleavages, countervailing power focuses on *economic* cleavages. In both contexts, the premise is the same: homogeneity is more stable than division, but consti-

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385 *See* U.S. CONST. art. I, §§ 2, 3.

386 *Id.* at art. II, § 2.

387 *See generally* MANIN, *supra* note 304, at 132–60 (discussing the aristocratic nature of elections).

388 *See, e.g.*, ALBERT M. KALES, UNPOPULAR GOVERNMENT IN THE UNITED STATES 211–12 (1914) (arguing for a more populist legislative system, but with "a second legislative chamber in which the representatives of property interests shall sit").

389 *See* AREND LIJPHART, DEMOCRACY IN PLURAL SOCIETIES 25 (1977) (defining consociationalism). For the classic treatment, see generally Arend Lijphart, *Consociational Democracy*, 21 WORLD POL. 207 (1969). *See also* Arend Lijphart, *Constitutional Design for Divided Societies*, 15 J. DEMOCRACY 96, 96 (2004); Juan J. Linz & Alfred Stepan, *Toward Consolidated Democracies*, 7 J. DEMOCRACY 14, 26 (April 1996).

tutional design can manage and mitigate the ill-effects of divided societies.[390] Yet while power sharing along cultural lines is widely accepted as a form of constitutional design, contemporary constitutional theory rarely discusses power sharing along economic lines.[391]

As a second example, proposals for greater deliberative democracy can be interpreted as a weaker form of the legislative mixed government strategy. The literature and variation in proposals in this area is vast: scholars and activists have proposed "minipublics," small groups of citizens who deliberate on policy issues and either advise officials or themselves vote on policy;[392] "Deliberation Day," a national day for citizens to deliberate and vote;[393] referenda; citizen assemblies;[394] citizen advisory councils;[395] and participatory budgeting.[396] Regardless of the specific mode, the central thrust of these varied

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390 In the mixed government context, the best statement remains Aristotle's: "[I]t is manifest that the best political community is formed by citizens of the middle class, and that those states are likely to be well-administered in which the middle class is large, and larger if possible than both the other classes, or at any rate than either singly; for the addition of the middle class turns the scale, and prevents either of the extremes from being dominant." ARISTOTLE, *supra* note 379, at 128.

391 At the minimum, in a society in which economic cleavages are salient and entrenched, consociational-style design strategies can be seen as a form of modern mixed government. More broadly, some economists have recently argued that in the absence of major disruptions like the twentieth century's two world wars, capitalism inherently creates increasing levels of economic inequality. *See* PIKETTY, *supra* note 1, at 20–27. If we accept that argument, then constitutional design in democratic capitalist states might want to be particularly attentive to design strategies that mitigate economic cleavages. To be sure, one might argue that there is a difference between characteristics that are more-or-less entrenched or immutable (i.e. that religion or ethnicity or race are different in degree or kind from economic class). But the strength of such an argument inevitably turns on a variety of contextual factors: the degree of equality at birth in the society, the degree of economic mobility in the society, and the like. In any event, the point here is simply to note that contemporary constitutional theorists often focus design to address cultural divisions, and that mixed government is analogous albeit applied to economic divides.

392 ROBERT E. GOODIN, INNOVATING DEMOCRACY: DEMOCRATIC THEORY AND PRACTICE AFTER THE DELIBERATIVE TURN 11–19 (2008); DELIBERATIVE MINI-PUBLICS: INVOLVING CITIZENS IN THE DEMOCRATIC PROCESS 1–3 (Grönlund et al. eds., 2014).

393 JAMES S. FISHKIN, WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION 29–31 (2009); BRUCE ACKERMAN & JAMES S. FISHKIN, DELIBERATION DAY 1–5 (2005); Ackerman & Fishkin, *Deliberation Day, in* DEBATING DELIBERATIVE DEMOCRACY 7, 7 (James S. Fishkin & Peter Laslett eds., 2003); *see also* JAMES S. FISHKIN, THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY 161–76 (1995) (proposing "deliberative polls").

394 GRAHAM SMITH, DEMOCRATIC INNOVATIONS: DESIGNING INSTITUTIONS FOR CITIZEN PARTICIPATION 30–39 (2009).

395 Archon Fung & Erik Olin Wright, *Deepening Democracy: Innovations in Empowered Participatory Governance*, 29 POL. & SOC'Y 5, 9–10 (2001).

