

## Political Equality and First Amendment Challenges to Labor Law

Luke Taylor

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POLITICAL EQUALITY AND FIRST AMENDMENT CHALLENGES  
TO LABOR LAW

*Luke Taylor*<sup>1</sup>

Table of Contents

I. INTRODUCTION.....	506
II. THE STATE HAS A COMPELLING INTEREST IN REDUCING ECONOMIC INEQUALITY’S TRANSMISSION INTO POLITICAL INEQUALITY.....	512
A. <i>Affirmative Reasons</i> .....	512
1. Empirics .....	513
2. The Constitutional Interest.....	516
3. The Interest as Understood Historically and in Political Theory.....	521
4. The Doctrinal Interest .....	524
B. <i>Prudential Concerns</i> .....	525
1. Entrenchment Concerns .....	527
2. No Limiting Principle .....	534
III. UNION-STRENGTHENING LAWS ARE PLAUSIBLY ADEQUATELY TAILORED TO THIS INTEREST. ....	536
A. <i>Narrow Tailoring Principles</i> .....	537
1. Five Overarching Questions.....	537
2. Efficacy-sensitivity .....	538
3. Cost-sensitivity.....	539
4. Deference to Legislatures’ Predictive Judgments .....	541
5. Political Feasibility and the Inside-Outside Problem.....	542
B. <i>Causation</i> .....	544
1. Organizing Countervailing Political Power .....	545
2. Advancing Economic Equality .....	547
C. <i>Necessity: Why Not Just Tax and Transfer?</i> .....	550
1. Progressive Tax’s Atrophy.....	553
2. Circuit-breaking Tax Is Likely Impossible. ....	554
3. Circuit-breaking Tax Would Possibly Be Too Expensive.....	557
D. <i>Over- and Under-inclusiveness and Proportionality</i> .....	559
CONCLUSION.....	559

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## I. INTRODUCTION

It's a hopeful time for the labor movement. The Protecting the Right to Organize Act, which would be the labor movement's biggest legislative victory since 1935,<sup>2</sup> has been passed by the House of Representatives after receiving President Biden's full-throated endorsement.<sup>3</sup> Other think-big reforms, such as sectoral bargaining,<sup>4</sup> are gaining mainstream attention.<sup>5</sup> But a countercurrent of litigation is rippling through courts in the wake of *Janus v. AFSCME*.<sup>6</sup>

The Supreme Court there dealt a major blow to public sector labor unions. But not just to these unions. Rather, *Janus* likely weakened these unions' ability to advance economic and political equality throughout the country. And the decision's mode of First Amendment analysis threatens other laws that strengthen both public and private sector unions' ability to do so.

In *Janus* the Court overruled *Abood v. Detroit Board of Education*,<sup>7</sup> which had held that states could require public sector employees in unionized workforces to pay a fee—called an agency fee—to help cover the union's costs of “collective bargaining, contract administration, and grievance adjustment.”<sup>8</sup> Agency fees are crucial in U.S. labor law. Because U.S. public and private sector unions are exclusive representatives<sup>9</sup> of any bargaining unit<sup>10</sup> in which a majority of employees support the union, they bear a legal duty to fairly represent all bargaining-unit employees—regardless of whether the employee is a dues-paying union member. This duty imposes significant costs on the union: costs of negotiating and administering a collective bargaining

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2. See Celine McNicholas et al., *Why Workers Need the Protecting the Right to Organize Act*, ECONOMIC POLICY INSTITUTE (Feb. 9, 2021), <https://www.epi.org/publication/why-workers-need-the-pro-act-fact-sheet/>.

3. *Statement by President Joe Biden on the House Taking up the PRO Act*, THE WHITE HOUSE (March 9, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/09/statement-by-president-joe-biden-on-the-house-taking-up-the-pro-act/>.

4. In sectoral bargaining, all firms in an economic sector would together negotiate with a union or group of unions work conditions that bind all those firms.

5. E.g. Emily Bazelon, *Why Are Workers Struggling? Because Labor Law is Broken*, N.Y. TIMES (Feb. 19, 2020).

6. 138 S. Ct. 2448 (2018).

7. 431 U.S. 209 (1977).

8. *Id.* at 225–26.

9. This means only the union, not individual employees, may negotiate the employment contract that will bind those employees.

10. A bargaining unit is a group of job classifications the occupants of which can effectively negotiate, through a union, a common contract with an employer.

agreement and processing grievances for all employees. This duty simultaneously incentivizes employees to free ride—that is, to use but not pay for the union’s services. By requiring all employees whom the union represents to pay a fair share of the union’s expenses related to collective bargaining and contract administration, agency fees prevent the free-rider problem from depleting unions’ resources and rendering unions ineffective.

A quick note about the structure of First Amendment law will be helpful before I further discuss *Janus*. Put simply, the Court must find two things to conclude that a law violates the First Amendment. First, the law must *impinge on* (sometimes courts use the word ‘infringe’) the First Amendment, i.e. restrict someone’s ability to do something that the First Amendment protects. Second, the government must fail to show that it needs to restrict that ability to advance a compelling (or sometimes just important or substantial) goal.

*Janus* held first that—in public sector workforces—requiring employees to pay the union an agency fee impinges on the First Amendment. The Court reasoned that “union speech in collective bargaining addresses” many “sensitive political topics.”<sup>11</sup> Public sector unions express views in collective bargaining not only on “how public money is spent” but also “on a wide range of subjects—[including] education, child welfare, healthcare, and minority rights . . . climate change, the Confederacy, sexual orientation and gender identity, evolution, and minority religions.”<sup>12</sup> The Court concluded that because agency fees therefore compel employees to “subsidize private speech on matters of substantial public concern,”<sup>13</sup> requiring these fees impinges on the First Amendment.

The Court next concluded that neither of Illinois’s proffered state interests in agency fees justified that impingement. Preventing employees from free riding on the union’s services is not a compelling state interest, the Court declared.<sup>14</sup> Nor did the state’s interest in promoting labor peace justify requiring agency fees. The Court assumed without deciding that the state had a compelling interest in labor peace<sup>15</sup>—defined narrowly as an interest in avoiding the conflict and disruption that could occur in a workplace if multiple unions could represent that workplace’s employees.<sup>16</sup> But the Court concluded that abolishing agency fees would

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11. *Janus*, 138 S. Ct. at 2475–76.

12. *Id.*

13. *Id.* at 2460.

14. *Id.* at 2466–68.

15. *Id.* at 2465–66.

16. *Id.* This definition of labor peace is narrower than the labor peace concern that partly motivated the National Labor Relations Act (NLRA). The NLRA sought to obviate bloody, costly strikes

not imperil that peace.<sup>17</sup>

The principal dissent emphasized that the majority opinion disregarded both *stare decisis* and the leeway First Amendment doctrine elsewhere gives public employers to manage their workforces. But the dissent did little to affirmatively explain the value of strong labor unions to our democracy. Indeed, nowhere does *Abood* or *Janus*'s dissent even nod to what many would say was the main thing at stake in these cases: labor unions' role in advancing economic and political equality.

Part II of this Article argues that the Court should recognize a compelling state interest in reducing economic inequality's transmission into political inequality. Part III explains why various union-strengthening laws that the Court might decide impinge on the First Amendment—not just public sector agency fees—are quite plausibly adequately tailored to advancing that interest, as would be required for that interest to justify any such impingement.

After all, the Roberts Court's trend of expanding the scope of First Amendment impingement, combined with *Janus*'s reasoning and dicta, have caused many people to fear that union-strengthening laws beyond public sector agency fee requirements are now endangered. Already litigants are arguing that agency fees for *private* sector unions violate the First Amendment,<sup>18</sup> despite the hurdle such challenges face in establishing state action.<sup>19</sup> And courts have faced a swarm of suits alleging that public sector exclusive representation violates the First Amendment by compelling speech and association.<sup>20</sup> One such suit's

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that resulted from the poor working conditions that workers lacking a strong union faced. Kavitha Iyengar, *Janus v. AFSCME*, 40 BERKELEY J. EMP. & LAB. L. 183, 190, n.72 (2019).

17. *Id.* at 2466.

18. *Rizzo-Rupon v. Int'l Ass'n of Machinists & Aerospace Workers*, AFL-CIO Dist. 141, 822 F. App'x 49, 50 (3d Cir. 2020) (rejecting this argument).

19. Such fees almost surely do not involve state action. The NLRA merely permits (not requires) private parties to enter into agency fee agreements. Yet Justice Kennedy seemingly implied during oral argument that he thought this permission could satisfy the First Amendment's state action requirement. See Benjamin Sachs, *Friedrichs and the Private Sector*, ON LABOR (Jan. 14, 2016), <https://onlabor.org/friedrichs-and-the-private-sector/>. A footnote in *Janus* cast doubt on but expressly declined to resolve whether this mere permission constitutes state action. *Janus*, 138 S. Ct. 2479 & n. 24. If the Court found state action, whether it would then find First Amendment impingement is unclear. Private sector unions' collective bargaining routinely addresses various of the "sensitive political topics" that *Janus* noted public sector unions address. *Supra* text accompanying note 16. But *Janus* noted that even if the First Amendment applied to private-sector agency fees, "the individual interests at stake still differ. In the public sector, core issues such as wages, pensions, and benefits are important political issues, but that is generally not so in the private sector." *Janus*, 138 S. Ct. at 2480.

20. Courts have repeatedly concluded that these claims are foreclosed by *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984). There, the Court summarily affirmed the constitutionality of exclusive representation, *id.* at 279, and further held that the state's "meet and confer" statute – which required state employers of unionized workforces to confer with only the union about certain policy matters – did not restrict union non-members' First Amendment right to speak or to associate, *id.* at 289–90.

success would likely excite similar claims against exclusive representation in the private sector.<sup>21</sup>

Beyond casting shadow on these long-standing fixtures of U.S. labor law, *Janus*'s reasoning could impede various proposed reforms for strengthening workers' ability to effectively organize. A Court like our current might find that any attempt to mandate unionization<sup>22</sup> impinges on the First Amendment, even if that mandate were structured to merely require collective bargaining without requiring that each worker pay or be a member of the union.<sup>23</sup> A more politically viable alternative to mandatory unionization is to require workforces to opt out of, not opt into, unionization.<sup>24</sup> This proposal would address the oft-cited challenges faced by workforces seeking to unionize.<sup>25</sup> And research into how opt-out and opt-in rules influence outcomes in other domains suggests an opt-out regime could substantially increase unionization.<sup>26</sup> Yet unless this opt-out regime were shown to serve a state interest that *Janus* did not consider, the Court would likely invalidate it by extending *Janus*'s subsidiary

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Courts have rejected claims that *Knight*'s authority is unsettled by *Janus*'s dictum that exclusive representation significantly impinges First Amendment associational freedoms. *E.g.* *Mentele v. Inslee*, 916 F.3d 783, 788–89 (9th Cir. 2019) But at least one court warned that *Janus* “arguably undermines some of [*Knight*'s] reasoning.” *Bierman v. Dayton*, 900 F.3d 570, 574 (8th Cir. 2018), cert. denied, 139 S. Ct. 2043 (2019) (mem.).

And courts that have reached the matter have concluded that exclusive representation would survive heightened scrutiny even if it did impinge on the First Amendment. These decisions note that *Janus*'s withholding strict scrutiny from agency fees, paired with Supreme Court compelled speech precedent, suggests courts should review any such impingement with “exacting” – but not strict – scrutiny. *E.g.* *Mentele*, 916 F.3d at 790 & n.3; *see also* Brad Baranowski, *The Representative First Amendment: Public-Sector Exclusive Representation After Janus*, 99 B.U. L. REV. 2249, 2267 & n.14 (2019) (noting compelled expression and compelled association claims receive a “heightened level of scrutiny” and “[w]here exactly this level falls on the Court's tiers of scrutiny is murky”). Concerning the Supreme Court's most recent formulation of the exacting scrutiny standard, *see infra* note 176 and accompanying text.

21. Such challenges could establish state action because the NLRA *requires* exclusive representation. 29 U.S.C.A. § 159(a). These challenges would then face the uncertainty discussed *supra* note 19 concerning whether private sector union speech implicates First Amendment interests as much as does public sector union speech.

22. For argument that law should require certain workforces be unionized, *see* Tristan Bird, *Representation Elections Are Incompatible with Workplace Democracy*, ONLABOR (May 14, 2018), <https://www.onlabor.org/representation-elections-are-incompatible-with-workplace-democracy/>.

23. Any mandatory unionization scheme would almost surely involve unions bargaining contracts for some workers who do not want the union's representation, and thus, at least in the public sector, by *Janus*'s logic “significant[ly] impinge” First Amendment associational freedoms. *Supra* notes 19–20. As a gestalt matter, judges accustomed to our present system of industrial relations might blanch at a scheme that lets workers vote only for which union will represent them, not for whether to be unionized at all.

24. For one such proposal, *see* Mark Harcourt et al., *A Union Default for the U.S.*, ONLABOR (Jul. 15, 2020), <https://www.onlabor.org/a-union-default-for-the-u-s/>.

25. *See generally, e.g.*, Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) (discussing these challenges).

26. *See* Aaron Tang, *Janus and the Law of Opt-Out Rights*, HARV. L. REV. BLOG (Jul. 2, 2018), <https://blog.harvardlawreview.org/janus-and-the-law-of-opt-out-rights/>.

holding that the First Amendment bars an analogous opt-out regime for workers' payments to unions.<sup>27</sup>

Possibly—though unlikely—*Janus*'s reasoning would threaten even the sectoral bargaining<sup>28</sup> model that policymakers and labor advocates have increasingly recommended the United States adopt to strengthen unions' ability to improve workers' conditions.<sup>29</sup> And undoubtedly any ban on captive audience meetings<sup>30</sup>—a ban the PRO Act includes<sup>31</sup>—would face First Amendment challenge.<sup>32</sup>

Too much is uncertain in First Amendment doctrine to know which of the above laws the Court would find even impinge on the Amendment.<sup>33</sup> This Article's focus on whether any such impingement would be justified does not imply that such impingement exists. Any conclusion that private sector agency fees involve state action would be startling. But the Roberts Court's ever-widening conception of First Amendment impingement has treated onlookers to serial surprise. And the Court could, by extending *Janus*'s reasoning, more easily find impingement in other of the above cases.

Also unclear is whether the Court would find whatever impingement any union-strengthening law causes to be justified by the watered-down<sup>34</sup> and under-theorized conception of labor peace that *Janus* merely assumed *arguendo* was a compelling interest.<sup>35</sup>

27. *Janus*, 138 S. Ct at 2486.

28. *Supra* note 4.

29. One reason challenges to private sector sectoral bargaining would be even more tenuous than challenges to private sector exclusive representation is that the relationship between unions negotiating at the sectoral level and workers is more attenuated than that between unions negotiating at the plant or enterprise level and workers. The public is therefore less likely to attribute the positions that sectoral unions espouse to any given worker – a fact that weakens compelled speech and compelled association challenges. *E.g.* *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 655 (1994).

30. These are meetings employers require employees to attend, wherein employers or consultants express anti-union views.

31. *Supra* note 2.

32. For an evaluation of such a challenge, see Elizabeth Masson, “Captive Audience” Meetings in Union Organizing Campaigns: Free Speech or Unfair Advantage, 56 HASTINGS L.J. 169, 187–88 (2005).

33. For arguments that the Court erred in concluding that public sector agency fees impinge on the First Amendment, see sources collected in Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 604 n.257 (2021).

34. *Supra* note 16.

35. Neither *Janus* nor *Abood* spelled out why states' interest in avoiding the conflict that could occur in a workplace that multiple unions sought to represent is compelling. For a discussion of resulting uncertainty about whether the Court would find that states' labor peace interest justifies any impingement public sector exclusive representation causes, see Tang, *infra* note 37, at 191–93 (concluding the Court should find that this interest justifies any such impingement). The Court's failure to spell out its theory of why the labor peace interest is compelling also raises questions about whether that implicit theory would justify private sector union-strengthening laws. Analyzing those questions is beyond this Article's scope, but the most convincing of the possible concerns undergirding the labor peace interest would justify

But what is certain is that the First Amendment, at least as the Roberts Court has developed it, poses enough threat to current and future labor law that we should consider explicating a stronger foundation for that law. Expounding how strong unions advance a compelling interest in reducing economic inequality's transmission into political inequality aids that project. Doing so also has the virtue of bringing First Amendment analysis of labor law into better alignment with what is at stake in efforts to strengthen—or weaken—labor unions.

Three last introductory notes. As elaborated below, strong unions reduce economic inequality's transmission into political inequality via two often-overlapping but analytically distinct ways: by reducing economic inequality itself and by reducing the extent to which that inequality, once it arises, transmits to political inequality. Below, I use the term reducing “wealth-based political inequality” to refer to the state interest in reducing economic inequality's transmission into political inequality, and by that term I mean to encompass an interest in both these ways of reducing that transmission. Because campaign finance regulations reduce wealth-based political inequality via the latter way, this Article incidentally supplements literature arguing that an interest in reducing economic inequality's transmission into political inequality should justify campaign finance restrictions that the Court has held violate the First Amendment. The Court's holding that this interest justifies those campaign finance restrictions would not render those restrictions less restrictive alternatives to union-strengthening laws, though, because, *inter alia*,<sup>36</sup> holding that this interest justifies those campaign finance restrictions would not overrule the Court's holding that those restrictions impinge on the First Amendment.

Second, although this Article expounds the compelling interest in reducing *wealth*-based political inequality, my argument is not exclusive of arguments that the state has a compelling interest in advancing other forms of political equality. Rather, much of my argument applies to arguments that the state has a compelling interest in advancing other forms—such as gender- or race-based political equality.

Third, Professor Aaron Tang argues that reimbursing unions directly from state coffers, rather than from fees deducted from workers' paychecks, would be a less restrictive alternative for advancing any interest served by public sector agency fees.<sup>37</sup> But other scholars caution that direct reimbursement might not be as effective at supporting strong

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private sector laws.

