From Pioneer Egalitarianism to the Reign of the Super-Rich: How the U.S. Political System Has Promoted Equality and Inequality over Time

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The egalitarian pioneer ideal has faded into oblivion, and the New World may be on the verge of becoming the Old Europe of the twenty-first century's globalized economy.

—Thomas Piketty[1]

I. Introduction

In Thomas Piketty's book *Capital in the Twenty-First Century,* a big, sweeping analysis of world economic history that examines why economic inequality has waxed and waned over time and across nations,[2] the United States stands out time and again as the most puzzling and extreme case to be explained. In 1800, when Europe was stratified by class differences rooted in feudalism, wealth inequality in the United States hovered at a low level, not much greater than that of Sweden in the 1970's.[3] American wealth grew far more concentrated by the latter nineteenth century with the emergence of the Gilded Age. Yet by the mid-twentieth century, a new convergence between income groups took shape as the fortunes of the rich declined while the size of the middle class swelled and its living standards rose sharply. During this period, the United States, along with Great Britain, led the world with the highest marginal tax rates on the affluent that existed anywhere, between 70% and 80%.[4] Circumstances changed again after 1980, when economic inequality rose nearly everywhere worldwide, but catapulted upward especially in the United States.[5] A new class of super-

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[1] Thomas Piketty, Capital in the Twenty-First Century 514 (Arthur Goldhammer trans., Harvard Univ. Press 2014).

[2] Id. at 1.

[3] Id. at 347-49.

[4] Id. at 505-08.

[5] Id. at 324.

rich American CEOs and managers drew earnings that reached stratospheric levels, outdoing precedents in the nation's own history, equaling those of Europe in the Belle Époque period of the early twentieth century, and surpassing those of the rich elsewhere today.[6]

This story of the ebb and flow of inequality in the United States raises a perplexing question: How could this one nation—particularly one that prides itself on its democratic principles, representative government, and ideals of equal opportunity and social mobility—permit such different outcomes over time? After all, it started out devoid of the formal class trappings of Europe, then developed to possess fairly rigid class status hierarchies itself by 1900, then shifted and became far more egalitarian by the mid-twentieth century, and then transformed itself yet again from 1980 through 2010, this time toward skyrocketing inequality.[7] What do these transformations indicate about the American political system? How does it facilitate or mitigate inequality? And what might these twists and turns in U.S. history tell us about the nation's capacity to return to greater egalitarianism once again in the future?

While these matters are not Piketty's focus—they are stimulated by, rather than answered in the course of the story he tells—it is to his credit that his masterful work provokes such paradoxical and unanswered questions. *Capital in the Twenty-First Century* is first and foremost a deeply thought-provoking book. It presents nuanced and detailed findings from a vast new dataset compiled by the author and his collaborators that delve into topics ranging from the rate of return to capital versus the growth rate from antiquity to the present, to variation in the top income rates in European countries and the United States from 1900 to the present. It illustrates the meaning and significance of the trends it identifies through examples that encompass Jane Austen's novels and the replacement of inheritance based on primogeniture with equal partition among siblings.[8] Readers learn a great deal about a vast array of topics spanning centuries of time, the world over. Yet at its core, the book is also powerfully elegant, enunciating a clear and simple theory about why inequality grows over time: When the rate of return on capital outpaces the growth of the economy, inequality (or divergence in the distribution of wealth) necessarily increases because inherited wealth will grow in value at a rate that outpaces output and income, leading to a greater concentration of wealth over time.[9] This is not a deterministic theory; Piketty readily

[6] Id. at 294-96.
[7] See id. at 15, 291-96.
[8] Id. at 411-22.
[9] Id. at 25-27.

emphasizes that politics and institutions powerfully shape whether the world moves toward divergence or convergence of economic well-being.[10] He does not profess to have all the answers, but prompts the reader to grapple with serious and important questions and to consider systematic ways of thinking about them.