396 *Id.* at 10–12.

proposals is to facilitate democratic participation by a wider range of people than their duly elected representatives. Surprisingly, however, advocates for these proposals generally do not focus on the possibility that these proposals can serve as strategies to counterbalance elite economic rule.[397] Yet the design strategy is strikingly similar to that of mixed government. In each case, citizens at large are incorporated directly into the political process.

The legislative approach is not the only path for countervailing power. Republican Rome instituted countervailing powers into the structure of government through the creation of what we would consider an executive branch office: the Tribune of the Plebeians. Restricted only to plebeians, Tribunes had the power of *intercessio*, or the ability to veto, any action—prosecutorial or policy—at any stage in the process.[398] Although political theorists throughout history have drawn on the Tribune of the Plebs to inspire constitutional design,[399] a "modern tribunate" seems unlikely.[400]

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397 A notable exception is Archon Fung, *Putting the Public Back into Governance: The Challenges of Citizen Participation and Its Future*, 75 PUB. ADMIN. REV. 513, 521 (2015). Fung describes how social justice has motivated some efforts at participatory governance, but also notes that the social justice impetus for participatory designs has been eclipsed by other design goals.

398 LINTOTT, *supra* note 306, 32–33, 121–25; FRANK FROST ABBOT, A HISTORY AND DESCRIPTION OF ROMAN POLITICAL INSTITUTIONS 198–99 (1901); *see also* R. T. Ridley, *Notes on the Establishment of the Tribunate of the Plebs*, Latomus, T. 47, Fasc. 3 (JUILLET-SEPTEMBRE 1968) at 535, 537 (focus on economic motives).

399 When Machiavelli proposed a revitalization of the Florentine Republic in the sixteenth century, he proposed the creation of "provosts," akin to the Roman Tribunes. Provosts would be "drawn from the ranks of common citizens exclusively and rotated by lot into the Signoria and the senatorial council, to delay the decisions of such bodies and appeal them to the Great Council." MCCORMICK, *supra* note 307, at 103. Some scholars of American constitutional thought have argued that the Roman Tribunate partly inspired John C. Calhoun's theory of concurrent majorities. Mitchell Franklin, *The Roman Origin and the American Justification of the Tribunitial or Veto Power in the Charter of the United Nations*, 22 TUL. L. REV. 24, 25–26, 31–32 (1947); Mitchell Franklin, *Problems Relating to the Influence of the Roman Idea of the Veto Power in the History of Law*, 22 TUL. L. REV. 443, 443–45 (1948).

400 Professor John McCormick has recently argued for the creation of a modern American tribunate. His tribunate would include fifty-one citizens, chosen by lottery, for a one-year term. They would be compensated, get their jobs back when their service is complete, and be given other incentives (e.g., free college for children). Tribunes would be chosen from the population, but the top 10% by household wealth would be excluded, as would elected officeholders. The tribunate would be empowered to veto one statue, executive order, and Supreme Court decision per yearly term, in addition to calling one national referendum in which campaign spending would be severely restricted. Three-fourths of the tribunate would have the power to institute impeachment proceedings against federal officials. Tribunes themselves would be disciplined by future tribunates having the authority to indict prior tribunes for misconduct. Finally, the modern tribunate's

Still, the Tribunate model may help us think differently about existing institutions. In light of well-known economic inequality in the criminal justice system, jury participation, and at the extreme, jury nullification, could be interpreted as serving a similar function to the Roman tribune's clemency power because local juries are drawn from a non-elite, non-expert, non-economically powerful general public.[401] In a purely executive capacity, consider the position of "public advocate" or "ombudsman" that many states and cities have established to focus on investigating citizen complaints.[402] First adopted in the United States in the 1960s,[403] ombuds serve investigatory, oversight, and advocacy functions, with a focus on protecting individuals from "the excesses of public and private bureaucracies."[404] American ombuds and public advocate positions are nowhere near as strong as the Tribunate, but the

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powers could not be weakened, only strengthened. MCCORMICK, *supra* note 307, at 183–85.