36. For other reasons why not, see *infra* note 255.

37. Aaron Tang, *Public Sector Unions, the First Amendment, and the Costs of Collective Bargaining*, 91 N.Y.U. L. Rev. 144, 177–78, 204–18 (2016).

unions.<sup>38</sup> The less effective direct reimbursement is, the less likely it becomes a less restrictive alternative to public sector agency fees for reducing wealth-based inequality.<sup>39</sup>

I do not seek to resolve whether direct reimbursement would be as effective at supporting strong unions as the agency fees *Janus* invalidated. After all, this Article's intervention extends beyond the debate about public sector agency fees. It seeks to develop a framework for defending not only those fees but also other union-strengthening laws—laws to which Tang's proposal does not apply. It should be noted, though, that applying my framework to public sector agency fees would require more fully addressing Tang's argument.

## II. THE STATE HAS A COMPELLING INTEREST IN REDUCING ECONOMIC INEQUALITY'S TRANSMISSION INTO POLITICAL INEQUALITY.

In this Part, I explain why the state has a compelling interest in reducing wealth-based political inequality. First, Section A overviews affirmative reasons why the Court should recognize reducing this inequality to be a foundational, urgent goal. Section B explains why concerns that the Court has raised in its campaign finance decisions should not impede the Court from recognizing this goal to be a compelling interest for First Amendment purposes.

### A. Affirmative Reasons

Leading investigations into the Court's jurisprudence conclude that no particular methodology guides the mainly ad hoc—often un- or underexplained—judgments the Court makes in determining whether a state interest is compelling.<sup>40</sup> Sometimes the Court asserts that an interest is compelling because that interest itself advances constitutional values,

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38. Catherine L. Fisk & Martin H. Malin, *After Janus*, 107 CAL. L. REV. 1821, 1850–57 (2019); but see Aaron Tang, *Life After Janus*, 119 COLUM. L. REV. 677, 755–58 (2019) (responding to Fisk & Malin's critique).

39. See *infra* Section III.A.2.

40. Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 932–37 (1988) (“[T]he Court [usually] has failed to explain the basis for finding and deferring to compelling governmental interests.”); Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1321–22 (2007) (“Courts and commentators have sometimes suggested that compelling interests can be derived from the Constitution itself . . . Sometimes, however, the Supreme Court labels interests as compelling on the basis of little or no textual inquiry.”); see also *Let the End be Legitimate: Questioning the Value of Heightened Scrutiny's Compelling- and Important-Interest Inquiries*, 129 HARV. L. REV. 1406, 1410 (2016), (noting Court often deems an interest compelling based on “unelaborated social or moral value judgments,” and sometimes based on “traditional notions about the proper functions and operation of the state”); Richard M. Re, *Equal Right to the Poor*, 84 U. CHI. L. REV. 1149, 1204 (2017) (similar).

goals, or rights.<sup>41</sup> But an interest can be compelling even if it does not advance a constitutional end.<sup>42</sup>

Facing an amorphous framework for identifying compelling interests—a framework in which constitutional, moral, and historical considerations all sometimes feature—I argue the government has a compelling interest in reducing wealth-based political inequality in part by reviewing leading accounts of why that inequality presents not just a moral or social problem, but also a constitutional problem. If reducing wealth-based political inequality advances constitutional values, decisions extrapolating compelling interests from such values offer one basis for recognizing a compelling interest in reducing that inequality. I supplement that argument by showing that traditions of historical thought and political theory support recognizing a compelling interest in reducing wealth-based political inequality and that the Court’s campaign finance decisions arguably have already implicitly recognized such a compelling interest. But before developing these arguments, I review empirical literature recording the extent of wealth-based political inequality in the United States.

### 1. Empirics

That perceptions of the wealthy’s disproportionate political power have produced widespread concern and anger in the United States needs no citation. I instead here review scholarship confirming those perceptions’ accuracy. But first a few notes on terminology: my purposes here do not require me to choose a precise definition of “the wealthy” and “economic elites” whom I refer to throughout this Article as exercising disproportionate political power. The data discussed here reveals outsized political influence by persons at the ninetieth income percentile relative to persons at the seventieth, fiftieth, thirtieth, and tenth. This data suffices to show a remarkable wealth-based political inequality in the United States, even if more granular data would show that, for example, the top 1% or .01% of income earners have disproportionate political power relative to the top two through ten percent, or that inequalities in *wealth*

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41. *E.g.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311–13 (1978) (holding public university’s First Amendment right to academic freedom creates a compelling interest in being able to admit a diverse student body); *cf.* McConnell v. Fed. Election Comm’n, 540 U.S. 93, 137 (2003), *overruled on other grounds* by Citizens United v. Fed. Election Comm’n, 558 U.S. 310 (2010) (explaining Court deferentially reviews Congress’s campaign contribution limits in part because interest in “benefit[ing] public participation in political debate,” which those limits serve, is a “constitutional interest[.]” that “compet[es]” with the plaintiff’s constitutional speech interest).

42. Mark D. Rosen, *When Are Constitutional Rights Non-Absolute? McCutcheon, Conflicts, and the Sufficiency Question*, 56 WM. & MARY L. REV. 1535, 1538 (2015); *see also* Fallon, *supra* note 40, at 1322 & ns. 305–06 (citing cases recognizing sub-constitutional compelling interests).

not captured in the income data on which I primarily rely further skew political influence.

And in speaking of the wealthy and economic elites, I do not imply that the wealthy form a class with monolithic policy preferences or patterns of engaging in politics. Nor do I ignore that wealthy *persons* tend to influence politics through different channels than do wealthy business organizations.<sup>43</sup> I use these terms instead as convenient shorthand to discuss an aggregate phenomenon of wealth-based political inequality that can be mitigated by strengthening unions.<sup>44</sup>

The most comprehensive study of wealth's impact on political influence focused on federal policy outcomes and concluded that the wealthy's political influence dominates that of the poor and middle class.<sup>45</sup> That study—conducted by Martin Gilens—found this result in all the policy fields Gilens studied: economic and tax, social welfare, foreign,<sup>46</sup> and religious and social values.<sup>47</sup> Specifically, Gilens compared federal policy outcomes to political preferences held by people in the tenth, fiftieth, seventieth, and ninetieth percentiles of income distribution.<sup>48</sup> Gilens found that when the political preferences of persons at the ninetieth and tenth percentiles significantly diverge, only the preferences of those at the ninetieth meaningfully influence policy outcomes.<sup>49</sup> He found similar results by studying outcomes when the ninetieth percentile's preferences significantly diverged from the preferences held by people at the thirtieth, fiftieth, and even seventieth percentiles.<sup>50</sup> These comparisons to the thirtieth, fiftieth, and seventieth percentiles help rebut the possibility that a coalition of the middle class and the wealthy that outvotes the poor, rather than the wealthy's dominant political power, explains why policy outcomes correlate only with the ninetieth percentile's preferences across the set of policy issues for which

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43. See Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419, 435–36, (2015).

44. *Infra* Section III.B.

45. MARTIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* 70–96 (2012).

46. For other research finding similar results in foreign policy, 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).

47. Gilens, *supra* note 45, at 97–123.

48. *Id.*

49. *Id.* at 79–81 (concluding that when these preferences diverge, “government policy bears absolutely no relationship to the degree of support or opposition among the poor.”).

50. *Id.* at 79–82 (noting that aside from 90th percentile, “the only hint of a link between preferences and policies is for Americans at the 70th income percentile . . . but even for the 70th income percentile, the coefficient is small . . . and [statistically] nonsignificant”).

those preferences significantly diverge from the tenth's.<sup>51</sup> Indeed, Gilens further rebutted the possibility that majoritarian politics, rather than the wealthy's dominant political power, explain his findings by examining what happens when the preferences of the poor and middle-class align in opposition to the ninetieth percentile's preferences. Here, responsiveness to the ninetieth percentile "remains strong while responsiveness to the poor and middle class is completely absent."<sup>52</sup> Gilens further controlled for the impact of education levels and found that the foregoing results reflect policy bias toward the wealthy much more than toward the highly educated.<sup>53</sup>

Other studies of federal policy outcomes have reached conclusions similar to Gilens'.<sup>54</sup> And studies have found that the wealthy wield disproportionate political influence, relative to the poor, over *state*-level political outcomes too.<sup>55</sup> These studies have also found that, at the state level, political inequality exists further between the middle-class and the poor—with the former wielding disproportionate influence relative to the latter.<sup>56</sup>

Supplementing the foregoing studies' findings that the wealthy enjoy disproportionate political power, Kate Andrias has catalogued *how* the wealthy gain this power. Campaign spending gives wealthy individuals and firms disproportionate access to legislators<sup>57</sup> and favors candidates backed by the wealthy. Aside from campaign contributors receiving

51. *Id.* at 83–84.

52. *Id.* at 84 (analyzing policy issues in which preferences of fiftieth and tenth percentile align against preferences of ninetieth percentile).

53. *Id.* at 93–95.

54. See LARRY BARTELS, *UNEQUAL DEMOCRACY* 253–54 (2008) (concluding senators are more responsive to wealthy constituents and that “the views of constituents in the bottom third of the income distribution receive[] no weight at all in the voting decisions of their senators”). Bartels controlled for income-related disparities in voter turnout, which disparities did not “provide a plausible explanation for the [observed] income-related disparities in responsiveness.” *Id.*

55. See Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 N.Y.U. L. REV. 1527, 1580 (2015); Patrick Flavin, *Income Inequality and Policy Representation in the American States*, 40 AM. POL. RES. 29, 42 tbl. 1 (2012) (finding low-income residents have essentially no impact, while middle-income and high-income residents have substantial impact, on state-level policy); Elizabeth Rigby & Gerald C. Wright, *Whose Statehouse Democracy? Policy Responsiveness to Poor Versus Rich Constituents in Poor Versus Rich States*, in WHO GETS REPRESENTED 189, 208–09 tbl. 7.5, 213–14 tbl. 7.6 (Peter K. Enns & Christopher Wlezien eds., 2011) (listing results from four models measuring state-level political influence, all of which find low-income residents have no impact on state-level economic or social policy while high-income residents have substantial impact on those policy domains, three of which find middle-income residents have substantial impact, and one of which finds middle-income residents have minimal impact).

56. Flavin, *supra* note 55; Rigby & Wright, *supra* note 55.

57. Andrias, *supra* note 43, at 445; Joshua L. Kalla & David E. Brockman, *Campaign Contributions Facilitate Access to Congressional Individuals: A Randomized Field Experiment*, 60 AM. J. POL. SCI. 545, 556 (2016) (demonstrating that campaign contributions increase contributors' access to policymakers).

preferential access to legislators, the wealthy also gain disproportionate access to legislators through lobbying. Wealthy firms and organizations that represent wealthy individuals are disproportionately able to offer lobbyists to legislators,<sup>58</sup> and legislators rely on these lobbyists to flag issues worth addressing and to provide technical expertise concerning how to address those issues. Legislators, while shaping policy, also rely on their own intuitions, which some scholars have argued disproportionately favor the wealthy's interests, because federal and state legislators disproportionately come from more affluent backgrounds or large firms or business organizations.<sup>59</sup> Wealthy organizations additionally shape outcomes through their participation in the regulatory process. There is evidence that, particularly for regulatory issues that are complex and not highly salient, wealthy organizations are disproportionately able to shape regulations.<sup>60</sup> The revolving door problem<sup>61</sup> can exacerbate the regulatory influence that industry groups command.<sup>62</sup>

## 2. The Constitutional Interest

The above research suggests that the wealthy dominate political outcomes at both the federal and state level. That research suggests further that the wealthy dominate politics by capturing multiple branches of government at each level. Scholars have begun to explain how these outcomes betray goals the Framers sought to achieve through the Constitution's structural safeguards for spreading political power across different political actors—safeguards including federalism, separation of powers, and other structural provisions in the Constitution. Scholars have begun to explain, that is, how the wealthy's political dominance is not merely a moral or political-philosophical problem, but a constitutional

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58. See Andrias, *supra* note 43, at 440, 446.

59. NICHOLAS CARNES, WHITE-COLLAR GOVERNMENT, 7, 19–21 (2013) (finding legislators from working class backgrounds more support economically redistributive policies than do legislators from white-collar backgrounds, and working-class persons typically comprise approximately two to three percent of federal and state legislatures, although comprise between fifty and sixty percent of U.S. population); see also Andrias, *supra* note 43, at 447.

60. Andrias, *supra* note 43, at 449–51; William T. Gormley, Jr., *Regulatory Issue Networks in a Federal System*, 18 POLITY 595, 606–07 (1986) (“When issues are highly complex and not very salient, conditions are ripe for policymaking by a power elite.”); Thomas O. McGarity, *Administrative Law As Blood Sport: Policy Erosion in A Highly Partisan Age*, 61 DUKE L.J. 1671, 1745–47 (2012) (noting information asymmetries provide industry groups disproportionate influence over regulatory processes); see also *supra* note 55 and accompanying text (noting wealthy are disproportionately able to furnish lobbyists to lawmakers).

61. That is, the problem whereby agency officials' and staffers' plans to later work for the industries they regulate dampens their willingness to aggressively regulate those industries.

62. Andrias, *supra* note 43, at 450–451 (surveying literature on revolving door, while explaining the revolving door theory “does not hold up in all contexts”).

problem too.

The conceptual starting point for this constitutional argument is that the Framers designed the Constitution to prevent two types of political pathology: first, corrupt federal officials' "tyrannizing and plundering" their constituents, and second, "dominant factions of the electorate . . . captur[ing] the government for their own selfish ends[.]"<sup>63</sup> The Constitution's separation of powers and federalism structures ensure that the power to make and implement policy does not unduly concentrate in any one governmental institution, partly to preclude the first pathology above. But the Framers designed those and other structures of the Constitution also to guard against the second pathology. That is, to balance political power among different social groups.

The wealthy's domination of multiple—or all—branches of government conflicts with at least one purpose<sup>64</sup> of the Constitution's separating political power among three branches of government: the purpose of reducing the risk that any one "faction" would dominate policymaking.<sup>65</sup> Separating powers reduces this risk because electing legislative and executive representatives at separate times and via different electorates helps ensure that officials accountable to different coalitions of interests can check and balance each other.<sup>66</sup> But the wealthy's dominating policymaking by both of these branches affronts the goal of preventing any one faction from dominating policy.<sup>67</sup>

The Framers additionally designed certain of the Constitution's other structures as tools to balance political power among different social and interest groups. Perhaps the chief social group division that concerned the Framers was the division between slaveowners and non-slaveowners. The Constitution established the bicameral legislature, Electoral College, and Three-Fifths Clause to prevent the interests of either slaveowners or of non-slaveowners from dominating national politics at the expense of the

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63. See Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 666 (2011); Andrias, *supra* note 43, at 433.

64. Purposes additional to democratic accountability that separating powers advances include "energetic, efficient government," Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1729–30 (1996), competent government, see Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 640 (2000), and protection of fundamental rights, see *id.*

65. Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 435 (1987) ("The separation of powers and the system of checks and balances were intended to reduce th[e] risk . . . [that] private groups, whether minorities or (more likely) majorities, might use governmental authority to oppress others . . . A faction might come to dominate one branch, but it was unlikely to acquire power over all three.")

66. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 64 (2005) ("[B]ecause each government entity would be selected in a different way by a different constituency, ultimate government policy would reflect multiple indices of popular sentiment . . . different branches chosen at different times through different voting rules might together produce a more accurate and more stable composite sketch of deliberate public opinion.")

67. See generally Andrias, *supra* note 43.

other group's interests.<sup>68</sup>

The Constitution's federalism structure likewise balanced political power among different social groups,<sup>69</sup> although the extent to which the Framers intended federalism to effect that balance is not always clear. At the Founding and post-ratification, there were several distinct social group divisions among which federalism balanced power. Again, slaveholders used federalism to protect their interests against a federal government that could otherwise better implement abolitionists' goals.<sup>70</sup> More generally, different industries dominated southern and northern economies.<sup>71</sup> Federalism helped prevent groups from using the federal government to promote industries upon which they relied at the expense of groups that relied on other industries.<sup>72</sup> And constitutional historians have argued the Establishment Clause was originally understood to protect state-level religious establishments' ability to avoid domination by any federally-imposed religious establishment.<sup>73</sup> Because different states had established different religions, the federalist division of power enabled persons belonging to these different religions to gain state-level representation.<sup>74</sup> Some scholars have even argued federalism functioned initially to protect the ability of low- and middle-income classes to advance their interests through state legislatures, which were more accountable to those classes than was the federal government<sup>75</sup>—although these scholars have yet offered limited evidence that the Framers *intended* federalism to protect against the wealthy's disproportionate political power.

But does the wealthy's political dominance really conflict with the goal that the above constitutional designs advance of balancing power among social groups? One might object that we should not give too much weight to one purpose among several that the separation of powers advances. One

68. See Daryl J. Levinson, *Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 98 (2016) ("Proportional representation in the lower house of Congress and the Electoral College, bolstered by the Three-Fifths Clause, was supposed to guarantee that the South would soon have secure control over the House of Representatives and the presidency, while the greater number of Northern states would dominate the Senate.").

69. *Id.* at 83 ("[F]ederalism w[as] once conceived as mechanisms for balancing power among interests and social groups.").

70. *Id.* at 103.

71. MICHAEL J. KLARMAN, *THE FRAMERS' COUP 186–90* (2016).

72. See Levinson, *supra* note 68, at 102.

73. See Adam M. Samaha, *Endorsement Retires: From Religious Symbols to Anti-Sorting Principles*, 2005 SUP. CT. REV. 135, 163 (2005) (noting Establishment Clause "indicated restraints on the ability of the federal government to interfere with state religious 'establishments'"); Akhil Reed Amar, *THE BILL OF RIGHTS 32–34* (1998) ("The original establishment clause . . . is agnostic on the substantive issue of establishment versus nonestablishment and simply calls for the issue to be decided locally.").