Piketty challenges his fellow economists and all of us in the social sciences to move beyond narrow concerns that interest only our disciplinary colleagues, and to turn our sights to pressing questions of great public significance. Like nineteenth century predecessors in his discipline,[11] he puts inequality at the center of the analysis.[12] He embraces political economy, grappling with the question: "What public policies and institutions bring us closer to an ideal society?"[13] He invokes public engagement by scholars: "Social scientists, like all intellectuals and all citizens, ought to participate in public debate . . . [t]hey must make choices and take stands in regard to specific institutions and policies."[14] And he urges social scientists and historians to learn from each other, remarking "[d]isciplinary disputes and turf wars are of little or no significance."[15]

Certainly the same challenges could be posed to my own discipline of political science, or at least, could have been until recently. Early in its history, political science generated analyses of what made democracy function well, of matters relevant to "the ideal role of the state in the economic and social organization of a country."[16] Yet when the United States itself became more egalitarian in the mid-twentieth century, scholars eschewed historical and institutional analysis and began to focus more exclusively on individual citizens and how they behave and form preferences.[17] By the 1980's and 1990's, interest resurged in the significance of historical development, temporal patterns, and institutional arrangements, making possible broader analysis of how governing institutions affect arrangements in society and the economy.[18] Only in the past decade or so, however, after

[10] Id. at 276.
[11] See id. at 3-11, 16.
[12] Id. at 16.
[13] Id. at 574.
[14] Id.
[15] Id. at 33.
[16] Id. at 574.
[17] See, e.g., Angus Campbell, Philip E. Converse, Warren E. Miller & Donald E. Stokes, The American Voter (1980); Gabriel A. Almond & Sidney Verba, The Civic Culture: Political Attitudes and Democracy in Five Nations (1989).
[18] See, e.g., Daniel P. Carpenter, The Forging of Bureaucratic Autonomy: Reputations, Networks, and Policy Innovation in Executive Agencies, 1862-1928 (2001); Theda Skocpol, Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States (1992); Stephen Skowronek, Building a New American State: The Expansion of National Administrative Capacities, 1877-1920 (1982);

three decades of rising economic inequality, have a growing number of political scientists turned their attention more deliberately to consider how government and politics might have facilitated these trends and how it was affected by them.[19] This new focus was stimulated by a task force of the American Political Science Association, convened from 2003-2005 by then-president Theda Skocpol.[20] Indeed, the early work of Thomas Piketty and Emmanuel Saez, detailing the soaring inequality since the 1970's, stimulated the group's work.[21] Political scientists have learned more since then about the politics of inequality, but we still have much to learn.

In this Article, I take inspiration from the scope of Piketty's study and I engage in a sweeping political analysis of the United States, examining why and how it moved away from Gilded Age inequality and toward a period of convergence between income groups in the mid-twentieth century, and then shifted again so drastically toward greater inequality more recently. The puzzle I seek to explain is how the same set of political institutions could engender such different outcomes over time, and why such variation has occurred. This is perplexing given that the U.S. Constitution is one of the longest-functioning in the world,[22] such that these transformations took place in the absence of any overt change in political institutions, not to mention a coup d'etat, and because they have occurred, furthermore, in a nation with a system of representative government, aimed to reflect the will of the people. The answer I offer highlights the interaction between formal institutions, on the one hand, and politics and public policies, on the other. I argue that the U.S. political system is full of obstacles to responsiveness to the majority of citizens, while being at the same time more easily permeated by and responsive to powerful vested interests. In particular historical contexts, however, political circumstances align that grease the wheels of this complicated machinery, and facilitate greater responsiveness to average citizens. In short, the fit between U.S. institutional arrangements and politics more easily, almost by default, engenders divergence or inequality, whereas exceptional political circumstances are required to facilitate greater egalitarianism. In the contemporary period, moreover, the institutional arrangements have been rendered all the more ineffective by

[19] See Lawrence R. Jacobs & Theda Skocpol, American Democracy in an Era of Rising Inequality, in Inequality and American Democracy: What We Know and What We Need to Learn 1, 5 (Lawrence R. Jacobs & Theda Skocpol eds., 2005).

[20] See id. at 1-2.

[21] See Thomas Piketty & Emmanuel Saez, Income Inequality in the United States, 1913-1998, 118 Q.J. Econ. 1 (2003).