401 On jury participation serving a democratic function, the classic remains ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 258–64 (Harvey C. Mansfield & Delba Winthrop trans., 2000). The classic article on jury nullification is Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679 (1995). Of course, juries are not necessarily representative of the population writ-large, so a countervailing power justification for jury participation or nullification would probably need to be coupled with reforms of jury selection and peremptory challenge procedures.

402 For examples of states that have ombudsmen, see Public Counsel (Ombudsman's Office), Nebraska, http://nebraskalegislature.gov/divisions/ombud.php [https://perma.cc/XU9M-YAH6]; Arizona Ombudsman: Citizen's Aide, http://www.azleg.gov/ombudsman/ [https://perma.cc/B8DB-AFXL]; State of Hawaii, Office of Ombudsman, http://ombudsman.hawaii.gov [https://perma.cc/J6HX-J66F]; State of Iowa, Office of Ombudsman, https://www.legis.iowa.gov/Ombudsman/ [https://perma.cc/8SZ9-589M]; Office of Ombudsman, Alaska, http://ombud.alaska.gov [https://perma.cc/98JV-BHAR]; Public Advocate of New York, http://pubadvocate.nyc.gov [https://perma.cc/QLF6-7RCZ].

403 *See* Mark Green & Laurel W. Eisner, *The Public Advocate for New York City: An Analysis of the Country's Only Elected Ombudsman*, 42 N.Y.L. SCH. L. REV. 1093, 1104–05 (1998). The 1809 Swedish Constitution first established a position of ombudsman, and debates from the time suggest that the Roman tribunate may have been an inspiration for the post. Stig Jagerskiold, *The Swedish Ombudsman*, 109 U. PA. L. REV. 1077, 1080, 1079 & n.8 (1961). It seems that the more proximate inspiration was the role of attorney general. *Id.* at 1079. Among other things, the Swedish ombudsman serves as a prosecutor, with the formal power to try impeachment cases against the highest state officials (though not initiate them) and to initiate proceedings against lower judges. The ombudsman even has the power to prosecute members of a court, if she finds the court at fault in dismissing her actions (though this has never happened). *Id.* at 1087.

404 ABA, *Standards for the Establishment and Operation of Ombuds Offices* 1 (Feb. 2004), http://www.americanbar.org/content/dam/aba/migrated/leadership/2004/dj/115.authcheckdam.pdf [https://perma.cc/8BMT-AY5X]. For an early American treatment, see generally Kenneth Culp Davis, *Ombudsmen in America: Officers to Criticize Administrative Action*, 109 U. PA. L. REV. 1057 (1961)

ABA, for example, has recommended that ombuds should be granted subpoena power and the ability to initiate litigation or administrative actions.[405]

A final approach to countervailing power reimagines universal electoral suffrage as a form of mixed government. Given that elections are inherently aristocratic,[406] universal suffrage operates as a countervailing force against their aristocratic character. Such elections have a democratic component because suffrage enables mass electoral participation, but they also have an aristocratic component rooted in the inherent nature of electoral choice.[407] Together, then, modern elections are a particularly clever form of mixed government. One scholar has even gone so far as to suggest that in a world of mass suffrage, the Supreme Court's permissive campaign finance rules, which favor economic elites, can be interpreted as a way to guarantee that the rich have influence over the political process.[408] He does not link the idea to mixed government directly, but permissive campaign spending rules could be seen as akin to giving the wealthy countervailing power over elections. Given the aristocratic nature of elections, such additional protections are probably unnecessary. But viewed through this lens, *Citizens United* and similar cases take on a very different flavor.

2. *Leveling Up Strategies*

Instead of formally incorporating countervailing powers into government, or seeking to facilitate their representation in government, a second strategy is to increase the ability of countervailing powers to have influence within the political process. If part of the problem is that wealthy and corporate groups have more access and influence than middle-income people and the groups that represent them, then a "leveling up" strategy would find ways to increase the power of the weaker groups. Leveling up enables weaker groups to contend with (or at least not fall so far behind) more powerful groups in the political process.

("[P]resent[ing] for American consideration . . . the idea that lies behind the institution of the Ombudsman in the Scandinavian countries.").

405 ABA, *supra* note 404, at 6–7, 12.

406 *See supra* subpart III.D.