74. See Levinson, *supra* note 68, at 103 (noting "[s]everal states established different religions").

75. Joseph Fishkin & William Forbath, *Wealth, Commonwealth, & the Constitution of Opportunity*, 58 NOMOS 45, 62, 70–71 (2017).

could then object that the Framers' designing other constitutional provisions to balance political power between certain social groups says nothing about whether the Framers would have been concerned with political power imbalances between other groups—as relevant here, between different economic classes. Indeed, other nations have expressly structured their constitutions to help balance political power between different economic classes.<sup>76</sup> If the Framers wanted to preclude economic inequality from translating into political inequality, one might wonder, why did they not, for instance, establish a bicameral legislature in which the House would be elected only by voters of below median wealth and the Senate only by voters of above median wealth? Or why did they not use some other means to constitutionalize economic equality?

The reason is not that the Framers thought the republic could survive gross economic inequality, historians argue. Gordon Wood writes that “[a]lthough most Americans in 1776 believed that not everyone in a republic had to have the same amount of property . . . all took for granted that a society could not long remain republican if a tiny minority controlled most of the wealth.”<sup>77</sup>

Instead, one explanation scholars advance is that many Framers thought the government should and could adequately prevent economic inequalities from arising in the first place, obviating the need to incorporate economic class divisions into the government's structure or otherwise constitutionally limit economic inequality's transmission into political inequality. The United States' political economy at the time of the Founding was marked by a dominantly agrarian economy in which the policy of expropriating territory from indigenous people made land—back then, the primary source of wealth—seem abundant and widely obtainable.<sup>78</sup> Historians have argued that this backdrop caused James Madison, other Framers, and early political leaders to think that policies that facilitated land ownership would roughly ensure economic equality between the members of the population who these Framers and leaders expected to comprise the voting polity: white, property-owning men.<sup>79</sup> Only by maintaining rough economic equality through such policies, John Adams wrote in 1776, could the republic the Framers envisioned succeed.<sup>80</sup>

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76. See Ganesh Sitaraman, *Economic Structure and Constitutional Structure: An Intellectual History*, 94 TEX. L. REV. 1301, 1305–11 (2016) (describing Rome as example).

77. GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815* 7–8 (2009).

78. See GANESH SITARAMAN, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC* 8 (2017).

79. See *id.* at 8–11, 15.

80. Adams wrote then that because “[political] power always follows property . . . [t]he only possible way . . . of preserving the balance of power on the side of equal liberty and public virtue, is to . . .

The Framers therefore designed the Constitution against a backdrop of assumptions about economic equality that reflected the political-economic conditions of the Framers', but not our own, time. Land soon became limited, industrialization transitioned the United States from an agrarian economy and substantially shifted populations to cities, and corporations and trusts emerged, leading to concentrations of economic power that the Framers had not envisioned.<sup>81</sup> Today, the constitutional premise many Framers shared—that gross economic inequality begets political inequality incompatible with a republic—remains. But the Framers' policy premise—that the republic would prevent that ill by making land widely available—proved wrong.

A second objection to my argument is that the Framers' constitutional design in some ways aimed to *limit* the political power of economically subordinate groups—power some Framers worried these groups would leverage into laws that would violate ostensible property rights.<sup>82</sup> State-enacted debtor relief laws especially stoked those Framers' concern.<sup>83</sup>

But many scholars show that these Framers' underlying vision here was to preserve the ability of putatively noble, learned legislators to deliberate toward proper policy outcomes, by distancing those legislators from any powerful “faction”—the idea being that populist pressures could amount to capture by faction.<sup>84</sup> This (normatively debatable) vision is consistent with the Framers' belief that excessive wealth-based political inequality is hostile to the republic they envisioned and that lawmakers

. . . make a division of land into small quantities, so that the multitude may be possessed of landed estates. If the multitude is possessed of the balance of real estates, the multitude will have the balance of power, and in that case the multitude will take care of the liberty, virtue, and interest of the multitude, in all acts of government.” ERIC NELSON, *THE GREEK TRADITION IN REPUBLICAN THOUGHT* 209 (2004).

81. Sitaraman, *supra* note 78, at 16; Fishkin & Forbath, *supra* note 75, at 87 (noting that by the time of Jackson's presidency, “big firms and nation-spanning corporations had come to dominate the entire economy . . . This was the moment when the nation haltingly confronted the fact that the United States, like Europe, was destined to have a vast, permanent class of propertyless wage earners. It was no longer possible to contend that the industrial hireling was on a path to owning his own workshop, the agricultural tenant or laborer his own farm.”).

82. See, e.g., Gerald Leonard, *Jefferson's Constitutions*, in *CONSTITUTIONS AND THE CLASSICS: PATTERNS OF CONSTITUTIONAL THOUGHT FROM JOHN FORTESCUE TO JEREMY BENTHAM* 369, 369 (D.J. Galligan ed., 2015) (“The drafters of the 1787 Constitution designed the new national government to gather more power at the centre . . . Enhanced powers at the centre and new limitations on state powers would insulate government from excessively direct control of the people and limit the states' capacities to violate rights of property and the like.”); JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* 149, 218 (1990).

83. See Jack N. Rakove, *Confederation and Constitution*, in *THE CAMBRIDGE HISTORY OF LAW IN AMERICA: VOLUME 1, EARLY AMERICA (1580-1815)* 482, 502–03 (Michael Grossberg & Christopher Tomlins, eds., 2008).

84. See, e.g., Amar, *supra* note 73, at 29 (noting “the Madisonian system of deliberation among refined representatives” sought to ensure “each representative [w]ould be bound [not] by his relatively uninformed and parochial constituents [but] rather [by] his conscience, enlightened by full discussions with his fellow representatives bringing information and ideas from other parts of the country”); Leonard, *supra* note 82, at 369, 380 (similar).

should take certain actions to maintain a rough economic equality—just not actions violating ostensible property rights. Indeed, the founding-era assumption that lawmakers could maintain a rough economic equality among white men by distributing “open” land likely made the Framers complacent about detached legislators’ ability to maintain such equality. Rather than question that the Framers believed rough economic equality is necessary, we should question whether economic elites’ current domination of political outcomes is compatible with the Framers’ objective of fostering public policy that reflects legislators’ considered judgments about what serves the public good, rather than reflects pressure from a powerful faction.

Moreover, although Madison viewed the distinction between slave states and non-slave states as “the great division of interests in the United States,”<sup>85</sup> he thought the constitutional structures that balanced power among these states implemented the more general principle that “every peculiar interest whether in any class of citizens, or any description of states, ought to be secured as far as possible.”<sup>86</sup> Gilens’ data suggests the United States’ economic inequality has begot a political inequality that undermines that constitutional goal.

### 3. The Interest as Understood Historically and in Political Theory

Traditions of historical thought and political theory likewise support recognizing that reducing wealth-based political inequality is a compelling state interest. Various political theorists have developed arguments why a democracy’s constituents should each have a roughly equal opportunity to influence political outcomes. John Rawls, for the most cited instance, argued that all citizens should have an “approximately equal” opportunity to “influence the outcome of political decisions”<sup>87</sup>—a goal that Rawls deemed to be equally important for establishing a just and free society as is the goal of ensuring unencumbered political speech.<sup>88</sup> Rawls also believed economic inequality, by translating into political inequality, undermined this goal.<sup>89</sup> Because, as Section II.B elaborates, the Court’s resistance to recognizing

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85. 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA, IN 1787, at 264 (Jonathan Elliot ed., 2d ed. 1891).

86. Klarman, *supra* note 71, at 257 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 486 (Max Farrand ed., 1911 (statement of James Madison)); Levinson, *supra* note 68, at 98.

87. JOHN RAWLS, POLITICAL LIBERALISM 327 (1993).

88. See Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 601 (2008) (“Rawls argued that the . . . guarantee of roughly equal influence for everyone over all stages of the electoral process, is at least as high a constitutional priority as unfettered political speech.”).

89. See JOHN RAWLS, A THEORY OF JUSTICE, 90–95 (1971); *cf.* Rawls, *supra* note 87, at 267.

an explicit compelling interest in political equality owes more to prudential concerns than to disagreement with the principle that a republic should aspire to a rough political equality, I do not here further survey philosophical arguments supporting that aspiration.<sup>90</sup>

Of course, in no democracy could every constituent have exactly equal influence. But the inability to specify the exact threshold at which wealth-based political inequalities become unacceptable should not prevent us from recognizing that the level of distortion that Gilens' and other studies have revealed is unacceptable.<sup>91</sup>

Nor do the Court's precedents demand that we identify such a threshold before recognizing a compelling interest in reducing wealth-based political inequality. The Court has recognized state interests in "[m]aintaining a stable political system"<sup>92</sup> and in "procuring the manpower necessary for military purposes,"<sup>93</sup> for instance, without attempting to define how much military manpower suffices or the point at which political instability becomes a compelling concern.<sup>94</sup> And as elaborated below,<sup>95</sup> the Court's approach to administering constitutional ideals of equality in other contexts shows that it suffices to select *some* plausible threshold at which wealth-based political inequalities trigger a compelling interest, even if a different threshold would also have been plausible.

The notion that economic inequality threatens this country's constitutional structure further claims a substantial historical pedigree. As touched on in Part II-A(2), historians have recorded this notion's Founding-era purchase.<sup>96</sup> And post-ratification thinkers continued to

90. For a political-theoretical account additional to Rawls' concerning why economic inequality and wealth-based political inequality are hostile to a republic, see generally, e.g., Jack M. Balkin, *Republicanism and the Constitution of Opportunity*, 94 TEX. L. REV. 1427 (2016).

91. Cf. Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1612 (1999) ("In theory and in doctrine, we can often identify what is troublingly unfair, unequal, or wrong without a precise standard of what is optimally fair, equal, or right.")

A separate but similar point is that people can agree wealth-based political inequality is a compelling problem even if they subscribe to different of various theories about how to best structure governmental representation of the citizenry. See Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445, 1467–71 (2016) (explaining why this inequality undermines "a variety of constitutional theories on their own terms," including majoritarian, democratic, and optimistic pluralist theories, Republicanism, and other theories of representation, yet acknowledging this transmission is not a problem for some theories).

92. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 226 (1989).

93. *Gillette v. United States*, 401 U.S. 437, 462 (1971).

94. Cf. Fallon, *supra* note 40, at 1271 (noting similar indefiniteness occurs whenever government asserts compelling interest in national security or in protecting children).

95. *Infra* notes 166–167 and accompanying text.

96. For more on how this notion pervaded that era's thinking, see Fishkin & Forbath, *supra* note 75, at 62–70 (documenting how "the revolutionary generation . . . held it a constitutional essential for the new United States to avoid reproducing the hierarchies, titles, and aristocratic forms of privilege and elitism that the colonists hoped to leave behind. Most deemed it no less essential to supplant that

repeatedly regard economic inequality as a matter of constitutional concern. President Martin Van Buren believed that republican constitutionalism required permanent political organization among the non-wealthy to ensure that no aristocracy wielded outsized political influence.<sup>97</sup> And President Jackson and his political followers argued that economic inequality threatened “the grand republican principle of Equal Rights—a principle which lies at the bottom of our constitution” in part because that economic inequality forms a vicious cycle with political inequality.<sup>98</sup> Later, many Reconstruction-era lawmakers and citizens understood the Reconstruction Constitution to demand strengthening labor rights to combat economic inequality.<sup>99</sup>

Through the Gilded age and into the early twentieth century, too, labor advocates often understood labor rights as serving this constitutional function.<sup>100</sup> More generally, those eras’ reformers commonly understood economic inequality as posing a constitutional problem.<sup>101</sup> These views found famous expression when President Franklin Delano Roosevelt pitched an economically redistributive “Second Bill of Rights” to create an “economic constitutional order”<sup>102</sup> that would “protect majorities against the enthronement of” economic elites.<sup>103</sup> Such an order, Roosevelt argued, would vindicate the “political equality we once had won” but that “economic inequality” had rendered “meaningless” for too many people.<sup>104</sup>

If, for various reasons,<sup>105</sup> today’s arguments about economic equality

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aristocratic order with a republic . . . of ‘middling sorts,’ without extremes of wealth or poverty—above all, without a permanent class of impoverished . . . toilers or a permanent wealthy elite.”)

97. Leonard, *supra* note 82, at 387.

98. Fishkin & Forbath, *supra* note 75, at 75–79 (elaborating Jacksonian view that economic inequality presented constitutional problem).

99. *Id.* at 83–84.

100. See Joseph Fishkin & William Forbath, *The Anti-Oligarchy Constitution*, 94 BOSTON U. L. REV. 669, 684–85, 689 (2014).

101. See, Fishkin & Forbath, *supra* note 75, at 88; cf. K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 TEX. L. REV. 1329, 1337–44 (2016).

102. Franklin D. Roosevelt, *Message to the Congress Reviewing the Broad Objectives and Accomplishments of the Administration* (June 8, 1934), in THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT (New York, Random House, 1938), 3: 287, 288, 292.

103. Franklin D. Roosevelt, *Campaign Address on Progressive Government* (Sept. 23, 1932), in *id.*, 1: 752.

104. Franklin D. Roosevelt, *Acceptance of the Renomination for the Presidency* (June 27, 1936), in *id.*, 5: 230, 231–34.

105. Compare Fishkin & Forbath, *supra* note 75, at 55 (attributing decrease in argumentation that economic inequality is a constitutional problem to certain historical contingencies, including a shift toward conceiving constitutional argument as something “more clause-bound, and more strictly tied to what courts enforce, than anything nineteenth-century or early twentieth-century Americans would recognize,” with Kate Andrias, *Building Labor’s Constitution*, 94 TEX. L. REV. 1591, 1593–94 (2016) (arguing that, although “conceptually sound” arguments exist that the Constitution “support[s] rights to

air less often in a constitutional key, the above examples show that arguments proclaiming this equality's constitutional stakes are far from foreign to this country's constitutional tradition.

#### 4. The Doctrinal Interest

The Court's campaign finance decisions arguably have recognized, at least formerly, a compelling interest in reducing wealth-based political inequality.<sup>106</sup> Before *Citizens United v. FEC* confirmed that only an interest in preventing *quid pro quo* corruption or its appearance can justify restrictions on independent expenditures, the Court in *Austin v. Michigan Chamber of Commerce*<sup>107</sup> recognized a compelling interest in preventing corporations' "immense aggregations of wealth" from distorting the political speech marketplace.<sup>108</sup> Additionally, the Court in *Nixon v. Shrink Missouri Gov't PAC*<sup>109</sup> and later cases recognized a state interest<sup>110</sup> in preventing corruption defined as political officials' privileging large campaign donors' preferences.<sup>111</sup> As Chief Justice Roberts' *Citizens United* concurrence observed, "most scholars acknowledge" that the interest *Austin* deemed compelling was essentially the interest in political equality.<sup>112</sup> And multiple scholars have noted that the corruption interest *Nixon* recognized is best understood as an interest in preventing economic inequality's transmission into unequal political influence. David Strauss, for example, offers an extended argument why, if everyone had equal wealth to contribute to campaigns, elected officials' privileging campaign donors' preferences would unlikely be troubling and could instead improve democratic accountability by letting constituents record the

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decent employment and unionization," many in the labor movement have deprioritized these arguments due to concerns about relying on court-derived rights to advance labor's goals).

106. Supplementing the decisions discussed below is *Williams-Yulee v. Florida Bar*, 575 U.S. 433 (2015), where the Court, in rejecting a First Amendment challenge to a law prohibiting state judges from personally soliciting campaign donations, invoked the judicial oath to do equal right to the poor and to the rich. *Id.* at 445. For an argument that this oath instantiates an equal right principle that supports recognizing economic equality as a compelling interest, see Re, *supra* note 40, at 1203–07.

107. 494 U.S. 652 (1990), *overruled by* *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

108. *Id.* at 660.

109. 528 U.S. 377 (2000).

110. Formally the interest *Nixon* recognized was a "sufficiently important interest," because *Nixon* applied a form of heightened scrutiny below strict scrutiny. *Id.* at 388. *Nixon* nonetheless is a good indicator of the Court's willingness, formerly, to recognize a compelling interest in wealth-based political inequality. For the Court does not use a meaningfully different methodology for determining whether an interest is compelling than whether an interest is important. See generally *Let the End Be Legitimate*, *supra* note 40.

111. *Id.* at 389, *accord.*, e.g., *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003) (plurality).

112. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 381 & n.2 (2010) (collecting sources).

salience of their political preferences.<sup>113</sup> And, as Kathleen Sullivan notes, because the money that *Nixon* deemed corrupting goes to campaign funds and not candidates' own pockets, the interest *Nixon* recognized does not reduce to the interest in preventing legislators from improperly treating public office as an object for personal monetary profit. It instead reflects a concern with "unequal outlays of political money creat[ing] inequality in political representation."<sup>114</sup> Indeed, Justice Breyer's *Nixon* concurrence more overtly foregrounded the equality interest the majority there recognized, by describing the state's interest as one in "democratiz[ing] the influence that money itself may bring to bear upon the electoral process."<sup>115</sup>

Although *Citizens United* overruled *Austin* and held that the state lacks a compelling interest in preventing corruption as defined by *Nixon*, even the interest in preventing *quid pro quo* corruption that *Citizens United* deemed compelling retains an equality element. Sullivan's, and to some extent Strauss's, arguments both apply to *quid pro quo* corruption.

But the precise extent to which the interest in preventing *quid pro quo* corruption reduces to a concern with wealth-based political inequality is not here important.<sup>116</sup> What matters is, first, that *Austin* and *Nixon* show that the Court *has* recognized state interests that boil down to the interest in reducing wealth-based political inequality. This history suggests that judicial recognition of this latter interest is no pipe dream. And, second, that even the narrower interest *Citizens United* substituted for the interests that *Austin* and *Nixon* recognized embodies, to a significant extent, a concern with wealth-based political inequality.