[22] Theodore C. Sorenson, Isaac Marks Memorial Lecture, The American Constitution: Basic Chapter or First Draft?, 40 Ariz. L. Rev. 709, 709-10 (1998).

the emergence of sharp partisan polarization along with the complexities of the policyscape, meaning existing public policies that generate political effects of their own. Yet while the system is dysfunctional in many respects for most Americans, it is responsive to the demands of the wealthy and powerful vested interests, thus functioning as a "polarized plutocracy."[23] As a result, the political system has lost the capacity to facilitate social mobility through public policy, and yet lawmakers perpetuate tax policies that enable the wealthiest Americans to grow more affluent still.[24]

It should be noted that I am offering an unusually broad and sweeping analysis—a response inspired by the scope of Piketty's own work—and while that macro-level treatment can help to bring into view over-arching patterns and trends, by necessity much must be left out. I focus on higher education policies and the tax system, and touch on labor policies and the minimum wage, all policies that Piketty considers particularly important for their impact on inequality.[25] I do not engage in in-depth analysis that considers alternate hypotheses or elucidates mechanisms; rather I touch on literatures that themselves do offer such treatment. To set the stage for the analysis, I begin with a brief treatment of the framing of the constitution and its features, and an overview of the political arrangements that thrived in the Gilded Age.

II. The Governing Framework: The U.S. Constitution, Inequality, and Political Capacity

To what extent was the United States, early on, a nation of citizens who were "born equal?" Alexis de Tocqueville, the French visitor to the United States in the 1830's who wrote *Democracy in America*, is frequently quoted for suggesting that it was: "[T]he great advantage of the Americans. . . to have come to democracy without having to endure democratic revolution and to have been born equal rather than became so."[26] This coheres with Piketty's observation that the United States in the early nineteenth century featured low levels of economic inequality.[27] Yet, despite the phrasing of the Declaration of Independence, "that all men are created equal," the nation's relationship to equality contained contradictions from the beginning. Crucial

[23] Suzanne Mettler, Degrees of Inequality: How the Politics of Higher Education Sabotaged the American Dream 166-67 (2014).

[24] Id. at 7-28.

[25] See Piketty, note 1, at 71, 309.

[26] Alexis de Tocqueville, Democracy in America 589 (Arthur Goldhammer trans., The Library of America 2004) (1840).

[27] Piketty, note 1, at 347-49.

decisions surrounding the framing of the U.S. Constitution had implications for the government's ability to deal with inequality historically and continue to do so in our present time.

In some respects, the Constitution set in motion a bold new democratic experiment by terminating some types of formal inequality that still prevailed in Europe. The framers tossed asunder status distinctions that had undergirded inequality in Europe since medieval times, most obviously through the "title of nobility" clause[28] that prohibits the federal government from granting aristocratic titles and an additional clause[29] that applies the same restriction to the states. The Bill of Rights also extended civil liberties—ranging from freedom of speech, religion, and the press, to the rights of the accused[30]—although these would not become rights of citizens in a meaningful sense until well into the twentieth century when they became incorporated under the Fourteenth Amendment through a series of Supreme Court decisions that obligated states, henceforward, to honor them.[31]

In many other respects, the U.S. Constitution left existing status hierarchies untouched, in effect perpetuating them. Aside from aristocratic titles, other feudal forms of distinctions inherited and maintained through common law, such as relations between masters and servants, remained intact, relegated to the authority of the states in the very broad language of the Tenth Amendment.[32] Karen Orren has termed the result as "belated feudalism," and notes that as long as it prevailed, workers were deprived of rights or indeed the reach of legislative action, a situation that persisted until the enactment of the National Labor Relations Act of 1935.[33] More broadly, for practical purposes, most areas of law—and the definition of citizens' rights and obligations—belonged to the individual states. In the unique arrangements of American federalism, the national government would be responsible only for a small array of forms of governance, pertaining to internal improvements, tariffs, patents, and currency, while states retained jurisdiction for most areas of law, including property rights, banking and credit, estate and inheritance, corporate, commerce, and numerous others.