407 MANIN, *supra* note 304, at 155.

408 Michael Dorf explores, but does not hold, this view. *See* Michael Dorf, *WWJHED (What Would John Hart Ely Do) About Campaign Finance Regulation?*, DORF ON LAW (Sept. 29, 2014), http://www.dorfonlaw.org/2014/09/wwjhed-what-would-john-hart-ely-do.html [https://perma.cc/E56G-T77C].

Leveling up strategies are perhaps most common in campaign finance and lobbying reform proposals. The traditional approach to curtailing the influence of the wealthy is through campaign finance and lobbying restrictions.[409] But there is another approach: giving *more* power to the usually disempowered. Thus, campaign finance reform strategies like public financing through matching funds or grants,[410] or more radically, proposals for campaign funding vouchers[411] all seek to increase the influence of those without deep pockets. Similarly, scholars have suggested leveling up in the lobbying context, either through research consultants for legislators, akin to public interest lobbyists that provide information,[412] or through a public defender approach for lobbying by public interest organizations.[413] Interestingly, some studies have also shown that compulsory voting—a system that levels up power at the ballot box—leads to a decrease in inequality and increased income for the bottom quintiles of the population.[414]

Another example is recent proposals attempting to increase the political power of labor unions. Labor unions have "play[ed] a significant role in the political mobilization of those who, on the basis of their income and education, might otherwise not take part politically."[415] Labor unions mobilize voters, engage in lobbying efforts, and are significant campaign contributors, and historically, they have been behind much of the legislative efforts focused on benefitting lower- and middle-income Americans, whether or not they are in a union.[416] The challenge is that union membership is declining, and in the political realm, there is increased hostility to unions and collective bargaining.[417] In this context, some have argued for in-

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409 *See supra* section IV.B.1.

410 For an overview of state public financing programs, see National Conference of State Legislatures, *Overview of State Laws on Public Financing*, Jan. 23, 2013, http://www.ncsl.org/research/elections-and-campaigns/public-financing-of-campaigns-overview.aspx [https://perma.cc/QU6D-6W3F].

411 BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS 142 (2002); LESSIG, *supra* note 13, at 265–69.

412 Gerken & Tausanovitch, *supra* note 350, at 87–89.

413 Dorie Apollonio, Bruce E. Cain, & Lee Drutman, *Access and Lobbying: Looking Beyond the Corruption Paradigm*, 36 HASTINGS L.Q. 13, 46 (2008).

414 Alberto Chong & Mauricio Olivera, *Does Compulsory Voting Help Equalize Incomes?*, 20 ECON. & POL. 391, 412–13 (2008).

415 SIDNEY VERBA, KAY LEHMAN SCHLOZMAN & HENRY E. BRADY, VOICE AND EQUALITY 384 (1995).

416 For a history of some of the critical developments, see JENNIFER KLEIN, FOR ALL THESE RIGHTS 149–51 (2003).

417 DAVID MADLAND, KARLA WALTER & NICK BUNKER, CTR. FOR AM. PROGRESS ACTION FUND, UNIONS MAKE THE MIDDLE CLASS: WITHOUT UNIONS, THE MIDDLE CLASS WITHERS 1 (2011), https://cdn.americanprogress.org/wp-content/uploads/issues/2011/

creased attention to "minority unions," unions composed of a minority of a workforce that choose to be members.[418] Minority unions are not exclusive collective bargaining entities, but they allow members to organize and represent their own interests. Professor Ben Sachs has recently argued for "unbundling" the union's functions to separate political and collective bargaining purposes.[419] His hope is that workers could create "political unions" that will be able to exercise countervailing political power vis-à-vis the wealthy.

D. Bypassing the Political Process

The final category of solutions seeks to bypass the traditional separation of powers constitutional structure, and erect new institutions that can prevent elite capture. Political parties and the bureaucracy are two examples of this final design strategy.

1. *Political Parties*

Recent scholarship has stressed how political parties can undermine the proper (or at least theoretically proper) functioning of the separation of powers.[420] When one party has total control over the different branches of government and partisan preferences trump an individual's identification with their political institution, the separation of powers fails to offer meaningful checks on political action.[421] Separation of *parties*, that is, divided government, might therefore be more meaningful than the separation of *powers*. This important insight must be tempered by the possibility that both parties will be captured by economic elites.[422] Interestingly, however, on some theories, parties themselves can actually play a role in combating elite economic power.