### B. Prudential Concerns

There are therefore substantial affirmative arguments that the government has a compelling interest in reducing wealth-based political inequality. But any argument in favor of this interest should address the concerns that have caused the Court in its campaign finance decisions—starting with *Buckley v. Valeo*<sup>117</sup>—to so far reject a broader compelling interest in political equality full-stop.<sup>118</sup> Scholars have explained that the

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113. David A. Strauss, *What Is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141, 142–49 (1995); see also RICHARD HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* 81–82 (2016) (same).

114. Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 678–79 (1997); Strauss, *supra* note 113, at 144, 148 (same).

115. *Nixon*, 528 U.S. at 401 (Breyer, J., concurring).

116. Concerning other conceptualizations of that interest, see generally Yasmin Dawood, *Classifying Corruption*, 9 DUKE J. CONST. L. & PUB. POL'Y 103 (2014).

117. 424 U.S. 1 (1976).

118. *Buckley* rejected a compelling interest in "equalizing the relative ability of individuals and

Court has rejected a compelling interest in political equality not because political equality is an un compelling goal in principle, but because the Court has worried lawmakers could—through laws ostensibly aimed at equalizing political speech—try to suppress dissent, to more generally retaliate against disfavored viewpoints, or to otherwise entrench themselves in office.<sup>119</sup>

Then-professor Elena Kagan more specifically argued that two premises have caused the Court to reject a compelling interest in political equality. First, legislators have inherent incentives to pursue these bad motives, which raises the risk that laws aimed at altering the speech market will advance these motives.<sup>120</sup> Second, the difficulty of measuring whether different groups *do* have disproportionate political influence hinders the Court’s ability to assess whether a speech regulation ostensibly advancing political equality does advance that goal or instead advances only the aforementioned bad motives.<sup>121</sup>

But as elaborated below, the emergence since *Buckley* of databases recording groups’ policy preferences at the federal and state levels suggests that measuring groups’ political influence is more viable than this second premise credits—at least as to gender, race, and income.<sup>122</sup> While we can question whether lacking reliable methodologies for measuring groups’ political power warranted the campaign finance decisions’ even initially rejecting a compelling interest in political equality, this new data especially calls for reevaluating that rejection.

To discuss the fears Kagan noted, I below organize the Court’s stated reasons for rejecting a compelling interest in political equality into two analytically distinct, although functionally overlapping, concerns. First, the concern that legislators will use political equality as a pretext for laws

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groups to influence the outcome of elections.” *Id.* at 48. The Court reasoned that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment” – a much-criticized conclusion the Court announced without citing direct support. *Id.* The Court later applied *Buckley* to reject various regulatory schemes meant to equalize electoral candidates’ financial resources. In *Davis v. Fed. Election Comm’n*, the Court rejected a compelling interest in “level[ing] electoral opportunities for candidates of different personal wealth.” 554 U.S. 724, 741 (2008) 741. Later, *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett* concluded at a higher level of generality that “the government has [no] compelling state interest in ‘leveling the playing field’ that can justify undue burdens on political speech.” 564 U.S. 721, 749 (2011).

119. David A. Strauss, *The Equality Taboo*, 2015 U. CHI. LEGAL F. 509, 511–12 (2015); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 468–72 (1996).

120. *Id.* at 469.

121. *Id.* at 469–70.

122. See Stephanopoulos, *supra* note 55, at 1531, 1572–1602 (demonstrating that recently available data at federal and state levels permits assessing whether these groups’ “aggregate policy preferences are less likely to be enacted than those of similarly sized and classified groups”); see also *supra* notes 45–55 and accompanying text (detailing studies assessing income-based disparities in political influence at federal and state levels).

that entrench their (or their party's) incumbency. Second, the concern that an interest in equalizing political influence lacks a limiting principle.

### 1. Entrenchment Concerns

The most common way the Court has expressed the entrenchment concern in its campaign finance decisions is by noting that campaign finance restrictions inherently advantage incumbent legislators over non-incumbent candidates because the latter depend more than the former on campaign spending.<sup>123</sup> But at least one Justice has explicitly worried that legislators may use such restrictions to increase the relative power of groups on whom the legislators partly rely for reelection.<sup>124</sup>

Some Justices would likely harbor a similar concern with recognizing a compelling interest in reducing wealth-based political inequality in the labor law context. Legislators' goals in strengthening unions might be not only to reduce wealth-based political inequality, but also to strengthen the political clout of an institution that tends to support Democrats.<sup>125</sup> In fact, Justice Kennedy hinted, during *Janus*'s oral argument, that unions' political clout counseled in favor of invalidating Illinois' agency fees statute—although he did not explain why that clout so counseled.<sup>126</sup>

This section's remainder addresses Justice Kennedy's possible concerns. I first explain why any legislative intent to use union-strengthening laws to increase the electoral prospects of specific legislators, or of Democrats in general, would not constitute viewpoint discrimination. I then argue that legislators' enacting these laws with at least some motive to entrench themselves or their party should not otherwise preclude those laws' being justified by a compelling interest in reducing wealth-based political inequality. I finally argue that the threat that these laws will effect that entrenchment—regardless of legislative motive—should not preclude their being justified by that compelling interest.

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123. See *Buckley v. Valeo*, 424 U.S. 1, 56–57, (1976).

124. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 692 (1990) (Scalia, J., dissenting).

125. Although labor unions contribute to both major political parties, unions have historically offered more support to Democrats. Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 *YALE L.J.* 400, 436 n.133 (2015).

126. When the union's lawyers agreed that "if [they] d[id] not prevail in this case, the unions will have less political influence," Justice Kennedy asked, "Isn't that the end of this case?" Transcript of Oral Argument at 54, *Janus*, 138 S. Ct. 2448 (No. 16-1466), 2018 WL 1383160. Justice Kennedy did not note that unions use this influence disproportionately to support Democrats. We can wonder whether his concern would remain if unions' political influence were evenly distributed among political parties.

*i. Bolstering Political Allies is Not Viewpoint Discrimination*

Justice Kennedy unlikely thought that legislators' enacting laws partly with the goal of strengthening groups who politically support them *ipso facto* constitutes viewpoint discrimination. For that claim seems untenable. Daryl Levinson and Ben Sachs explain how legislators enact innumerable laws that have the potential and often the goal of strengthening entities or coalitions that support these legislators or their party.<sup>127</sup> Even if the Court believed legislators enact union-strengthening laws partly to increase political speech favoring Democrats, the Court's holding that these laws therefore viewpoint discriminate would require the Court to address why countless laws of the sorts that Levinson and Sachs identified do not also viewpoint discriminate. For instance, if minimum wage earners disproportionately favor Democrats, would minimum wage laws violate the First Amendment because they predictably increase these workers' resources to engage in political speech supporting Democrats? Would laws weakening unions viewpoint discriminate because they predictably reduce speech supporting Democrats?

Any holding that union-strengthening laws are viewpoint discriminatory based on the Court's belief that legislators enacted those laws to strengthen unions' ability to support Democrats would not only lack a limiting principle. Such a holding would additionally face doctrinal barriers. For starters, *United States v. O'Brien*<sup>128</sup> should foreclose speculations about this motive. *O'Brien* stands for the proposition that, although the government's restricting speech for viewpoint-discriminatory reasons impinges on the First Amendment, the Court's tools for sussing out such motive do not include freewheeling speculation.<sup>129</sup> The Court instead limits itself to doctrinal tools as proxies to sleuth such motives. In particular, the Court uses divergent standards of review for laws depending on whether those laws are facially viewpoint-discriminatory, content-based, or content-neutral.<sup>130</sup> The Court does so due to the conceptual and evidentiary difficulties that inquiries

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127. Levinson & Sachs, *supra* note 125, at 407–08, 426–55 (2015) (illustrating “three general mechanisms of functional entrenchment. First, politicians, parties, and temporarily prevailing coalitions can enact substantive policies that strengthen political allies or weaken political opponents. Second, they can enact policies or programs that change the composition of the political community, selecting in allies or selecting out opponents. Third, they can shift the locus of political decision making to an actor or institution that is responsive to allies or unresponsive to opponents.”).

128. 391 U.S. 367 (1968).

129. Kagan, *supra* note 119, at 492; see *O'Brien*, 391 U.S. at 383 (“[T]his Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.”).

130. Kagan, *supra* note 119, at 443–92.

into legislative motive inevitably face.<sup>131</sup> And although inferences of impermissible legislative intent are a doctrinally-sound basis for finding violations of the Equal Protection Clause,<sup>132</sup> the First Amendment's Establishment Clause,<sup>133</sup> and the First Amendment's Free Exercise Clause,<sup>134</sup> *O'Brien* remains good law at least as to non-religion First Amendment allegations.<sup>135</sup>

Even if *O'Brien* did not bar the Court's freestyle speculation into entrenchment motive, the Court held in *Rucho v. Common Cause*,<sup>136</sup> where plaintiffs alleged that partisan gerrymanders violate the First Amendment, that legislators' intentionally bolstering coalitions that support their political party does not in itself constitute viewpoint discrimination or otherwise impinge on the First Amendment.<sup>137</sup> And assuming that *Rucho*'s First Amendment holding should not be limited to the partisan gerrymandering context just because the decision reasoned partly from considerations specific thereto,<sup>138</sup> *Rucho* counsels against any distinction between legislators' bolstering favorable political coalitions by diluting the power of partisan opponents' vote and by altering the electoral speech marketplace. For *Rucho* acknowledged that partisan

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131. There are conceptual barriers to defining what would constitute any legislator's intent, "[c]onsider[ing] that each legislator possesses a complex mix of hopes, expectations, beliefs, and attitudes." Kagan, *supra* note 119, at 438. These conceptual difficulties compound when we consider that legislatures have many members. *Id.*; *O'Brien*, 391 U.S. at 384.

These conceptual difficulties dissolve if we seek to identify, not "the" or "a" "legislative intent," but instead any motivation that was a but-for cause of a law's enactment. *E.g.* Laurence H. Tribe, *The Mystery of Motive, Private and Public: Some Notes Inspired by the Problems of Hate Crime and Animal Sacrifice*, 1993 S. CT. REV. 1, 33 n. 79. But although but-for motive is a coherent concept, the Court has no reliable way to sleuth out such motive. Kagan, *supra* note 119, at 440. Accordingly, the Court relies on the proxies I listed in the main text for identifying impermissible intent. Although those proxies are imperfect, "the alternative—a direct inquiry into motive—will produce even more frequent errors." *Id.* at 453.

132. *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

133. *Edwards v. Aguillard*, 482 U.S. 578, 586–87 (1987).

134. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534 (1993).

135. *E.g. First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1278 (9th Cir. 2017).

136. 139 S. Ct. 2484 (2019).

137. *Id.* at 2504 (holding that legislators' intentionally using redistricting to weaken the ability of voters to form a prevailing coalition for the opposing party does not impinge on the First Amendment).

138. *Rucho* reasoned partly that the Framers' choice to entrust districting to legislatures, whom the Framers knew would engage in partisan gerrymandering, counsels against holding that partisan gerrymanders violate the First Amendment. *Id.* at 2494–97. But separate from this argument about Framers' intent, *Rucho* reasoned also that some partisan motivation is inevitable in legislative redistricting and courts lack judicially manageable standards for determining a threshold at which such partisan motivation becomes unconstitutional. *Id.* at 2504–05 and *Gaffney* passage there cited. This latter reasoning supports finding that legislative motive to bolster partisan coalitions through means other than gerrymandering likewise does not, standing alone, violate the First Amendment, given this motive's inevitable entanglement with countless laws and the lack of manageable standards for identifying impermissible legislative intent. *Supra* notes 127–131 and accompanying text.

gerrymanders impair the disadvantaged party's ability to elicit volunteers.<sup>139</sup>

One might think a different analysis were due if union-strengthening laws improved Democrats' chances by restricting speech favoring Republicans. But they do not. Assuming *arguendo* that private sector exclusive representation restricts rights *to speak*, that restriction limits only a worker's ability to negotiate terms of employment with her employer. This speech is arguably, by *Janus*'s logic, political speech for First Amendment purposes. But this speech is no vehicle for electoral advocacy. And other challenges to union-strengthening laws do not allege restriction of a worker's right to speak.<sup>140</sup>

Nor could a plaintiff try to distinguish *Rucho* by arguing agency fees force her to aid speech favoring Democrats. None of the ways agency fees strengthen unions' electoral political advocacy, elaborated below,<sup>141</sup> involve compelling anyone to fund that advocacy. Nor could unions do so: the Court's longstanding holdings that unions may not require anyone to subsidize union speech on electoral politics remain good law.<sup>142</sup>

#### *ii. Entrenchment Motive Should Not Preclude a Compelling Interest*

More likely, then, Justice Kennedy's concern was that an agency fees statute's being enacted to some extent due to legislators' entrenchment motives would vitiate the state's claim that the statute advances compelling interests in labor peace and preventing free riders. Yet the Court has never explained why the threat of entrenchment motives or effects should in itself bar finding that a compelling interest in political equality justifies a First Amendment-impinging law that advances that equality.

Kagan's account seemingly explains why not: arguing that entrenchment motive and entrenchment effect should not invalidate a law that advances political equality is beside the point if the Court lacks reliable means of ensuring that the law does so. But because recent

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139. *Id.* at 2504.

140. Challenges to agency fees and to public sector exclusive representation raise only *compelled* speech and association claims. Public sector exclusive representation cannot restrict rights *to speak* because the state's greater power to negotiate with no employees includes a lesser power to negotiate with, as it were, only some. *See* *Thompson v. Marietta Educ. Ass'n*, 371 F.Supp.3d 431, 435 (S.D. Ohio 2019) and transcript cited therein.

141. *Infra* notes 220–226 and accompanying text.

142. *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 235 (1977) (holding First Amendment bars requiring objecting workers to fund union spending for “the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to [the union’s] duties as collective-bargaining representative”; *Comm’n Workers of Am. v. Beck*, 487 U.S. 735, 762–63 (1988) (interpreting NLRA to not authorize collective bargaining agreements that permit unions to require objecting workers to fund such spending).

advances in data improve the Court's ability to measure whether laws do advance political equality,<sup>143</sup> I address here why neither the threat of entrenchment motive nor of entrenchment effect should in principle bar recognizing a compelling interest in reducing wealth-based political inequality.

Again, although the Court has, in the context of the First Amendment's religion clauses, circumvented *O'Brien's* bar on inquiries into legislative motive, *O'Brien* shows at least that there is no uniform First Amendment anti-pretext principle that would require the Court to deny a compelling interest in political equality based on the Court's speculating that legislatures were only pretextually advancing that interest.

Are there nonetheless good other reasons for the Court to deny this compelling interest based on such pretext concerns? An affirmative answer seems unlikely even if we set aside the conceptual and evidentiary concerns that inquiries into legislative motive raise.<sup>144</sup> Imagine first (implausibly) that no legislators who voted for a hypothetical First Amendment-impinging law that does advance political equality at all hoped to thereby advance political equality. Imagine they all merely hoped to entrench their incumbency. Even if so, that motive should unlikely in itself preclude a compelling interest in political equality from justifying the law. First, the point of permitting compelling interests to justify First Amendment impingements more likely is to permit state action that advances a state of affairs that crucially benefits a polity, than to ensure the legislature's subjective satisfaction whenever the legislature wants to advance such a state of affairs. Second, any goal of disincentivizing or punishing unseemly legislative motive unlikely warrants invalidating the law. For if advancing political equality were important enough to justify a *First Amendment impingement* when the legislature intended to advance that political equality—a position that follows from any claim that a law would be justified by a compelling interest in political equality but for concerns that entrenchment motives underly the law—why would advancing that political equality not be important enough to outweigh the court's distaste for crass political motives that are not themselves unconstitutional?<sup>145</sup>

And of course, the legislative motive underlying any law that meaningfully advances political equality would surely be, at worse,

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143. *Supra* note 122 and accompanying text.

144. *Supra* note 131 (describing those barriers).

145. *Supra* Section II.B.1(i) (explaining that legislators' intent to entrench themselves is not unconstitutional). For detailed discussion of when and why governmental motive should matter in First Amendment analysis, see Kagan, *supra* note 119, at 505–14 (concluding there are appreciable arguments why governmental motive is important to First Amendment analysis, but explicitly not endorsing any claim that motives should be more important to that analysis than a law's effects).

mixed. At least one Court opinion has already explained that a law serves a compelling state interest when legislators enacted the law to advance two goals: one of which is a compelling state interest and the other of which is not.<sup>146</sup> Granted, the non-compelling motive at issue in that opinion was not a bad motive. But, per the reasoning in the above paragraph's last two sentences, that unlikely makes a difference.

*iii. The Threat of Entrenchment Effect Should Not Preclude a Compelling Interest*

A separate possibility is that the campaign finance decisions rejected a compelling interest in political equality based not on the Court's concern that legislators intended to entrench themselves but instead on the concern that these laws threatened to in fact excessively entrench incumbents. James Gardner argues "[w]hat may be the strongest slippery slope challenge to campaign spending restrictions rests on the fear that such measures, however well-motivated, will have the unintended consequence of giving incumbents an advantage over challengers so significant that even the most rudimentary kind of democratic accountability will be destroyed."<sup>147</sup>

But this ground for rejecting a compelling interest in reducing wealth-based political inequality faces doctrinal and practical objections. Take doctrinal first. For the Court to reject a compelling interest on grounds that actions advancing that interest could excessively entrench incumbents logically requires that the Court adopted some judgment of what constitutes excessive entrenchment.<sup>148</sup> That judgment is in tension with the Court's having deemed partisan gerrymandering claims non-justiciable on the ground that the Court has no manageable standards for deciding how much entrenchment is "too much."<sup>149</sup>

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146. Justice Kagan's dissent in *Arizona Free Enter. Club* made this point, which the majority did not dispute. *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 782 (2011) (Kagan, J., dissenting).

147. James Gardner, *Anti-Regulatory Absolutism in the Campaign Arena: Citizens United and the Implied Slippery Slope*, 20 CORNELL J.L. & PUB. POL'Y 673, 676 (2011) (proceeding to refute this slippery slope challenge).

148. The Court's doing so does not require deciding the precise threshold at which entrenchment becomes excessive. But it logically requires finding that the amount of entrenchment that could plausibly result from recognizing this compelling interest would be excessive.

149. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2498 (2019); Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385, 1412–13 (2013). A counterargument is that *Rucho* feared the politicization of courts that occurs when courts must repeatedly make these decisions without manageable standards, *Rucho*, 139 S.Ct. at 2507, and that rejecting a compelling interest in political equality once and for all based on entrenchment concerns is not comparably politicizing. But *Rucho* presented the Court's lack of competence to determine what constitutes excessive entrenchment as a basis for its holding that is seemingly independent from the concern that adjudicating partisan gerrymandering cases would politicize courts. See *Rucho*, 139 S. Ct. at

One practical objection to the Court's rejecting a compelling interest in political equality based on a concern about entrenchment effects is that to do so ignores alternative routes to the same harm: that ninety-five percent of incumbent candidates between 1980 and 2006 won their elections shows incumbents are already extremely hard to defeat and there is little room for First Amendment-impinging laws that advance political equality to increase incumbent entrenchment.<sup>150</sup> And the Court would similarly ignore alternative routes to entrenchment if its concern were that a law ostensibly advancing political equality will entrench a political party, given Levinson and Sachs' survey of the innumerable strategies that parties use to entrench themselves.<sup>151</sup>

Perhaps most important, the claim that legislators may use laws ostensibly advancing political equality to entrench themselves or their party tells only half the entrenchment story. Gilens' data, combined with the wealthy's tendency to favor laws that protect and strengthen their economic and political advantage, shows that preventing legislative bodies from adjusting imbalances in political power threatens to perpetuate *class* entrenchment.<sup>152</sup> Barring a compelling interest in reducing wealth-based political inequality on grounds that this interest could produce excessive incumbent- or party-entrenchment implicitly adopts a view that the costs of whatever incumbent- or party-entrenchment such reforms threaten exceed the costs of the class entrenchment that such reforms could reduce<sup>153</sup>— a view not obviously right.

A different way to put the point is to recognize that the concern that legislators will entrench themselves is a concern that they will cause themselves to remain in office via some obstruction of the way we want democracy to function.<sup>154</sup> I have in this Article assumed agreement with

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2507 ("Any judicial decision on what [constitutes excessive entrenchment would be] beyond the competence of the federal courts.").

150. Gardner, *supra* note 147, at 705–15 (showing that the argument that the threat of excessive entrenchment justifies barring a compelling interest in political equality suffers four characteristics of weak slippery slope arguments).

151. *Supra* note 127 and accompanying text.

152. For one economist's account of how the wealthy leverage their outsized political influence to increase their economic advantage, creating a vicious cycle between economic inequality and political inequality that entrenches the wealthy's power, see JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE* 35–104, 119 (2012).

153. See Jedediah Purdy, *Beyond the Bosses' Constitution: The First Amendment and Class Entrenchment*, 118 COLUM. L. REV. 2161, 2162 (2018).

154. See Levinson & Sachs, *supra* note 125, at 409 ("[T]he persistence of politicians or parties in office . . . is not necessarily proof of entrenchment. If politicians [or] parties . . . are retained simply because they continue to be popular among the electorate, this would not be viewed as entrenchment. Entrenchment implies that the political system is not responsive to changes in voters' preferences; a system that is perfectly responsive to unchanging preferences would be viewed as a well-functioning democracy.").

the premise that, in principle, a democracy's constituents should each have a roughly equal opportunity to influence political outcomes.<sup>155</sup> Arguing that a law that advances wealth-based political equality causes entrenchment of legislators or of a political party requires showing not just that the law makes certain legislators or a certain party more likely to retain office. It requires additionally showing that the law does so by creating political inequalities along an axis other than wealth such that the law overall moves us further from the ideal of each constituent having a roughly equal opportunity to influence political outcomes.

## 2. No Limiting Principle

Another reason the Court has rejected a compelling interest in political equality is that the Court has feared that this interest lacks a limiting principle.<sup>156</sup> Indeed, there are countless conceivable ways that certain entities or persons are positioned to utter speech that disproportionately influences political outcomes. A leading objection to recognizing a compelling interest in correcting distortions in political influence is that this interest could seemingly justify media censorship on grounds that the press or certain media outlets have disproportionate political influence.<sup>157</sup> Other of the many ways persons or groups are unequally situated to influence political outcomes or to get elected include differences in wealth, celebrity status,<sup>158</sup> cheap leisure time,<sup>159</sup> charisma,<sup>160</sup> and strength of group or campaign organization.<sup>161</sup>

Scholarship elsewhere refutes that this slippery slope concern warrants rejecting a compelling interest in political equality.<sup>162</sup> For this Article's purposes, then, it suffices to add that framing the compelling interest that

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155. *Supra* text accompanying notes 87-90.

156. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 360 (2010); McConnell v. Fed. Election Comm'n, 540 U.S. 93, 296-97 (2003), (Kennedy, J., concurring).

157. *Id.*

158. Samuel Gedge, "Wholly Foreign to the First Amendment": The Demise of Campaign Finance's Equalizing Rationale in Davis v. Federal Election Commission, 128 S. Ct. 2759 (2008), 32 HARV. J.L. & PUB. POL'Y 1197, 1197-98 (2009).

159. David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1384 (1994).

160. Strauss, *supra* note 119, at 521.

161. *Id.*

162. *See generally* Gardner, *supra* note 147; *see also, e.g.*, HASEN, *supra* note 113, at 117-23 (rebutting slippery-slope-to-censorship argument), 124-45 (rebutting argument concerning slippery slope to excessive media regulation independent of censorship motive), 146-60 (rebutting slippery-slope-to-excessive-entrenchment argument); *cf.* Purdy, *supra* note 153, at 2176 (explaining how doctrines letting politics impinge on the First Amendment to advance political equality can "be neutral both (1) in the formal sense that they do not require free-roaming, case-by-case judicial decisions about the distribution of political power and (2) in the substantive sense that they implement a version of the idea that the state is obliged not to make invidious distinctions among citizens").

justifies union-strengthening laws as an interest in reducing wealth-based political inequality rather than in advancing political equality more generally could blunt the edge of the Court's concern. This narrower interest could justify only laws that reduce economic inequality's transmission into political inequality in a manner consistent with the Court's narrow tailoring principles. The foregoing paragraph's parade of horrors suggests that there are seemingly much fewer ways that First Amendment impingements plausibly advance that interest consistent with narrow tailoring principles than there are ways that such impingements could, consistent with those principles, reduce *any* source of political inequality.

Of course, the Court's having abstracted the interests recognized by *Nixon* and *Austin* into interests in advancing political equality full-stop suggests the Court might chafe at recognizing a compelling interest in wealth-based political equality as distinct from one in political equality full-stop.<sup>163</sup> But scholars have noted the Court could adopt a compelling interest in combatting certain distortions of political influence without committing itself to recognizing an interest in combatting other distortions.<sup>164</sup>

And the emergence since *Buckley* of robust data recording income-based political inequality<sup>165</sup> vitiates the Court's concern that recognizing an interest in wealth-based political equality would invite First Amendment-impinging laws that ostensibly advance such equality but whose efficacy and necessity the Court cannot meaningfully assess. While I do not here try to hash out the optimal way to use this data to implement an administrable standard for evaluating such laws' efficacy and necessity, this data suggests administrable standards are likely available. The Court could—similar to how it has in administering its one person one vote rule<sup>166</sup>—select some plausible threshold at which discrepancies in political influence trigger a compelling interest.<sup>167</sup> The

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163. *Supra* note 112.

164. Hellman, *supra* note 149.

165. *Supra* note 122 and accompanying text.

166. To administer the constitutional requirement of one person one vote, the Court deems legislative districting schemes presumptively compliant if “the maximum population deviation between the largest and smallest district is less than 10%.” *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016). This shows that the Court can and does use plausible and administrable standards to constitutionalize political equality, even if the Constitution did not itself require the Court to choose whatever standard the Court selected instead of some other plausible and administrable standard. *See* Strauss, *supra* note 159, at 1385 (“‘One person, one vote’ is an example of . . . a workable conception of equality. ‘One person, one vote’ is not the necessary or inevitable rule for voting in a democracy . . . The great virtue of that principle is [instead] that it is a plausible account of democratic equality that is, relatively speaking, very easy to administer.”).

167. I do not address whether the Court should use a metric comparing inequalities in political influence between two points on the income distribution (e.g., a comparison between the 90th and 10th

Court could then rely on contemporaneous simulations of studies, such as those discussed earlier in this Article,<sup>168</sup> to assess whether that threshold is exceeded.

Any such standard might be more helpful for proving that the polity suffers enough wealth-based political inequality to *have* a compelling interest in reducing that inequality than for proving that a challenged law advances that interest.<sup>169</sup> But once courts have such a standard for showing that the state has a compelling interest in reducing such inequality, courts could likely rely on the type of reasoning and metrics I consider below in Section III-B to evaluate whether a challenged law advances that interest.<sup>170</sup>

### III. UNION-STRENGTHENING LAWS ARE PLAUSIBLY ADEQUATELY TAILORED TO THIS INTEREST.

Recognizing a compelling interest in reducing wealth-based political inequality would be only the first step in justifying any labor laws the Court may think impinge on the First Amendment. Next the Court would need to conclude that those laws are adequately tailored to serving that interest. This Part begins to develop an analysis of whether union-strengthening laws are adequately tailored. Although I focus particularly on showing why public-<sup>171</sup> and private sector agency fees are quite plausibly adequately tailored to that interest, the analysis below could be transferred to defend other union-strengthening laws by showing how those laws strengthen unions' ability to reduce economic inequality and to organize poor and middle-class people's political power.<sup>172</sup>

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percentile) or instead a metric that accounts for inequalities in political influence across the whole income distribution.

168. Section II.A.1.

169. This limitation is particularly apparent for challenged laws that were enacted before the time periods that the studies collected in Section II.A.1 observed. For such laws, we could not use successive iterations of those studies to compare the wealth-based political inequality that existed before and after those laws were enacted.

170. Possibly the Court could even rely on one of those metrics to establish its standard for how much inequality triggers a compelling interest. The Court might decide that the studies I considered *supra* Section II.A.1 satisfactorily establish that economic inequality does, when it exists, transmit into political inequality. The Court could then choose a certain threshold of economic inequality – perhaps as measured by the 90/10 ratio or by the Gini coefficient – that triggers a compelling interest in reducing wealth-based political inequality. This approach would remove any need to run new simulations of the studies considered *supra* Section II.A.1 contemporaneously with litigation that questions whether an interest in reducing wealth-based political inequality justifies a given law.

171. *But cf.* notes 37–39 and accompanying text.

172. The NLRA requires exclusive representation once a union acquires majority support because the NLRA's sponsors believed such representation makes unions more effective advocates for workers. Nat'l Lab. Relations Bd., Advice Memorandum, *Dick's Sporting Goods*, Case 6-CA-34821 (June 22, 2006) at 8. Testing this hypothesis is challenging because U.S. labor law has not experimented with members-only unions since the NLRA's enactment and because labor law in countries that allow

Below, I use the narrow tailoring framework associated with strict scrutiny although the union-strengthening laws this Article considers would likely receive sub-strict “exacting” scrutiny.<sup>173</sup> I do so mainly because, particularly if courts extend *Americans for Prosperity Foundation v. Bonta*’s<sup>174</sup> recent formulation of the standard for exacting scrutiny beyond the context of laws that compel disclosure, questions and principles that I explain guide strict scrutiny would also guide a court deploying exacting scrutiny, with a key difference between strict and exacting scrutiny being that the latter does not require that challenged state action be the least restrictive means of achieving the state’s asserted interest.<sup>175</sup> My discussion of less restrictive alternatives below thus does not imply that governments would need to show that a challenged union-strengthening law is the least restrictive means to advance the interest in reducing wealth-based political inequality.

### A. Narrow Tailoring Principles

In this Section, I review principles that shape strict scrutiny’s narrow tailoring inquiry. First, I specify the five questions that the narrow tailoring inquiry asks of challenged state action. I then discuss four considerations the Court does or should take into account in answering those five questions. My discussion reveals principles and sites of doctrinal uncertainty that will inform any inquiry into whether union-strengthening laws are adequately tailored to reducing economic inequality’s transmission into political inequality.

#### 1. Five Overarching Questions

The narrow tailoring inquiry asks five questions.<sup>176</sup> First, causation:

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members-only unions differs from U.S. labor law in many other ways. Applying this Article’s framework to challenges to exclusive representation would thus substantially rely on the deference principles developed *infra* III.A.4.

In contrast, there is more evidence that sectoral bargaining strengthens unions’ ability to reduce economic inequality and organize poor and middle-class political power. See Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 94 (2016); Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 631–32 (2007).

Showing that an opt-out unionization regime increases long-term unionization rates would go far in transferring my analysis below to defend such a regime. Significant evidence supports such a showing. *E.g. supra* notes 25–26.

173. *Supra* note 20.

174. 141 S. Ct. 2373 (2021).

175. *Id.* at 2383, 86–87 (“While exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government’s asserted interest.”). Whether and how courts will apply this standard to laws that trigger exacting scrutiny outside the compelled disclosure context remains to be seen.

176. Here I slightly modify Richard Fallon’s explication by explicitly noting the causality

does the challenged law advance the state's compelling interest? Second, necessity: must the state advance this interest by impinging on First Amendment rights through the challenged law, or could the state, with comparable efficacy, advance this interest through means that do not impinge on, or that less impinge on, those rights?<sup>177</sup> Below I refer to such means as "less restrictive alternatives." Third, under-inclusiveness: has the state failed to regulate conduct that poses a threat to the compelling interest comparable to the threat posed by the conduct that the challenged law regulates?<sup>178</sup> Under-inclusiveness does not necessarily invalidate the challenged action.<sup>179</sup> Fourth is over-inclusiveness. Save for a distinction not here relevant, the over-inclusiveness inquiry duplicates the necessity inquiry by asking whether the challenged action impinges on First Amendment rights more than is necessary to advance the compelling interest.<sup>180</sup> Over-inclusiveness does not necessarily invalidate the challenged action either.<sup>181</sup> Fifth is proportionality. The Court seemingly has never expressly noted that its narrow tailoring analysis includes a proportionality inquiry. But scholars have observed that in facing inevitable questions about how much over- or under-inclusiveness is too much—particularly in cases where the challenged action merely reduces rather than eliminates the harm that the state has a compelling interest in avoiding—courts must conduct an implicit proportionality inquiry to decide "whether a particular, incremental reduction in risk justifies a particular impingement of protected rights in light of other reasonably available, more or less costly and more or less effective, alternatives."<sup>182</sup>

## 2. Efficacy-sensitivity

The Court has never clearly resolved whether a proposed less restrictive alternative must be as effective as the challenged state action in advancing the government's compelling interest—nor whether, if it

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requirement that inheres in the necessity requirement. *See* Fallon, *supra* note 40, at 1321–31.

177. *Id.* at 1326.

178. *Id.* at 1327.

179. *Id.* at 1327.

180. *Id.* at 1328–29.

181. *Id.*

182. *Id.* at 1330–31. Numerous other scholars have likewise noted that the narrow tailoring prong requires courts to conduct an implicit proportionality analysis. *E.g.* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 722–23 (1978). And scholars have amply argued why the Court should explicitly embrace a structured proportionality inquiry when reviewing claims of constitutional rights' violations. *See generally, e.g.*, Jamal Greene, *Rights as Trumps?*, 132 *HARV. L. REV.* 28 (2018); *see also* A Shield for David and a Sword Against Goliath: Protecting Association While Combatting Dark Money Through Proportionality, 133 *HARV. L. REV.* 643, 643–45 (2019) (arguing a proportionality approach advances ends the First Amendment aims to advance).

need not be as effective, how close is close enough.<sup>183</sup> The Court has in some cases suggested that challenged state action survives strict scrutiny if the proposed less restrictive alternative less effectively advances the state's compelling interest.<sup>184</sup> But other times the Court has at least implicitly indicated that a proposed less restrictive alternative need not as effectively advance the state's compelling interest.<sup>185</sup>

The important point is that a proposed less restrictive alternative's being less effective cuts against, even if it does not necessarily bar, requiring the state to pursue that alternative. And the Court's lacking any clear rule for how comparably effective a less restrictive alternative must be supports scholars' conclusions that the Court must conduct a relatively ad-hoc proportionality analysis to decide whether the government must forego the challenged state action.<sup>186</sup> I therefore below provide reasons why alternative means of advancing the state's interest in reducing wealth-based political inequality may be less effective, without trying to quantify that efficacy gap.

### 3. Cost-sensitivity

Nor has the Court developed clear standards to evaluate when if ever the government must pursue a proposed less restrictive alternative that imposes financial costs that the challenged state action does not. In *Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth*,<sup>187</sup> the Court held that although students whom a university required to pay fees to support an extracurricular program that expressed political viewpoints to which those students objected receive "some First Amendment protection," the state need not refund objecting students' fees, because doing so "could be so . . . expensive" as to threaten the extracurricular program's existence.<sup>188</sup> Elsewhere, Justice Breyer has noted that the narrow

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183. Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 Yale L.J. 3094, 3118–19 (2015).

184. *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 669 (2004) ("The Government's burden is . . . to show that a proposed less restrictive alternative . . . is less effective."); *see also id.* at 666 (suggesting challenged state action must have "some additional" efficacy relative to proffered alternatives to withstand strict scrutiny); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997) (noting, but without clarifying whether the Court was articulating a necessary or a sufficient condition, that "[t]he [state action's] burden on . . . speech is unacceptable if less restrictive alternatives would be at least as effective in achieving th[at] [action's] legitimate purposes").

185. *Sable Commc'ns of Cal. V. FCC*, 492 U.S. 115, 128–30 (1989) (invalidating a complete ban on indecent phone communications, because "extremely effective" alternative safeguards that "only a few . . . young people" would circumvent were less restrictive alternatives for serving the state's interest in shielding youth from such communications).

186. *Supra* note 182.

187. 529 U.S. 217 (2000).