The new nation also inscribed in law an extreme form of inequality that no longer existed in the Old World: slavery. This occurred in part through the document's silences, as it relegated substantial au-

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[28] U.S. Const. art. 1, § 9.

[29] U.S. Const. art. 1, § 10.

[30] U.S. Const. amend. I; U.S. Const. amend. VI.

[31] E.g. Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947).

[32] U.S. Const. amend. X.

[33] Pub. L. No. 74-198, 49 Stat. 449 (1935); see Karen Orren, Belated Feudalism: Labor, the Law, and Liberal Development in the United States 2-3, 68-117 (1991).

thority over slavery to the individual states. But the Constitution itself also featured several explicit references to it: the three-fifths compromise, which configured representation in relation to the number of slaves in an area, the fugitive slave clause, and a clause prohibiting Congress from outlawing slavery at least before 1808.[34] The conflicts over these issues led eventually to the Civil War, followed by a failed reconstruction effort, and finally the formal extension of civil rights to African Americans only in the 1960's. As Piketty notes, racial inequality in the United States remains strongly related to economic inequality to this day.[35] The mechanisms through which this relationship has been perpetuated have changed dramatically over time.

But the definition of rights is only one of the means through which the new Constitution would influence the extent of equality in U.S. society; it would also yield a dramatic impact through the arrangements it established for governance, as these would shape state capacity to regulate capital, to impose taxes, to promote education of citizens, and to fashion what Piketty calls "a social state."[36] The United States is the world's oldest constitutional democracy, yet this distinction also carries with it inherent burdens: The Constitution was a jerry-rigged product born of deep political struggles and contentious compromises, at a time when its framers did not have the benefit of canvassing which features had succeeded or failed in other such experiments in governance.[37] The Constitution actually replaced the first existing government established after the new nation declared its independence, the highly decentralized arrangements set forth in the Articles of Confederation, ratified in 1781. The constitutional convention of 1787 was convened particularly by those who thought that the new nation required a stronger national government than the Articles permitted, one with the capacity to enforce treaties, protect borders, raise revenues, and to put down domestic insurrection occurring in some states.[38] The delegates possessed a strong awareness that ratification of the new constitution could meet with substantial resistance in the states, several of which were dominated by revolutionary fervor and populist approaches to economic policy.[39]

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[34] U.S. Const. art. 1, § 2, cl. 3 (amended 1868); art. 4, § 2, cl. 3 (repealed 1865); art. 5.

[35] Piketty, note 1, at 158-61.

[36] Id. at 471.

[37] See David Brian Robertson, The Constitution and America's Destiny 165-201, 236 (2005).

[38] John P. Roche, The Founding Fathers: A Reform Caucus in Action, 55 Am. Pol. Sci. Rev. 799, 804-05 (1961).

[39] Id. at 799; see also Robertson, note 37, at 165-201.

As a result, the framers engaged in significant compromises, and in the process they dismissed plans for a stronger and more centralized national government, favoring instead arrangements that present severe obstacles to lawmaking and governing authority. The U.S. system of separation of powers makes national policymaking more complicated—and removed from popular control—than in most any other comparable affluent nation. Unlike parliamentary systems that facilitate some degree of cooperation between prime ministers and parliaments, the U.S. system puts the executive and legislative branches at odds, as they are each elected through different procedures for different terms and empowered to halt each other's initiatives.[40] The U.S. system is unique among comparable nations in featuring a president selected through an electoral college system that grants extra weight to the choices of small-population states. The bicameral legislature includes an upper house that mirrors the federal structure of the nation, with each state possessing two Senators regardless of population; this means that today residents of Wyoming, one of the least populated states, in essence receive nearly seventy times the amount of representation in the Senate as those in California, the most populated state.[41] "The U.S. Senate has the most permissive rules of any legislature in the world," according to political scientist Barbara Sinclair.[42] Individual Senators can filibuster a bill by talking about it endlessly—or today, just threaten to do so—unless 60 out of 100 Senators agree to close off the discussion and bring the bill to a vote.[43] In addition, they can anonymously place a hold on a bill, their identity known only to the majority leader, and refuse to permit the bill to come to the floor for consideration. Filibusters and holds can be used to win concessions or simply to kill a bill. As a result of these and other procedures, the Senate is often called the "graveyard of legislation."[44] Even if related bills make it through both the House and Senate and a final compromise bill gains approval in both, the president still possesses the power to veto the bill.[45] Given all of these hurdles, aside from rare exceptions, U.S. lawmaking proceeds more quickly only when the same party controls the White House and Congress, and holds large majorities in both of its chambers.