As Professor Nancy Rosenblum has shown, the "holistic" tradition in political thought sees the community as a unified whole, and generally opposes parties—except when there is a "party to end parties."[423] Partisans will create a party that they

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04/pdf/unionsmakethemiddleclass.pdf [https://perma.cc/3VJR-E8Q2]; Karla Walter & Jackie Odum, *The Assault on Unions Is Hurting All Workers*, NEWSWEEK (May 14, 2015), http://www.newsweek.com/assault-unions-hurting-all-workers-331991 [https://perma.cc/NTS3-TUCJ].

418 CHARLES J. MORRIS, THE BLUE EAGLE AT WORK 8–9 (2005).

419 Sachs, *supra* note 16, at 155–57.

420 *See* Levinson & Pildes, *supra* note 22, at 2313.

421 *Id.* at 2315–16.

422 *See supra* notes 151–57 and accompanying text.

423 NANCY ROSENBLUM, ON THE SIDE OF ANGELS 36–67 (2008).

claim represents the whole of the society, as opposed to other factions that do not speak for the united community.[424] The party's goal is to bring an end to politics through its domination.[425] The party offers a structure to counteract economic powers that are seen as capturing and corrupting the political system. Because it exists outside of the (corrupted) structures of government, the party becomes a way to oversee and check elites in government, or better yet, to wrest control of the government from the elites and give it to the people.[426]

Consider a few examples. With the rise of finance in London in the early eighteenth century, Robert Walpole began using executive patronage to reshape the balance of power in English politics by making the different branches of the government interdependent.[427] Opponents of Walpole, like Henry St. John, Viscount Bolingbroke, argued that a "country" party needed to play the role of mobilized opposition against the corrupt, self-interested "court" of professional politicians.[428] Another example is the rise of the American party system.[429] During the Jacksonian Era, the efforts to create a mass, mobilized Democratic Party were tied, in part, to opposition to the Bank of the United States and the power of economic elites.[430] Channeling the holistic approach Rosenblum describes, Jacksonian partisans even described themselves as "the Democracy," to show their commitment to replacing elite rule with the rule of the people at large.[431] Martin Van Buren, who was the critical figure in the creation of Jackson's Democratic Party, described the need for the Party: the Democracy would fight "the selfish and contracted rule of a judicial oligarchy, which, sympathizing in feeling and acting in concert with the money

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424 *Id.*

425 *Id.* at 38.

426 There is some overlap between parties as a bypassing tool and a leveling up tool. I separate the two here, because theorists have thought about parties as serving an institutional corrective to a flawed separation of powers system.

427 ISAAC KRAMNICK, BOLINGBROKE AND HIS CIRCLE: THE POLITICS OF NOSTALGIA IN THE AGE OF WALPOLE 119–24 (1968).

428 BOLINGBROKE, POLITICAL WRITINGS 37 (David Armitage ed., 1997) (noting that the country party must be "formed on principles of common interest" and is opposed to "the prejudices and interests of particular sets of men").

429 *See generally* GERALD LEONARD, THE INVENTION OF PARTY POLITICS (2002) (giving an account of the rise of party politics in the United States); RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM (1960) (same).

430 *See generally* Major L. Wilson, *The "Country" Versus the "Court": A Republican Consensus and Party Debate in the Bank War*, 15 J. EARLY REP. 619 (1995) (tying the Jacksonian Party organization to the war over the Bank of the United States and fears of "court" corruption).

431 ROSENBLUM, *supra* note 423, at 54–55.

power, would assuredly subvert the best features of a political system that needs only to be honestly administered."[432] Van Buren even analogized explicitly to Bolingbroke's experience fighting "the money power" in England a century earlier.[433] For Van Buren, the Democratic Party would be an extra-governmental vehicle that could operate across geography, time, branches of government, and candidates, to ensure the rule of the people rather than the elites. As Frederick Grimke, writing in 1848, explained, "parties take the place of the old system of balances and checks. The latter balance the government only, the former balance society itself."[434] In balancing society, the Democratic Party counteracted the power of elites.