188. *Id.* at 232.

tailoring analysis is sensitive to governmental budgetary pressures—a point the majority did not dispute.<sup>189</sup> And in a case where the government argued a proposed alternative was too expensive, the Court rejected that argument not in principle, but instead only after the challenger agreed to pay for the alternative’s added expense.<sup>190</sup>

Granted, the Court has elsewhere indicated it might require the government to pursue a less restrictive alternative even if that alternative is more expensive than the challenged action.<sup>191</sup> Recently, in *Burwell v. Hobby Lobby Stores, Inc.*,<sup>192</sup> the Court mused in dicta that a less restrictive alternative to requiring objecting employers to fund employees’ contraceptive coverage might be to require the government to fund that coverage.<sup>193</sup> The Court suggested two conditions must prevail before it might require the government to pursue any such alternative. First, the cost of government funding must be “minor when compared with the overall cost of” the governmental program (there, Obamacare) of which the challenged state action was part.<sup>194</sup> Second, the Court hinted that requiring the government to pursue an alternative entailing such minor costs might be improper if that requirement imposed “a whole new program or burden on the Government.”<sup>195</sup>

For present purposes, *Burwell* suggests that the Court may require the government to pursue an alternative that is costlier than the challenged state action only if the additional cost is minor. I therefore below offer reasons why requiring the government to increase taxes to replace a union-strengthening law’s role in reducing wealth-based political inequality might impose costs that are more than minor. I do not try answering here what we should say is the program of which union-strengthening laws are part—which strict *Burwell* fidelity would demand we use as the denominator for determining these costs’ magnitude. Nor do I try answering whether the changes to tax law necessary to render tax an as-effective alternative would effectively constitute a new governmental program or burden.

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189. *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 688–89 (2004) (Breyer, J., dissenting); *cf. U. S. Postal Serv. V. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 135 (1981) (Brennan, J., concurring) (arguing “preventing loss of mail revenues” is a “significant governmental interest”).

190. *See United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 824 (2012).

191. *See Roy G. Spece, Jr., The Most Effective or Least Restrictive Alternative as the Only Intermediate and Only Means-Focused Review in Due Process and Equal Protection*, 33 VILL. L. REV. 111, 149–50 (1988) (citing examples, but concluding that at some point a proffered less restrictive alternative’s greater expense bars the Court from requiring the state to pursue it.).

192. 573 U.S. 682 (2014).

193. *Id.* at 728.

194. *Id.*

195. *Id.* at 738–39 (Kennedy, J., concurring). Justice Kennedy provided a fifth vote for the majority opinion seemingly subject to this limitation.

#### 4. Deference to Legislatures' Predictive Judgments

The Court has advanced no clear rule concerning what deference it gives to the government's factual findings concerning causation or necessity. But a recurring theme is that the Court accords factual findings substantial deference when those findings amount to predictive judgments.<sup>196</sup> The Court in *Turner Broad. Sys., Inc. v. FCC*<sup>197</sup> explained that, at least as to Congress's "predictive judgments" bearing on the "factual necessity" of challenged state action, the Court will not "reweigh the evidence *de novo*" or "replace Congress' factual predictions with [its] own," but instead will require only that Congress "has drawn reasonable inferences based on substantial evidence."<sup>198</sup>

Whether *Turner*'s rule applies of its own force to strict scrutiny is unclear. *Turner* and a later opinion applying its rule applied heightened but not strict scrutiny.<sup>199</sup> Nowhere did these opinions purport to limit their rules to sub-strict heightened review. But even if these rules governed only sub-strict heightened review, they would seemingly govern challenges to private sector agency fees and likely any compelled speech and compelled association challenges to exclusive representation or sectoral bargaining. For *Janus* applied only "exacting" scrutiny to agency fees.<sup>200</sup> Although *Janus* suggested agency fees might warrant strict scrutiny, the Court would unlikely subject private sector agency fees to strict scrutiny, because doing so would imperil a range of subsidies and fees in other contexts.<sup>201</sup> And lower courts have repeatedly noted that exclusive representation would face only exacting scrutiny.<sup>202</sup>

Furthermore, the Court in *Holder v. Humanitarian Law Project*<sup>203</sup> signaled that deference to predictive judgments is also appropriate during strict scrutiny. The Court there held it must "grant weight" to Congress's "empirical conclusions" in matters concerning national security and

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196. The Court in other areas of law similarly accords greater deference to predictive than to non-predictive empirical conclusions. See *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 98, 103 (1983) (holding that in reviewing administrative agencies' discretion, a "court must generally be at its most deferential" when the agency "is making predictions, within its area of . . . expertise, at the frontiers of science . . . as opposed to [making] simple findings of fact").

197. 512 U.S. 622 (1994).

198. *Id.* at 665–66; accord *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 165–66 (2003), *overruled on other grounds by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

199. *Turner*, 512 U.S. at 635; *McConnell*, 540 U.S. at 165–66.

200. *Janus v. Am. Fed'n of State, Cty., & Mun. Employees*, 138 S. Ct. 2448, 2465 (2018).

201. William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 196–201 (2018) (discussing *Janus*'s implications for bar dues and public university student activity fees). For argument that agency fee statutes should receive strict scrutiny, see Tang, *supra* note 37, at 185–90.

202. See *supra* note 20.

203. 561 U.S. 1 (2010).

foreign affairs, because these are areas where (1) “information can be difficult to obtain,” and (2) “the impact of certain conduct can be difficult to assess.”<sup>204</sup> At least this latter characteristic echoes *Turner*’s claim that courts should reasonably defer to legislative predictive judgments about the necessity of First Amendment-impinging laws.

True, *Holder* involved national security—an area where the Court in many legal contexts is especially deferential to the political branches. But likewise the Court’s deference to predictive judgments is a theme that marks other legal contexts.<sup>205</sup> There is thus little warrant for limiting *Holder* to national security cases rather than reading it to endorse deference to predictive judgments in strict scrutiny generally, particularly given that *Holder* expressly cited the predictive nature of the congressional judgments as why deference was due.

### 5. Political Feasibility and the Inside-Outside Problem

We might think that a proposed less-restrictive alternative’s political infeasibility should not help a challenged law survive strict scrutiny. If the state’s interest is truly compelling, this intuition runs, the state’s electorate and representatives will have sufficient will to enact an alternative policy that effectively advances that interest. This intuition seems sensible in many contexts, although its exact logic is unclear.<sup>206</sup>

But this intuition is misplaced at least when the compelling interest is combatting distortions in the political process itself.<sup>207</sup> The Court has seemingly never addressed how this intuition would apply in that context. But it would be odd for the Court to assume that the political infeasibility

204. *Id.* at 34–35.

205. *Supra* note 191.

206. The intuition embodies an evidentiary and a predictive principle. The evidentiary principle is that a less restrictive alternative’s being politically infeasible discredits the claim that the asserted interest is compelling because that infeasibility is probative that the polity’s electorate and elected representatives do not widely and deeply view the interest that the alternative and challenged action advance to be exceedingly important. But whether the polity’s weak attachment to that interest discredits the claim that this interest is compelling for strict scrutiny purposes is unclear. Because constitutional rights check majoritarianism, what makes an interest compelling for strict scrutiny purposes unlikely reduces to how many of the polity’s members deem the interest terribly important. If, however, we conceive the compelling interest analysis as examining certain (ostensibly) objective indicia of an interest’s weight – such as the interest’s relevance to a society’s ability to properly function, *see supra* note 40 (noting Court has not clarified what makes an interest compelling) – a polity’s weak attachment to the interest could conceivably be probative that the interest is not compelling.

The predictive principle is that the interest’s being compelling discredits the claim that a less restrictive alternative is politically infeasible. That is, because the interest is compelling – regardless of what exactly makes it compelling – the polity will surely muster the will to enact the alternative if the Court invalidates the challenged action.

207. The narrow tailoring prong’s cost-sensitivity arguably shows that, even in other contexts, the Court has not reflexively assumed that a polity’s lacking the political will to enact a proposed less restrictive alternative discredits that the interest is compelling.

of a proposed alternative for reducing wealth-based political inequality discredits the claim that a polity's members widely and deeply view that interest as compelling,<sup>208</sup> after the Court recognized this to be a compelling interest on the ground that such inequality impedes legislatures' enacting laws that have widespread and deep support in the polity. Alternatively, it would be odd for the Court to assume that the importance of reducing wealth-based political inequality will persuade the wealthy to not render a proposed less restrictive alternative politically infeasible by organizing their opposition to that alternative. Either of the above assumptions would suffer from the "inside/outside fallacy": the phenomenon whereby a legal theory first diagnoses a problem caused by certain actors' having certain motives and then prescribes a solution to that problem that assumes those same actors lack those same motives.<sup>209</sup> The tailoring prong in this context should instead be sensitive to how the wealthy's undue influence can block a state from enacting a proposed less restrictive alternative.

The Court should exercise this sensitivity in at least two ways. These two considerations should not hand the government a trump card to defend laws that reduce wealth-based political inequality. But these considerations should at least make the Court pause before striking down such laws in cases where it is highly contested that there is even any First Amendment *impingement*.<sup>210</sup> Again, *Janus* was such a case. So would be any challenge to private sector agency fees, public- or private sector exclusive representation, or private sector sectoral bargaining.

First, the Court should not assume that a state that has overcome the wealthy's influence to enact a challenged law can again overcome that influence, if the Court invalidates that law, to enact an alternative. Given Gilens' data, we can expect economically redistributive laws to often be products of fragile, fleeting political coalitions. Any of various reasons might explain why a winning coalition converged around one means (Law One) rather than another (Law Two) for reducing wealth-based political inequality. But even if a coalition could have prevailed to enact Law Two when Law One was enacted, that would not mean that the coalition could prevail to enact Law Two later. Contingent conditions that at Time One opened a policy window to challenge the wealthy's influence may lapse by Time Two.

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208. See also *supra* note 206 (questioning that claim's relevance).

209. See Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1744–45 (2013).

210. Cf. Purdy, *supra* note 153, at 2185 ("Institutions that balance the power of wealth by enabling working people to combine for effective advocacy—in collective bargaining and in the broader contests of politics—should be assumed to be compatible with First Amendment interests unless there is a very strong showing to the contrary.").

That our federal and state governments structurally tend toward inertia further suggests that the battle to replace Law One with Law Two would likely wage uphill. Our federal and state governments split decisionmaking among three branches, and divided the legislative branch into two houses,<sup>211</sup> partly to make enacting legislation more difficult. And some scholars have argued that the degree of gridlock our federal and state governments currently suffer exceeds even what federal and state constitutional framers intended. Jack Balkin, for instance, argues that “when combined with today's highly polarized political parties, veto points that once promoted bargaining and compromise now produce intransigence and gridlock.”<sup>212</sup> Again, the wealthy are disproportionately able to use these veto points to block policies they disfavor through strategic campaign spending, lobbying, and their involvement in regulatory processes.<sup>213</sup>

Second, the Court should consider whether evidence that a proposed alternative would more effectively reduce wealth-based political inequality should counsel to some extent *against* requiring the state to pursue that alternative. For we might expect the wealthy to even more fiercely resist a more effective alternative, further reducing the state's chances of enacting that alternative to replace a challenged law. Although it is unclear exactly when the Court should refuse to require a less restrictive alternative on grounds that the alternative would be too effective and therefore politically unfeasible, I hope it will seem obvious that the particular tax and transfer regime I discuss in Section III-C(2) is one example of where the Court should so refuse.

### B. Causation

There are two analytically distinct but mutually reinforcing ways whereby unions mitigate wealth-based inequalities in political influence.<sup>214</sup> First, by organizing low-income and middle-class people to countervail the wealthy's political power in influencing public policy. Second, by reducing economic inequalities. In turn there are two analytically distinct but mutually reinforcing ways that unions reduce economic inequalities. First, through their above-mentioned organizing of political power to shape public policy—a function I below call

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211. Except for Nebraska, where the legislature is unicameral.

212. Jack M. Balkin, *The Last Days of Disco: Why the American Political System Is Dysfunctional*, 94 B.U. L. REV. 1159, 1165 (2014).

213. Andrias, *supra* note 43, at 472, 484; *see also id.* at 455 (noting that business interests “tend to contribute strategically to members of both parties in order to obtain influence over key chokeholds,” and providing examples of strategic giving to legislative committee members).

214. These correspond to two of the four possible approaches to reducing wealth-based political inequality noted *infra* notes 249-250 and accompanying text.

“political advocacy.”<sup>215</sup> Second, via collective bargaining with employers—through which unions increase the compensation workers receive.

### 1. Organizing Countervailing Political Power

We can reasonably expect that the public policies unions advance by organizing low-income and middle-class people’s political power would include economically redistributive policies. And below I offer examples showing this is so. But insofar as the state’s compelling interest is reducing economic inequality’s transmission into political inequality—rather than reducing economic inequality because economic inequality is per se bad—evidence that unions increase lawmakers’ responsiveness to low-income and middle-class voters’ political preferences, and that a challenged union-strengthening law helps unions do so, should suffice to establish that that law advances the state’s compelling interest, even absent evidence showing that unions advance economic equality.

And Gilens offers evidence that unions increase that responsiveness. After noting that strong interest groups can mitigate wealth-based political inequality, he concludes that “unions are among the most important political forces moving federal policy in a direction desired by the less well-off.”<sup>216</sup> This finding does not surprise. For Gilens found that unions rank among the interest groups in the United States whose policy positions most strongly positively correlate with the “preferences of the less well-off.”<sup>217</sup> And not only do unions align themselves with these positions, but unions have organized low-income and middle-class persons on a scale greater than any other non-party group, helping unions persuade lawmakers to turn these preferences into policy.<sup>218</sup> Indeed, multiple studies show a correlation between union density and legislators’ votes for the positions unions advocate.<sup>219</sup>

But do agency fees strengthen unions’ political advocacy? Evidence suggests yes, even though agency fees cover only costs relating to collective bargaining and contract administration. A recent study concluded that agency fees do so after controlling for other relevant differences between so-called right to work states (i.e., states that bar

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215. I use this shorthand while mindful that, per *Janus*, collective bargaining is also in a sense political advocacy.

216. Gilens, *supra* note 45, at 157–58.

217. *Id.* at 157.

218. Benjamin I. Sachs, *The Unbundled Union: Politics Without Collective Bargaining*, 123 *YALE L.J.* 148, 168–69 (2013) (noting that labor unions at their peak represented over one-third of the country’s wage earners).

219. *See id.* at 171 & notes 100–03 (collecting studies).

agency fees) and agency fee states.<sup>220</sup> That conclusion is unsurprising considering that right-to-work laws force unions to shift resources from political advocacy and voter turnout to efforts to persuade workers to pay their fair share of union representation.<sup>221</sup>

Beyond that study's finding that right-to-work laws force unions to redirect money that unions could have spent on political advocacy, other research suggests right-to-work laws reduce the amount of money even initially available for unions' political advocacy. One study shows that public sector workers in agency fee states were more than twice as likely to be union members than were public sector workers in right-to-work states.<sup>222</sup> Union members, unlike non-members, pay dues to fund not only the union's costs of collective bargaining and contract administration but also the union's political advocacy.<sup>223</sup> This study therefore means public sector workers in agency fee states were more than twice as likely to financially support unions' political advocacy than such workers in right-to-work states.

There are reasons to think agency fees might cause some of, not merely correlate with, that higher rate of union membership. First, there is substantial, albeit contested, evidence that agency fees make unions more effective in their workplace representation.<sup>224</sup> And workers are likely more willing to pay a union to represent their interests outside the workplace once they have seen that unions can powerfully represent their interests inside the workplace.<sup>225</sup> Second, the marginal cost to workers of paying membership dues is lower in agency fee states than in right-to-work states, because these workers' alternative to paying membership dues is to pay an agency fee, rather than to pay nothing. These workers are therefore more likely to pay membership dues to fund the union's political advocacy and to gain other membership benefits. Third, free riding in right-to-work states can drive union membership below a

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220. James Feigenbaum, Alexander Hertel-Fernandez, & Vanessa Williamson, *From the Bargaining Table to the Ballot Box: Political Effects of Right to Work Laws* (Nat'l Bureau Econ. Res., Working Paper No. 24259, 2018). The study found right to work laws reduced county-level democratic vote shares in in federal and state elections. *Id.* at 4. Part of this effect seemingly owes to right-to-work laws' decreasing voter turnout by reducing unions' ability to mobilize voters. *See id.* at 11–15. The study also found evidence suggesting that right-to-work laws reduce economically redistributive state policy and reduce the number of state legislators from working class backgrounds, although the authors' ability to show that right to work laws cause not merely correlate with these outcomes was limited. *Id.* at 19–23.

221. *See id.* at 6, 16.

222. Elizabeth McNichol, *Weaker Unions Could Mean More Income Inequality in States*, CENTER ON BUDGET AND POLICY PRIORITIES (March 6, 2018), <https://www.cbpp.org/blog/weaker-unions-could-mean-more-income-inequality-in-states>.

223. *Supra* note 142.

224. *Infra* notes 243–244.

225. *See* Daron Acemoglu & James A. Robinson, *Economics versus Politics: Pitfalls of Policy Advice*, 27 J. ECON. PERSPECTIVES 173, 177–79 (2013) (arguing so).

majority of a collective bargaining unit, increasing the union's vulnerability to decertification.<sup>226</sup>

## 2. Advancing Economic Equality

Economists and sociologists have offered evidence that unions also advance economic equality. Unions reduce economic inequality through *collective bargaining* by causing employers to increase workers' overall compensation. Studies have found that the average income for unionized employees exceeds that for non-unionized employees by ten to twenty percent.<sup>227</sup> Indeed, studies have shown that unions can weaken employers' power to drive down wages in monopsonized labor markets.<sup>228</sup> That is, markets in which employers insufficiently compete with each other to attract workers—markets that many recent studies conclude are increasingly common. Although some economists have argued that unions cause non-unionized workers' compensation to decrease and in this sense exacerbate economic inequality, other economists have concluded that unions can increase non-unionized workers' compensation. One way unions do so is by causing non-union employers to raise wages to disincentivize their employees from unionizing.<sup>229</sup>

Granted, some researchers have questioned the relationship that many studies find between collective bargaining and economic equality. These researchers argue that recent decades' increases in economic inequality owe little to unions' declining strength—or at least less to that decline than to technological change that raises demand for so-called skilled labor.<sup>230</sup>

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226. Janet C. Hunt & Rudolph A. White, *The Effects of Right-to-Work Legislation on Union Outcomes: Additional Evidence*, 4 J. LAB. RES. 47–63 (1983).