Furthermore, even when a president signs a bill into law, the Supreme Court possesses the power of judicial review and may declare it

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[40] Compare U.S. Const. art. 1, with U.S. Const. art. 2.

[41] Robert A. Dahl, How Democratic Is the American Constitution? 50 (2d ed. 2003).

[42] Barbara Sinclair, Party Wars: Polarization and the Politics of National Policymaking 186 (2006).

[43] Id.

[44] E.g. id. at 233.

[45] U.S. Const. art. 1, § 7, c1. 3.

unconstitutional.[46] For the first century and a half, the Supreme Court typically wielded this authority to block laws intended to manage the economy, including those that would mitigate inequality.[47] The judiciary was empowered to do so by its reading of the sparse and terse articulation of Congress' "enumerated powers" in the Constitution: "to lay and collect taxes . . . to provide for the common defense and general welfare;" "to regulate commerce with foreign nations, and among the several states" and so forth.[48] For the first century and a half, the Court understood these more as limitations on national governing authority rather than as grants of power.[49] To this day, efforts to create new legislation to lessen inequality—such as health coverage for working age Americans—must be crafted to circumvent constitutional roadblocks as perceived by the contemporary justices.[50]

The framers also introduced a system of federalism that today remains one of the most decentralized among comparable nations. As noted above, most areas of law remained under the jurisdiction of the states, permitting state legislatures to define the contours of citizenship as they saw fit. No guarantees of due process or equal protection of citizens became part of the Constitution until the Fourteenth Amendment was added in 1868, and it was not interpreted by the Supreme Court to actually apply to the states until the mid-twentieth century.[51] Yet, although states often emulate each other in adopting some policies, in other respects they diverge sharply. Furthermore, U.S. federalism created what David Brian Robertson called "the world's largest free trade zone," one in which business is free to relocate; therefore, state governments try to compete with each other to offer low taxes, few regulations, and other factors that attract employers.[52] On the one hand, these arrangements left states free to experiment with their own policy alternatives, including social and labor policies aimed to mitigate inequality; yet on the other hand, the dynamics of interstate economic competition serve as a deterrent to their adoption.

In effect, national government gained the authority to promote markets, but not to manage them, at least not without widespread po-

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[46] See, e.g., Marbury v. Madison, 5 U.S. 137, 177-80 (1803).

[47] See, e.g., Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895), aff'd on reh'g, 158 U.S. 601 (1895).

[48] U.S. Const. art. 1, § 8.

[49] See, e.g., Trade-Mark Cases, 100 U.S. 82, 93-99 (1879).

[50] See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2608 (2012).

[51] See, e.g., The Slaughter-House Cases, 83 U.S. 36, 77-81 (1873); Gitlow v. New York, 268 U.S. 652, 666 (1925).

[52] David Brian Robertson, Federalism and American Political Development, in The Oxford Handbook of American Political Development 2, 2 (Robert Lieberman, Suzanne Mettler, & Richard Valelly eds., forthcoming).

litical consensus. States, conversely, lacked economic sovereignty: They would have to compete to attract capital, limiting their ability to raise revenues or to place restrictions on business.[53] As David Robertson explains of the framers: "They built a partially finished national policy-making process, furnished it with an incomplete set of policy tools, and required extraordinary cooperative efforts to make the government work."[54] They also made the Constitution extremely difficult to amend. What these governing arrangements would mean for the owners of capital and for the extent of inequality in American society would become increasingly apparent over time.