2. The Bureaucratic State

A final strategy for countering elite economic influence is to bypass the political system with institutions that are insulated from economic influence. Although the common way of thinking about bureaucracies is rooted in technical expertise,[435] the rise of the bureaucracy was intimately interconnected with the rise of economically powerful actors in society—and seen at the time as a mechanism for combating their power. In a sense, the bureaucratic approach comes directly from Madison's point that "you must first enable the government to control the governed; and in the next place oblige it to control itself."[436] For the advocates of the bureaucratic state in the early twentieth century, the fundamental issue was that government could no longer control the governed.

In the Progressive Era, Theodore Roosevelt's vision of government regulating economic power provided a contrast to Brandeis's philosophy of breaking up concentrated economic power. Where Brandeis and Woodrow Wilson saw antitrust as a strategy for restraining industrial behemoths, Roosevelt argued for expanded national authority: "Big business has become nationalized and the only effective way of controlling and

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432 MARTIN VAN BUREN, THE ORIGIN AND COURSE OF POLITICAL PARTIES IN THE UNITED STATES 376 (1867).

433 *Id.* at 162–63.

434 FREDERICK GRIMKE, CONSIDERATIONS UPON THE NATURE AND TENDENCY OF FREE INSTITUTIONS 105 (1848).

435 Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1318–22 (1984); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1678 (1975); Cass. R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 441–42 (1987); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2352–58 (2001).

436 THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

directing it and preventing the abuses in connection with it is by having the people nationalize the governmental control in order to meet the nationalization of the big business itself."[437] Roosevelt recognized that growth of economic power was an inevitable part of capitalism, so the path forward was not "in attempting to prevent such combinations, but in completely controlling them in the interest of the public welfare."[438]

This same impetus is evident in the massive expansion of the bureaucracy associated with the New Deal order. For the New Dealers, the common law was itself a regulatory system, with judges rather than legislatures taking the primary role in making policy choices about economic power in society.[439] Economic transformations in the early twentieth century and the Great Depression demonstrated that the common law was insufficient: it overprotected "the rights of private property" and underprotected the "interests of the poor, consumers of dangerous food and drugs, the elderly, traders on securities markets, and victims of unfair trade practices."[440]

In crafting the bureaucratic state, the New Dealers were concerned with accumulation of private power in society and its ability to oppress individuals. In *The Administrative Process*, for example, James Landis roots the administrative state in the "rise of industrialism" and the "rise of democracy."[441] He argued that there were "concentrations of power on a scale that beggars the ambitions of the Stuarts" and that government action was necessary because "certain enterprises possess such great public significance that their pursuit and control cannot be intrusted to private industry."[442] The common law was insufficient because it was not enough to "presume[ ] the existence of an equality" between individuals such that common law litigation led to evenhanded treatment.[443] In fact, "the absence of equal economic power generally is so prevalent that the umpire theory of administering law is almost certain to fail."[444] The common law regulatory system had to be overturned because the "accumulation of such unredressed claims is of itself a serious social threat," one that demanded "positive solutions" and a government that "maintain[ed] continuing

437 Theodore Roosevelt, Speech in Denver, Colo., Aug. 29, 1910.
438 Theodore Roosevelt, Speech in Osawatomie, Kan., Aug. 31, 1910.
439 Sunstein, *Constitutionalism after the New Deal*, *supra* note 435, at 437.
440 *Id.* at 438.
441 JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 7 (1938).
442 *Id.* at 46, 120.
443 *Id.* at 36.
444 *Id.*

concern with and control over the economic forces which affect the life of the community."[445]

Viewed in this light, expertise is more than a restraint on bureaucratic discretion for fear of unchecked government power;[446] it is a strategy to prevent capture from economically powerful actors in society. A professional, expert-driven civil service should insulate policymaking from political and economic influence. Because civil servants are chosen for their technical knowledge, rather than by election, political preferences, or connections, they will be less likely to cower to influence. Expertise is therefore both limiting, in constraining government action, and empowering, in constraining political influence over decisionmaking.[447]

The motivation underlying this strand of Progressive and New Deal thought is instructive as a matter of design. It suggests that contemporary attention to protecting bureaucratic independence and preventing agency capture[448] may be a promising way to rebalance government policymaking away from economic elites. It also focuses attention on other design possibilities that are rooted in the idea of a professional system of public administration: expanding the civil service vis-à-vis political appointees,[449] extending terms of office for higher officials,[450] and restricting revolving door employment between agencies and their regulated industries.[451] At the same time, however, it raises concerns about the erosion of the professional, independent bureaucracy through privatization and contracting. If bureaucracy is a cure for the problem of economic power, the use of economically powerful actors in imple-

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445 *Id.* at 36, 8.