227. E.g. Henry S. Farber et al., *Unions and Inequality over the Twentieth Century: New Evidence from Survey Data 19–24* (Nat'l Bureau Econ. Res., Working Paper No. 24587, 2018) (finding that union wage premium has steadily stayed within this range over past eighty years); Brantly Callaway & William J. Collins, *Unions, Workers, and Wages at the Peak of the American Labor Movement*, in EXPLORATIONS IN ECONOMIC HISTORY, 95, 112–14 (Elsevier Vol. 68(c), 2018).

228. E.g. Efraim Benmelech et al., *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* 16 (U.S. Census Bureau Ctr. Econ. Studies, Working Paper No. 24307, 2018).

229. Mathieu Taschereau-Dumouchel, *The Union Threat*, SOC'Y FOR ECON. DYNAMICS MEETING PAPERS (2011); Henry S. Farber, *Nonunion Wage Rates and the Threat of Unionization*, 58 INDUS. & LAB. RELATIONS REV. 335 (2005).

230. Compare, e.g., Daron Acemoglu & Philippe Aghion, *Deunionization, Technical Change, and Inequality* 251 in 55 CARNEGIE-ROCHESTER CONFERENCE SERIES ON PUBLIC POLICY 229 (2001) (concluding that “although [such technological change rather than] deunionization” is “the primary cause of the surge in wage inequality,” deunionization “amplifies the original effect of skill-biased technical change by removing the wage compression imposed by unions”); with Ömer Tuğrul Açıkgöz & Barış Kaymak, *The Rising Skill Premium and Deunionization*, 63 J. MONETARY ECON. 37, 38 (2014)

But recent research plumbing new data sources suggests collective bargaining has exerted a powerful causal impact on economic inequality.<sup>231</sup> And evidence suggests unions advance economic equality not only through collective bargaining but also through their political advocacy. Unions were arguably the most powerful political force that led to Congress's enacting Medicare and minimum wage increases since Congress enacted the Fair Labor Standards Act in 1938.<sup>232</sup> Again, studies show a correlation between union density and legislators' votes for the policies unions advocate, including redistributive tax and social welfare positions.<sup>233</sup>

Whether unions reduce wealth-based political inequality by reducing economic inequality—rather than just by causing lawmakers to better respond to non-economically-redistributive political preferences held by low-income and middle-class people—almost surely depends on whether unions reduce economic inequality *between economic brackets that possess unequal political influence*. A detailed analysis of that question is outside this Article's scope. But evidence suggests unions do.

Gilens found that, at the federal level, people at the ninetieth income percentile possess political influence dominating that of people at the seventieth, fiftieth, thirtieth, and tenth percentiles.<sup>234</sup> Even were the government's interest only in reducing the economic (and thus political) power of people at or above the ninetieth economic percentile, studies suggest unions do so by reducing the ninety/ten ratio<sup>235</sup> and top ten percent's income share.<sup>236</sup> These findings are likely supported by separate studies finding that private sector unions redistribute profits from firm

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(concluding that unions have little effect on the equilibrium wage distribution).

231. Farber et al., *supra* note 227, at 2–3, 24, 32–33. These authors further argue that researchers' tendency to emphasize the causal impact on inequality of supply and demand for so-called skilled labor, rather than of unionization, may owe to the fact that micro-level data is more readily available for persons' education status before 1973 than for persons' union membership status before that year. These authors use a new source of micro-level data documenting union membership status over the past 80 years.

232. Sachs, *supra* note 218, at 170–71; THEODORE R. MARMOR, *THE POLITICS OF MEDICARE* 18 (2d ed. 2000) (noting that organized labor was “the most powerful single source of pressure” in the fight to enact Medicare).

233. *Supra* note 218.

234. *Supra* notes 45–53 and accompanying text.

235. This ratio compares the 90th percentile income to the 10th percentile income.

236. Farber et al., *supra* note 227, at 32–33 (finding the “rise (decline) in union density between 1940–1960 (1970–2004) can explain” approximately 5–15% of the “decline (rise) in the 90/10 ratio”); *id.* at 4 (finding increasing union density decreases top ten percent's income share).

One might worry that people at the 99th or 99.9th percentile could independently dominate politics if only the power of people at the 90th percentile were reduced. Were that so, research assessing unions' ability to reduce economic inequality between persons at the 99th or 99.9th percentile and other percentiles would help assess how much unions reduce wealth-based political inequality by reducing economic inequality as opposed to by causing lawmakers to better respond to non-economically-redistributive political preferences held by low-income and middle-class people.

managers<sup>237</sup> and shareholders<sup>238</sup> to workers. *Public* sector unions of course do not similarly redirect money from shareholders and firm managers through collective bargaining. Toward assessing how much public sector unions reduce the ninety/ten ratio and top ten percent share, future research could disaggregate how much unions reduce the ninety/ten ratio and top ten percent income share through political advocacy rather than through collective bargaining.

In light of findings that the middle class has disproportionate political influence relative to the poor at the state level,<sup>239</sup> unions' recorded impact on the Gini coefficient,<sup>240</sup> which summarizes inequality across the entire income distribution,<sup>241</sup> might further demonstrate that unions advance economic equality between groups with disparate political influence. Research showing that public sector unions lift people into the middle-class brackets that enjoy state-level political influence could be a way—separate from demonstrating public sector unions' impact on the ninety/ten ratio or top ten percent income share—to show that public sector unions reduce wealth-based political inequality by reducing economic inequality.

How do agency fees help unions advance economic equality? The extent to which agency fees improve union density and unions' ability to increase workers' compensation through collective bargaining is uncertain.<sup>242</sup> Studies that have controlled for variables correlating with

237. John DiNardo et al., *Unions and the Labor Market for Managers* 17, 23, (Inst. Lab. Econ. IZA Discussion Paper No. 150, 2000) (concluding “the pay of managers or related occupations is reduced by about 5 to 7 percent in an industry that is completely unionized compared to one that is non-union”).

238. See, e.g., David Lee & Alexandre Mas, *Long-Run Impacts of Unions on Firms: New Evidence from Financial Markets, 1961–1999*, 127 Q. J. LAB. ECON. 333, 334–35 (presenting data indicating shareholders expect unionization to decrease their dividends by approximately ten percent). Evaluating how redistributing profits from shareholders to workers impacts economic inequality would require assessing the portion of income that different economic brackets receive from shareholdings, including through institutional investors. I do not try to assess that. But the outsized share of stock and mutual fund assets that the top 1% and top 10% of wealth-holders own suggests that unions' redistributing wealth from shareholders to workers would reduce the most wealthy's economic (and so political) power. See Edward N. Wolff, *Household Wealth Trends in the United States, 1962–2013: What Happened over the Great Recession?* 2 RUSSEL SAGE FOUND. J. SOC. SCI. 6, 37 tbl.5 (2016) (showing that as of 2013, the top 1% of the wealth distribution hold 49.8% of stock and mutual fund assets. And accounting for indirect ownership through retirement plans and similar accounts, the top 10% own 81.4% of those assets.).

239. *Supra* note 55.

240. See Farber et al., *supra* note 227 at 32–33 (finding the “rise (decline) in union density between 1940–1960 (1970–2004) can explain” between approximately five and fifteen percent of the “decline (rise) in the . . . Gini coefficient[.]”).

241. The Gini coefficient is a way to provide an aggregate summary of income or wealth inequality across all income percentiles in a population.

242. See generally William J. Moore, *The Determinants and Effects of Right-To-Work Laws: A Review of the Recent Literature*, 19 J. LAB. RES. 445 (1998) (reviewing literature assessing right-to-work laws' impact on these outcomes and discussing methodological difficulties such studies face).

That European labor unions rely less than do U.S. unions on agency fees yet have been more powerful does not imply that abolishing agency fees in the U.S. won't substantially weaken unions. For

right-to-work laws have found that agency fees increase both union density<sup>243</sup> and unions' ability to secure higher compensation for workers through collective bargaining,<sup>244</sup> although conflicting studies exist as to both of these metrics of agency fees' impact.<sup>245</sup>

But there is precedent for deferring to legislative judgments, in the face of conflicting studies, that agency fees significantly impact these metrics—at least under the exacting scrutiny that *Janus* applied to public sector agency fees and that private sector agency fees would likely receive if the Court found those fees impinge on the First Amendment.<sup>246</sup> Moreover, even if right-to-work laws did not impact union density or unions' ability to improve workers' compensation through collective bargaining, studies have explained why agency fees make unions less effective in advancing economic equality through their political advocacy.<sup>247</sup> Legislatures thus have strong grounds for concluding that agency fees advance economic equality.

### *C. Necessity: Why Not Just Tax and Transfer?*

Why aren't other policies adequate alternatives for reducing economic inequality's transmission into political equality? Ganesh Sitaraman has ordered approaches to reducing this transmission into four analytical categories.<sup>248</sup> First, countering economic inequality directly through policies that impede people's ability to amass excessive economic power

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European labor law systems include many tools for strengthening labor unions that U.S. labor law lacks. Brishen Rogers, *Three Concepts of Workplace Freedom of Association*, 37 BERKELEY J. EMP. & LAB. L. 177, 212–16 (2016) (concluding “[agency fees] . . . are superfluous in Europe, but essential in the United States”).

243. E.g. David T. Ellwood & Glenn Fine, *The Impact of Right-to-Work Laws on Union Organizing*, 95 J. POL. ECON. 250, 250–73 (1987) (attributing to right to work laws an eight percent decline in union density); *but see* Moore, *supra* note 242, at 449–53 (discussing contrary studies and concluding “whether or not [right-to-work] laws reduce unionization remains an open question”).

244. E.g. Henry S. Farber, *Union Membership in the United States: The Divergence between the Public and Private Sectors* 25–26 (Princeton Univ. Indus. Relations Section, Working Paper No. 503, 2005) (finding that allowing agency fees increases unionized workers' earnings by 3.7 percent without impacting non-unionized workers' earnings); Gasper A. Garofalo & Devinder M. Malhotra, *An Integrated Model of the Economic Effects of Right To Work Laws*, 13 J. LAB. RES. 293 (1992) (accounting for unions' impact on wages both directly through collective bargaining and indirectly through productivity effects, and finding that right to work laws have large negative effect on wages); Thomas M. Carroll, *Right to Work Laws Do Matter*, 50 S. ECON. J. 2, 499–502 (1983) (same); *but see* Moore, *supra* note 242, at 458–60 (discussing studies finding right to work laws do not significantly affect wages).

245. *Supra* notes 242–243.

246. *Supra* notes 200–201 and accompanying text; *see* *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 394–95 (2000) (applying exacting scrutiny and deferring, in the face of conflicting studies, to legislative determination that large campaign contributions can corrupt our political system).

247. *Supra* notes 216–226, 232–233.

248. Sitaraman, *supra* note 91, at 1508–30.

in the first place.<sup>249</sup> Second, safeguarding the political process from the transmission of that economic power—once it arises—into disproportionate political power. Third—a sub-species of the second—incorporating countervailing powers into the political process. Fourth, “bypassing the political process,” including by trying to create a bureaucracy insulated from political influence.<sup>250</sup>

Other scholarship explains shortcomings of approaches to safeguarding the political process, such as campaign finance regulation and lobbying reform, that do not build countervailing political power—including those approaches’ shortcomings relative to labor law strategies.<sup>251</sup> Likewise other scholarship explains shortcomings of efforts to insulate bureaucracy from the wealthy’s influence.<sup>252</sup> I do not further address such strategies.

I instead begin to analyze whether the possibility of countering economic inequality directly through policies that do not impinge on the First Amendment means First Amendment-impinging labor laws (assuming *arguendo* those laws impinge on the Amendment) are inadequately tailored to reducing wealth-based political inequality. Below I begin this analysis only for tax and transfer because the argument that tax and transfer constitutes a less restrictive alternative is the most intuitive and because insights from my discussion of tax and transfer apply to evaluating whether other vehicles for directly reducing economic inequality are less restrictive alternatives.

I draw on principles discussed in Section III.A to explain why union-

249. Leading examples of such policy vehicles include tax, antitrust, corporate governance, common law rules of property and contract, *id.*, and education policy.

250. *Id.* at 1526–30.

251. For literature documenting how political actors bypass campaign finance restrictions by devising new forms of political spending that the law has not anticipated or reached, see sources collected in Sachs, *supra* note 218, at 207 & notes 8–9 and 164 & notes 60–62. For an argument that campaign finance regulations are, partly for that reason, less effective at remedying wealth-based political inequality than are laws that facilitate poor- and middle-class persons’ organizing, see *id.* at 164–68; *cf.* Levinson, *supra* note 68, at 136–37.

The Court’s so far rejecting any compelling interest in political equality has further limited campaign finance regulations’ efficacy for reducing wealth-based political inequality. Even if the Court now found that a political equality interest justified campaign finance restrictions that the Court previously held violate the First Amendment, and even if those restrictions were as effective as union-strengthening laws in reducing wealth-based political inequality, that holding would not render those restrictions less restrictive alternatives to union-strengthening laws because that holding would not overrule the Court’s holding that those regulations *impinge on* the First Amendment.

For arguments that using heightened judicial review to invalidate laws that the wealthy unduly influenced would be an ineffective way to reduce wealth-based political inequality, see generally Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31; see Andrias, *supra* note 43, at 491–93; Levinson, *supra* note 68, at 114–16, 118–20.

252. *E.g.*, Levinson, *supra* note 68, at 113–18. Even if we could insulate bureaucracy from the wealthy’s influence, agencies’ dependence on congressional authorization to act would limit the extent to which agencies could reduce wealth-based inequality.

strengthening laws are plausibly adequately tailored to reducing wealth-based political inequality, despite the option of pursuing that goal through tax and transfer. At my argument's heart is the fact that unions, unlike tax, reduce wealth-based political inequality through *both* Sitaraman's first and third mechanisms: countering economic inequality directly and incorporating countervailing power into the political process.

This fact helps explain why a mixed regulatory approach that relies on both progressive taxation and strong unions can be a more effective strategy for reducing economic inequality than an approach that tries to replace strong unions with increased taxation. To show that, I argue that although there are tax reforms that could advance economic equality as well as could any union-strengthening law *if* those tax reforms are enacted, adequately enforced, never later weakened or repealed, and updated over time to adopt to changing circumstances, we can expect the wealthy to organize to lengthen the odds of realizing those conditions. Because unions organize countervailing political power that can help resist the wealthy's efforts to repeal or weaken redistributive taxation,<sup>253</sup> a strategy for reducing economic inequality that relies partly on union-strengthening laws will likely be more effective in the long run than a strategy that substitutes increased taxation for those laws.

That unions organize countervailing political power might not be a reason to rely on union-strengthening laws to reduce economic inequality if lawmakers could enact and implement what I will call a "circuit-breaking tax regime"—that is, a tax regime that would sufficiently reduce economic inequality at Time One to eliminate concern about a wealthy class that has both the incentive and disproportionate political power to repeal or weaken that tax strategy at Time Two.<sup>254</sup> But I show that it would be both likely impossible and possibly undesirably expensive to try to enact such a regime.

Finally, so long as a circuit-breaking tax regime is untenable, a regulatory approach that substituted increased taxation for union-strengthening laws could be less effective than a mixed regulatory approach at reducing *wealth-based political inequality* even were I wrong that this approach would be less effective over time than a mixed regulatory approach at reducing *economic inequality*. For if substituting increased taxation for strong unions can fully compensate for unions' impact on economic inequality but cannot reduce economic inequality enough to prevent wealth-based political inequalities from exceeding

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253. *Supra* Section III.B.1.

254. I need not here pin down exactly what would constitute such reform. Conceptually, we would need to decide what level of wealth-based distortion in political influence triggers a compelling interest. We would then face empirical difficulty in determining how much economic inequality would cause our democracy to leap that threshold.

whatever level triggers a compelling interest,<sup>255</sup> unions' function of organizing countervailing political power will combat those political inequalities in a way that such increased taxation does not.

### 1. Progressive Tax's Atrophy

A court would reach this tailoring analysis only after agreeing that economic inequality gives economic elites undue political influence. Once legislatures enact progressive taxation, we can reasonably expect that economic elites will try to leverage that influence to repeal or modify that taxation. Political scientists have recorded these elites' successful efforts to do so. Jacob Hacker and Paul Pierson argue that groups favoring tax cuts have failed in recent decades to generate broad or salient public support for such tax cuts; since at least the 1980s, tax cut politics have instead been largely driven by organizations like the Club for Growth and Americans for Tax Reform that have relatively small, but unusually wealthy, memberships.<sup>256</sup> This extraordinary wealth begets extraordinary campaign funding: Club for Growth was the primary funder, aside from the Republican Party, of Republican candidates in the 2002 midterm elections.<sup>257</sup> These organizations have successfully leveraged a strategy of conditioning that campaign funding on candidates' pledges to cut or not raise taxes—a strategy particularly targeting candidates on the congressional committees that are most influential in enacting tax cuts.<sup>258</sup> This strategy has enabled these organizations to achieve multiple upwardly-redistributive federal tax cuts since the 2000s.<sup>259</sup>

Sure, we can expect the wealthy to similarly organize to weaken or repeal union-strengthening laws. But, again, labor unions, unlike tax, not only advance economic equality but also build resistance to the wealthy's repeal efforts by simultaneously organizing countervailing political power. And tax law's highly technical nature may make it easier to reduce tax laws' progressivity in ways ordinary voters cannot easily see than it is to as-stealthily weaken unions through legislation or regulations.<sup>260</sup> Even

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255. *Supra* notes 166–167 (explaining the Court need only select some plausible threshold at which wealth-based political inequalities trigger a compelling interest, even if a different threshold would also have been plausible).