III. From Pioneer Egalitarianism to the Gilded Age

Over the first several decades after independence from Great Britain, outside of the slave-holding regions of the South, a relatively egalitarian society seemed to flourish in the United States. When Tocqueville toured the nation, he was particularly struck by the degree of equality he found, a "social condition" that he perceived to be deeply consequential. "[T]he aristocratic element in America, [was] weak from the outset," he wrote. "By contrast, time, events, and laws have made the democratic element not only preponderant but, in a manner of speaking, unrivaled." He expected that this equality would "ultimately enter into the world of politics . . . ."[55]

Tocqueville's visit occurred at a point when the United States likely seemed especially exceptional and distinct from Europe for its democratic inclusion of white male citizens. During the first three decades of the nineteenth century, most states had dropped their few remaining limitations on male suffrage, and by the 1830's, nearly all men who were not slaves could vote—regardless of whether or not they owned property.[56] Then President Andrew Jackson engineered the spoils system through which elected officials could offer perks such as jobs and other resources to the party faithful, and the nation developed vigorous—albeit chaotic—electoral politics.[57] By the 1850's and 1860's, Richard Bensel reports, voting had become a lively and widespread social spectacle that brought together ordinary men—often in make-shift polling places in saloons or livery stables—in exciting ritu-

[53] Robertson, note 37, 199-201.

[54] Id. at 236.

[55] Tocqueville, note 26, at 59-60.

[56] See Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States 25, 314 (rev. ed. 2009).

[57] See Jerry L. Mashaw, Administration and "The Democracy": Administrative Law from Jackson to Lincoln, 1829-1861, 111 Yale L.J. 1568, 1615-20 (2008).

als that celebrated "ethnocultural themes of identity, manhood, and mutual recognition of community standing."[58]

A half century after Tocqueville, another foreign visitor—Lord James Bryce of the United Kingdom—came to the United States, retraced his journey, and reached very different conclusions. The Oxford law professor and ambassador wrote in his book *The American Commonwealth*, published in 1888: "Sixty years ago, there were no great fortunes . . . no poverty. Now there is some poverty (though only in a few places can it be called pauperism), many large fortunes, and a greater number of gigantic fortunes than in any other country of the world."[59] By that point in time, industrialization was underway, generating the proliferation of large corporations and the finance industry, and their amassing of large profits for the few, while the vast majority of Americans endured difficult working conditions and low wages.[60]

Throughout this time period many reformers, including farmers and workers, sought to rein in the most egregious excesses of industrialization, and they succeeded in some respects but made less headway in others.[61] A vast scholarly literature has examined these developments, a summary of which is beyond the scope of this Article, given the focus here on more recent periods. Instead I briefly discuss why reformers at that time made less progress in improving workers' status relative to other goals.

Political scientist Elizabeth Sanders has shown how agrarian reformers in the late nineteenth and early twentieth century mobilized effectively to push back against industrial and financial capitalism. These populists believed in using state power—ideally, self-regulating policies, not sprawling bureaucracies—in order to "restrain rapacious corporations, prevent excessive concentration of wealth and market power, and publicly provide certain goods and services that either would not be sufficiently furnished by private enterprise or would be supplied only through monopolistic exactions."[62] After 1896, they represented the backbone of the Democratic Party and the "territorial nature of their political demands interacted with the structure of Congress and the electoral system to give them a driving force and an

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[58] Richard Bensel, The American Ballot Box: Law, Identity, and the Polling Place in the Mid-Nineteenth Century, 17 Stud. Am. Pol. Dev. 1, 26 (2003).

[59] Viscount James Bryce, 3 The American Commonwealth 745 (Cosimo, Inc. 2007) (1897).

[60] Elizabeth Sanders, Roots of Reform: Farmers, Workers, and the American State, 1877-1917, at 16-17, 110 (1999).

[61] See notes 66-69 and accompanying text.

[62] Sanders, note 60, at 4.

institutional strength that workers could not match."[63] To the extent to which farmers and workers united successfully, collectively they had enough power to enact several limits on the rise of capital, including the creation of a federal income tax, a publicly-controlled banking system, antitrust policy, federal control of railroads, and early telecommunications.[64] Yet, when it came to improving the conditions of workers whose livelihoods were most immediately contingent on this emerging wealthy class, the reformers encountered roadblocks: specifically, U.S. federalism and the role of the courts in defining the meaning of the Constitution.