446 Frug, *supra* note 435, at 1318–22.

447 *Id.*

448 For recent work on agency independence, see generally Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163 (2013); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599 (2010); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture through Institutional Design*, 89 TEX. L. REV. 15 (2010); CARPENTER & MOSS, *supra* note 156.

449 For an argument in favor of civil service reform that would lead to greater professionalization of the bureaucracy, see Francis Fukuyama, *Why We Need a New Pendleton Act*, AM. INTEREST (Nov. 3, 2013), http://www.the-american-interest.com/2013/11/03/why-we-need-a-new-pendleton-act/ [https://perma.cc/5F7F-JFB9].

450 Levinson & Pildes, *supra* note 22, at 2378.

451 *See generally* Wilmarth, *supra* note 291 (discussing the revolving door in the financial regulation context).

menting public policy might require a new system of checks and balances.[452]

CONCLUSION

In light of the persistent problems facing constitutional design regarding economic power, it is unlikely that the reality of elite economic domination can simply be "solved" through institutional design. Any institutional design strategy will need to be evaluated based on its plausibility and effectiveness, and the unfortunate reality is that strategies to grapple with economic power face serious tradeoffs along these lines. Some strategies, like switching from elections to lottery, might be more effective but are implausible to the point of being fantastical. Other strategies, like antitrust-style regulation to break up powerful corporations, are more plausible but less effective. In addition, every strategy suffers from one or more of the persistent problems of economic power.

Still, the answer is not despair. While no single strategy is a silver bullet, the possible strategies are also not ineffectual or mutually exclusive. Each can serve as a complement along with others, and an overall approach to grappling with economic power in constitutional design will likely need to incorporate a variety of strategies to different degrees. In this sense, any design that confronts economic power will likely follow the theory of the second-best.[453] In the most casual sense, a second-best approach suggests that optimal policies might not be possible, but suboptimal policies might still be helpful in advancing the desired aims. More formally, the theory of the second-best holds that suboptimal designs in any particular area can be combined to reach an overall design that is "as close as possible to the ideal."[454] It is a fallacy of division to assume that for the overall system to feature political equality along economic lines, every component of the system must also have that feature.[455]

For example, assume that the optimal solution to economic power's influence is campaign finance reform along lines that safeguard politics. Campaign finance reform suffers from the

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452 *See generally* Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 515 (2015) (setting out "[a] theory of an enduring, evolving separation of powers" that "checks and balances state power in whatever form that power happens to take").

453 For the classic work in economics, see generally R. G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956).

454 VERMEULE, SYSTEM OF THE CONSTITUTION, *supra* note 123, at 30.

455 *Id.* at 9.

hydraulic problem, among others, so economic power will still find a way to influence politics. A second-best approach might thus combine campaign finance restrictions with efforts to combat economic inequality upstream from the political process and an administrative state composed of experts, with restrictions attempting to prevent capture of the bureaucracy as well. While this multi-pronged effort will not be perfect, it would narrow the scope and avenues of elite domination. The point is that without attention to the system as a whole, each of the persistent problems looms larger.

Despite widespread contemporary interest and attention to issues of economic power and inequality, constitutional theory has been surprisingly silent about the power of economic elites over policymaking. This silence is puzzling given a robust and extensive political science literature demonstrating that economic elites dominate the American political system, the historical tradition of constitutional theory engaging the problem of economic power, and claims that the Madisonian system prevents factional tyranny. But the consequence of silence is that leading constitutional theories over the last few decades are strikingly limited, even on their own terms. Moreover, while there are a number of approaches to mitigating the influence of economic power, any attempt to design institutions to address the influence of elite economic power will face persistent, pervasive, and perverse problems. Going forward, constitutional theorists will not only need to recognize the reality of economic power, but also its persistence.