256. JACOB S. HACKER AND PAUL PIERSON, *Tax Politics and the Struggle over Activist Government*, in *THE TRANSFORMATION OF AMERICAN POLITICS: ACTIVIST GOVERNMENT AND THE RISE OF CONSERVATISM* 256, 267–68 (Theda Skocpol & Paul Pierson, eds., 2007); *see also* SPENCER PISTON, *CLASS ATTITUDES IN AMERICA* 57 (2018) (similar); *but cf. generally* MICHAEL GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH* (2011) (arguing the 2001 estate tax repeal enjoyed substantial support across economic classes).

257. HACKER & PIERSON, *supra* note 256.

258. *Id.* at 268.

259. *Id.* at 270–72.

260. *See id.* at 271–72 (explaining “tax-cut advocates have learned how to design policies in ways

were tax law and labor law equally susceptible to being weakened over time by the wealthy's political efforts, the wealthy might have a harder time repealing economically-redistributive laws in two different policy domains than in one. For all these reasons, a mixed regulatory approach that supplements tax strategies with labor law strategies could be more effective at advancing economic equality over time than an approach that relies solely on tax.

## 2. Circuit-breaking Tax Is Likely Impossible

A circuit-breaking tax regime<sup>261</sup> could, in theory, obviate concern that the wealthy will leverage their disproportionate strength to weaken or repeal progressive tax reforms. But the first reason to not require the government to pursue a circuit-breaking tax regime as a less restrictive alternative to union-strengthening laws is that such a regime is likely impossible to enact.

### *i. The Inside-Outside Problem*

The very problem a circuit-breaking tax regime would aim to address likely renders that regime unattainable. Again, determining how redistributive a tax regime must be to be circuit-breaking is both conceptually and empirically difficult.<sup>262</sup> But it seems reasonable to assume that circuit-breaking tax reform would need to be of a magnitude that the wealthy's current outsized political power would render politically infeasible.<sup>263</sup> And again, the tailoring inquiry should be sensitive to this reality when the compelling interest at issue is reducing economic inequality's distortion of political influence.<sup>264</sup>

### *ii. Tax Hydraulics*

Tax hydraulics further cast doubt on a government's ability to effect circuit-breaking tax reform. By "hydraulics," I refer to the process by which people and firms develop strategies to achieve their goals while paying less in taxes.<sup>265</sup>

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that make tax cuts look much smaller and more equitable" than they are); *supra* note 60 and accompanying text (arguing a policy area's complexity can increase the wealthy's political influence therein).

261. *Supra* note 254 and accompanying text.

262. *Id.*

263. Cf. David Singh Grewal & Jedediah Purdy, *Inequality Rediscovered*, 18 THEORETICAL INQUIRIES L. 61, 70 & n.38 (2017) (noting wealthy's influence over tax policy undermines premise that tax-and-transfer is interchangeable with "embedded 'pre-distributive' policies such as labor law").

264. *Supra* Section III.A.5.

265. David Landau, *Political Support and Structural Constitutional Law*, 67 ALA. L. REV. 1069,

Through tax hydraulics, people and firms can exploit and even create tax loopholes.<sup>266</sup> Although lawmakers sometimes intentionally incorporate so-called “loopholes” into tax laws to satisfy lobbyists, many tax loopholes were unintended by lawmakers. Scholars have suggested unintended loopholes are unavoidable.<sup>267</sup> Loopholes might result when different parts of the tax code interact in unforeseen ways<sup>268</sup>—interactions that tax codes, due to their length and complexity, are susceptible to. Loopholes might alternatively result when tax rules are unintentionally underinclusive. This under-inclusiveness can occur when lawmakers could not think of or feasibly specify all the transactions to which they could apply a given tax rule<sup>269</sup> or when a technology or business strategy arises after the tax was enacted to which the tax does not apply.<sup>270</sup>

The problem of the “uncommon becoming common” marks one systematic way in which tax laws are particularly vulnerable to under-inclusiveness. Lawmakers often tailor laws to only common circumstances. This is because uncommon circumstances are harder to foresee and, even if lawmakers do foresee them, the benefits of appropriately regulating a rare occurrence may not justify the costs of developing a more complex law.<sup>271</sup> Yet when lawmakers take this approach to crafting tax law, taxpayers often learn that they can modify their behavior to achieve their goals via thereto uncommon—thereafter common—transactions or business strategies that lawmakers left undertaxed.<sup>272</sup>

The extraordinary income that managers of hedge funds and private equity firms enjoy offers one illustration.<sup>273</sup> The large fees these managers

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1075 (2016) (“The tax area is a clear example [of the hydraulics problem]: the complexity of the system often allows regulated entities and their lawyers to develop alternative strategies that achieve roughly the same goal as the path that has been shut down and without a substantial change in cost or other inconvenience.”).

266. An uncontested definition of ‘tax loophole’ eludes commentators. *See generally* Heather M. Field, *A Taxonomy for Tax Loopholes*, 55 HOUS. L. REV. 545 (2018). I use the term (sometimes redundantly qualified with ‘unintended’) to denote tax advantages lawmakers did not intend to permit or create.

267. Kyle D. Logue, *Tax Law Uncertainty and the Role of Tax Insurance*, 25 VA. TAX REV. 339, 366 (2005).

268. Sheldon D. Pollack, *Arenas of Federal Tax Policy*, 135 TAX NOTES 1499, 1505–06 (2012).

269. Logue, *supra* note 267, at 365–66.

270. Field, *supra* note 266, at 554.

271. David A. Weisbach, *Formalism in the Tax Law*, 66 U. CHI. L. REV. 860, 868 (1999).

272. *Id.* at 863–64, 869 (1999) (illustrating via partnership income tax rules); *see also* Logue, *supra* note 266, at 366 (“[W]hat was a potentially small loophole with relevance to only a few transactions, and thus not worth worrying about, becomes a large loophole as enterprising tax advisors funnel money and clients through such gaps.”).

273. For other examples of tax hydraulics, see Ronald J. Gilson & David M. Schizer, *Understanding Venture Capital Structure: A Tax Explanation for Convertible Preferred Stock*, 116 HARV. L. REV. 874, 876–77 (2003) (noting how the companies that venture capitalists finance issue convertible preferred stock “to shield incentive compensation from . . . ordinary income rates, so managers can enjoy

earn for investing other people's money is taxed not at the income tax rate but instead at a much lower capital gains rate, due to partnership tax legislation and regulations that Congress and the IRS enacted before these types of firms were widespread.<sup>274</sup> Although the preferential tax treatment these managers receive thanks to these laws is widely deemed indefensible,<sup>275</sup> legislative history does not indicate Congress and regulators intended these laws to bequeath a windfall.<sup>276</sup> On the contrary, some commentary suggests that these laws resulted from a routine extension of longstanding partnership tax principles.<sup>277</sup> Indeed, the comparatively minor role that hedge funds and private equity firms played in our economy when these laws were enacted calls into question the extent to which Congress and regulators could have foreseen the extraordinary incomes that these laws would abet.

Tax hydraulics may imperil lawmakers' ability to effect circuit-breaking tax reform especially given the rise, particularly since the mid-twentieth century, of an "income defense industry" of skilled professionals whom the wealthy can hire to resist taxes and other regulations.<sup>278</sup> Government regulators have trouble staying ahead of this industry, whose members compete aggressively to find ways to minimize clients' tax burdens.<sup>279</sup>

Analyzing the potential cost-efcacy of approaches that governments could take to limit this industry's ability to impede tax strategies for advancing economic equality is beyond this Article's scope. My limited point here is that whereas the inside-outside problem suggests governments could unlikely amass political will to even *try* to enact a circuit-breaking tax regime, tax hydraulics suggest any such attempt to enact that regime might fail.

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. . . a preferential tax rate"); Sloan G. Speck, *Tax Planning and Policy Drift*, 69 TAX L. REV. 549 (2016) at 559, 575 (discussing corporate inversions and the estate and gift tax).

274. Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States*, 38 POL. & SOC. 152, 170 (2010) (discussing hedge funds); EILEEN APPLEBAUM & ROSEMARY BATT, PRIVATE EQUITY AT WORK: WHEN WALL STREET MANAGES MAIN STREET 272–75 (2014) (private equity firms).

275. Applebaum & Batt, *supra* note 274.

276. See Dean Galaro, Gregory Crespi, *The Carried Interest Standoff: Reaffirming Executive Agency Authority*, 70 S.M.U. L. REV. 153, 158–160.

277. David A. Weisbach, *The Taxation of Carried Interests in Private Equity*, 94 VA. L. REV. 715, 750 (2008).

278. DANIEL MARKOVITS, THE MERITOCRACY TRAP: HOW AMERICA'S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLE CLASS, AND DEVOURS THE ELITE 55 (2019).

279. Logue, *supra* note 267, at 366 ("[C]ompetition induces tax advisors to compete to provide the most aggressive, tax-minimizing interpretations of the tax laws possible."); see also Michael J. Graetz, *Can a 20th Century Business Income Tax Regime Serve a 21st Century Economy*, 30 AUSTRALIAN TAX FORUM 551, 556 (2015) (noting the U.S. has recently faced "a new aggressiveness in tax minimization by large business entities").

### 3. Circuit-breaking Tax Would Possibly Be Too Expensive

The likely impossibility of circuit-breaking tax reform should suffice to counsel against requiring the government to pursue such reform as a less restrictive alternative to union-strengthening laws. But a legislative judgment that such reform would be unduly expensive could be a separate ground for not demanding this alternative. Economists frequently argue that progressive tax carries some trade-off with economic efficiency and growth, although the magnitude of this trade-off for any given tax scheme is hard to determine.<sup>280</sup> Specifically, debates continue about the extent to which progressively taxing income and wealth reduces entrepreneurship and innovation, labor supply, the effort people commit to their jobs, and people's willingness to invest in obtaining education and training or invest their money more generally.<sup>281</sup>

I take no position on whether the tradeoffs between progressive taxation and any of these drivers of economic growth would render circuit-breaking tax unduly expensive. One reason why I do not is that there is also substantial research indicating that economic inequality itself stunts economic growth.<sup>282</sup> My limited point is that empirical debates about tradeoffs between progressive taxation and economic growth could provide grounds for a legislative judgment that circuit-breaking tax would be unduly expensive. That judgment could warrant deference on either of two grounds. First, it would constitute a predictive judgment because it would predict aggregate responses of economic actors over time to tax levels presumably much higher than the United States has yet imposed.<sup>283</sup> To whatever extent tax levels may have been closer to circuit-breaking many decades ago, changes in social and economic conditions since then make it hard to predict the extent to which the effects of such tax levels today would track the effects back then. Second, at least insofar as union-strengthening laws receive only "exacting" scrutiny, such a legislative finding could earn deference under precedents in which the Court, while applying exacting scrutiny, deferred to legislative factual findings that some studies support but others refute.<sup>284</sup>

Capital's mobility across national and state borders further suggests circuit-breaking tax reform could be unduly expensive. Recent decades have brought conditions that enable people and firms to more easily move

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280. *E.g.*, JOEL SLEMRUD & JON BAKIJA, *TAXING OURSELVES: A CITIZEN'S GUIDE TO THE DEBATE OVER TAXES*, 100, 115 (4th Ed. 2008).

281. *Id.*

282. Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 *GEO. L.J. ONLINE* 1, 8–9 & n.9 (2015).

283. *See supra* Section III.A.4 (discussing deference to legislatures' predictive judgments under exacting and strict scrutiny).

284. *Supra* note 246.

capital across international lines.<sup>285</sup> These conditions impede progressive taxation of personal and corporate income, because raising taxes on income earned from capital—a source of income that the wealthy disproportionately receive—incentivizes people and firms to “escape taxation easily by shifting capital to low- or no-tax jurisdictions.”<sup>286</sup> This indicates that circuit-breaking tax reform might cause a degree of capital flight that sufficiently stunts economic growth to support a legislative prediction that such reform would be prohibitively expensive.

Capital mobility between states within the United States would be relevant to assessing whether tax and transfer is a less restrictive alternative to state-level union-strengthening laws. Much recent empirical literature has detected a minimal relationship between state tax levels and firms’ location decisions.<sup>287</sup> But for two reasons this empirical literature would not necessarily impugn a state legislature’s prediction that a circuit-breaking tax regime would drive enough business into other states as to render that regime unduly expensive. First, this literature presumably<sup>288</sup> has not observed firms’ responses to circuit-breaking tax regimes. Second, for game theoretical reasons elaborated elsewhere,<sup>289</sup> this literature does not even rule out the possibility that tax incentives significantly influence firms’ location choices between states that subject firms to tax levels below circuit-breaking.

Debates air too over the extent if any to which *unions* reduce economic growth. My point is merely that, given tailoring analysis’s cost sensitivity, a legislative judgment that circuit-breaking taxation could unduly impair economic growth would counsel against requiring a legislature to pursue such a regime as a less restrictive alternative to union-strengthening laws.

In sum, then, political feasibility concerns, and possibly cost concerns, should bar deeming circuit-breaking tax to be a less restrictive alternative to First Amendment-impinging union-strengthening laws. And efficacy concerns likely bar deeming taxation short of circuit-breaking levels a less restrictive alternative to such laws.

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285. Graetz, *supra* note 279 (noting “a technological revolution” has allowed “information and money, and in some cases products and services, to be moved around the world with the click of a mouse”); Reuven S. Avi-Yonah, Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State, 113 HARV. L. REV. 1573, 1575 (2000) (noting globalization has increased capital’s mobility).

286. *Id.* at 1576, 1625.

287. James R. Rogers, *The Law and Policy of State Tax Competition: Much Ado About Nothing?*, 4 GEO. J.L. & PUB. POL’Y 101, 101–02 & n.1 (2006).

288. I write ‘presumably’ because I have not attempted to determine exactly what would constitute a circuit-breaking tax regime.

289. Rogers, *supra* note 287, at 104–06.

*D. Over- and Under-inclusiveness and Proportionality*

I do not address over-inclusiveness, because the over-inclusiveness inquiry repeats the above necessity inquiry except for a consideration not here relevant.<sup>290</sup> For two reasons I do not discuss under-inclusiveness at length. First, a government's taking some, but not all possible, steps to reduce wealth-based political inequality does not trigger the under-inclusiveness inquiry's first concern: the concern that the challenged state action will be a futile strategy for advancing the state's interest in avoiding a given harm if the state action fails to regulate other conduct that causes that harm.<sup>291</sup> The harm caused by wealth-based political inequality is one of degree: I assume courts would agree that governments have a compelling interest in meaningfully reducing that inequality, even if governments do not completely equalize political influence among constituents. That latter goal, again, seems likely impossible.

Second, the government's failing to pair union-strengthening laws with maximal use of every other regulatory vehicle for reducing wealth-based political inequality unlikely implicates the under-inclusiveness inquiry's second concern: that content- or viewpoint-based suppression of speech was lawmakers' real goal in enacting a challenged law.<sup>292</sup> The political feasibility and cost-efficacy considerations I discussed with respect to circuit-breaking tax reform are more plausible reasons why governments do not maximize those tools' service for reducing this inequality.

I do not explicitly analyze proportionality, because the Court lacks clear criteria for that analysis.<sup>293</sup> But the political feasibility and cost-efficacy considerations that I discuss with respect to circuit-breaking tax reform would bear on that analysis.

#### IV. CONCLUSION

The Court should recognize that our federal and state governments have compelling interests in reducing economic inequality's transmission into political inequality (put differently, "wealth-based political inequality"). Unions advance that interest in two overlapping ways: by bolstering low-income and middle-class people's political power to influence public policy and by, both through that political power and through collective bargaining, reducing economic inequality. Public sector agency fees, which the Court recently held violate the First Amendment, help unions advance this interest. So do other union-

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290. *Supra* notes 180, 255 and accompanying text.

291. *Id.*

292. Fallon, *supra* note 40, at 1327.

293. *Supra* note 182 and accompanying text.

strengthening laws that many people worry the Court now might hold also impinge on the First Amendment.

Not only do these laws help reduce economic inequality's transmission into political inequality. They are also quite plausibly adequately tailored, for First Amendment purposes, to that objective. Other scholarship discusses how strong unions can be more effective at reducing that transmission than are various strategies for safeguarding the political process, including campaign finance restrictions and lobbying restrictions. This Article focused instead on showing why replacing strong unions with increased taxation would unlikely be as effective in reducing wealth-based political inequality as would be a mixed regulatory approach that relied on both strong unions and progressive taxation. The root of why is that strong unions, unlike tax and transfer, both increase economic equality and organize countervailing political power among low-income and middle-class people. A circuit-breaking tax regime that would effectively eliminate concern about wealth-based political inequalities is likely impossible and could be undesirably expensive. Absent a circuit-breaking tax regime, unions' organization of countervailing political power helps prevent the wealthy from, over time, weakening or repealing progressive taxation. For that reason a mixed regulatory approach can be more effective over time at reducing *economic inequality* than an approach that replaces strong unions with increased taxation. Even were a mixed regulatory approach not more effective over time at reducing economic inequality, unions' role in organizing countervailing political power would likely make a mixed regulatory approach more effective at reducing *wealth-based political inequality*.

Arguing that union-strengthening laws advance an interest in reducing wealth-based political inequality could raise concerns that have caused the Court to, in its campaign finance decisions, reject a compelling interest in political equality. The core of those concerns was the Court's fear that judges lack tools to assess whether alleged inequalities in political influence actually exist. But recent advances in social science offer new tools for measuring wealth-based, as well as gender- and race-based, political inequality. These advances call for the Court to reassess its aversion to recognizing a compelling interest in political equality. Although this Article focused on unions' role in advancing wealth-based political equality, those social science tools and much of this Article's argument support additionally recognizing compelling interests in advancing political equality along other dimensions, such as gender and race.