The judiciary of that era treated authority over the regulation of working conditions as beyond the reach of Congress and in many instances also of state legislatures. Beginning in the 1870's, public officials used state power—police, state militias, and national guardsmen—to repress labor activism; by the 1890's, courts themselves ordered injunctions to crush strikes, starting with the Pullman strike in 1894.[65] By the early twentieth century, the Supreme Court began to interpret the commerce clause and taxing powers more broadly and upheld legislation that used such powers to protect the general welfare with respect to prostitution and lottery tickets.[66] On labor matters, however, strict constructivist interpretations prevailed. In 1898, Congress enacted the Erdman Act to safeguard railroad workers' rights to join labor unions, but in 1908 the Supreme Court declared it unconstitutional on the basis that it violated "freedom of contract," a due process dimension of the Fifth Amendment, by inserting unjustifiable government intervention into the private relationship between employers and employees.[67] Similarly, some state legislatures had begun to enact laws to shield workers from the most exploitative working conditions, for example, by limiting the length of the work day. These, too, were invalidated by the Court, once again based on "freedom of contract."[68] The court also took a hard line on efforts to regulate labor conditions on the basis of the Commerce Clause; in 1918 it declared a child labor law enacted by Congress to

[63] Id.

[64] Id. at 184.

[65] See generally Paul Avrich, The Haymarket Tragedy (1984); Jeremy Brecher, Strike! (rev., expanded & updates ed., 2014); Melvyn Dubofsky, We Shall Be All: A History of the Industrial Workers of the World (2d ed., 1988); Paul Krause, The Battle for Homestead, 1880-1892: Politics, Culture, or Steel (1992).

[66] See, e.g., Champion v. Ames, 188 U.S. 321 (1903) (holding that Congress can regulate interstate transfer of lottery tickets under the Commerce Clause).

[67] Adair v. United States, 208 U.S. 161, 179-80 (1908).

[68] Lochner v. New York, 198 U.S. 45, 64 (1905).

violate this principle by legislating in a domain—production processes—that belonged to the states.[69]

Reformers tried numerous strategies throughout this period, and met with some success, but in ways that highlighted the parameters of U.S. exceptionalism. The "social state" began to develop in the United States, but as Theda Skocpol has shown, it did not assume the "paternalist" guise of benefits for workers and their families that European countries developed at that time.[70] Rather, by the 1890's, veterans' pensions for Union soldiers who had served in the Civil War grew widespread and generous.[71] Then by the 1910's and 1920's, a small "maternalist" welfare state took shape, as reformers managed to create some social welfare policies directed to women as mothers and discovered that courts would permit protective labor laws if they applied to women only, on the basis of their role as potential mothers.[72] The maternalists did not succeed in enacting minimum wage laws for women only, despite their efforts to do so. The Supreme Court invalidated minimum wage laws that had been created in sixteen states and the District of Columbia.[73] This meant that on net, their achievements guaranteed women what some historians have considered dubious rights—to work in fewer occupations and for fewer hours than men.[74]

In sum, Americans had not accepted the rise of industrial capitalism without a struggle, but their successes in mitigating the emergence of inequality were uneven. They achieved new laws to regulate the emergence of big business and to enlarge upon and clarify the taxing power of the federal government. They found some ways to extend social provisions to citizens in need. But when it came to addressing the needs of those whose well-being was most personally and directly affected by changes in the economy that privileged a new class of elites, U.S. political institutions failed to provide the flexibility and leverage necessary to craft policy responses.

IV. The Great Convergence, 1929-1979

When the stock market crashed on October 29, 1929, it set the scene for a change in governance in the United States. Over the next few years, manufacturing output fell by half, unemployment rose from 3%

[69] Hammer v. Dagenhart, 247 U.S. 251, 276-77 (1918).

[70] Theda Skocpol, Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States 157-58 (1992).

[71] Id. at 149-50.

[72] Id. at 317.

[73] Adkins v. Children's Hospital, 261 U.S. 525 (1923).

[74] Suzanne Mettler, Dividing Citizens: Gender and Federalism in New Deal Public Policy 34-37 (1998).

of all working-age Americans to 25%, over 9000 banks shut down, and personal incomes fell by more than half.[75] The traditional poor relief programs, run by some states and localities, lacked the capacity to handle the crisis. By the time President Franklin D. Roosevelt was inaugurated in 1933, the nation was in despair. Many Americans would recognize the opening words of Roosevelt's first inaugural address, "[f]irst of all, let me assert my firm belief that the only thing we have to fear is fear itself,"[76] but many fewer are likely familiar with what came next, an attack on the bankers:

> [T]he rulers of the exchange of mankind's goods have failed, through their own stubbornness and their own incompetence, have admitted their failure, and abdicated. Practices of the unscrupulous money changers stand indicted in the court of public opinion, rejected by the hearts and minds of men. . .
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> Faced by failure of credit they have proposed only the lending of more money. Stripped of the lure of profit by which to induce our people to follow their false leadership, they have resorted to exhortations. . . They know only the rules of a generation of self-seekers. . .
>
> The money changers have fled from their high seats in the temple of our civilization. We may now restore that temple to the ancient truths.[77]

The policies of the early New Deal, many of which aimed to provide relief to the unemployed, were novel in some respects, but they did not in and of themselves threaten the class system that had developed during the Gilded Age. Nonetheless, the New Deal signaled a shift in governance, one that in time would help facilitate what Piketty calls "convergence" and Claudia Goldin and Robert Margo have termed "the great compression," referring to a dramatic lessening of economic inequality that would endure for forty years.[78]

Certainly after World War II the economy grew substantially, but what was most striking was that unlike the late nineteenth and early twentieth centuries when the rich cornered so much of national

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[75] See Rosemary D. Marcuss & Richard E. Kane, Born of the Great Depression and World War II, Surv. of Current Bus., Feb., 2007, at 32, available at http://www.bea.gov/scb/pdf/2007/02%20February/0207-history-article.pdf.

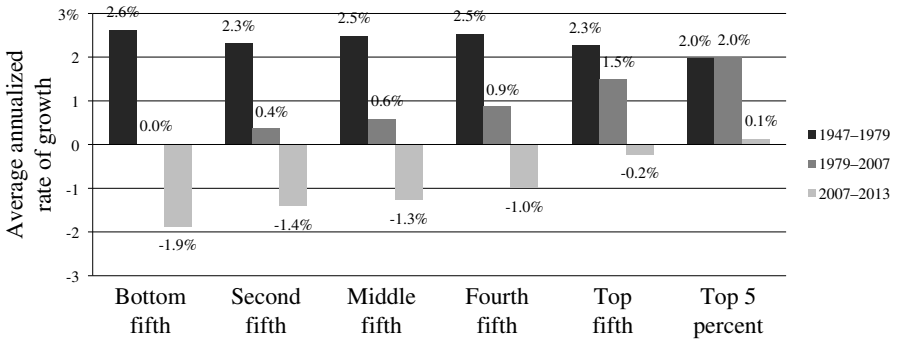
[76] President Franklin D. Roosevelt, First Inaugural Address, para. 1 (Mar. 4, 1933), available at http://www.bartleby.com/124/pres49.html.

[77] Id. at paras. 4-6.

[78] Piketty, note 1, at 21, 22, 27; Claudia Goldin & Robert A. Margo, The Great Compression: The Wage Structure in the United States at Mid-Century, 107 Q.J. Econ. 1, 1 (1992).

wealth, in the postwar period it could be said, as John F. Kennedy did, that a "rising tide lifts all boats."[79] These trends are indicated by Figure 1, which shows that all income groups saw their incomes rise during the 1947-1979 period, those at the bottom quintile even more than those in the top quintile, and all quintiles more than those in the top 5%.

FIGURE 1
AVERAGE FAMILY INCOME GROWTH, BY INCOME GROUP, 1947-2013[80]



The growth of the middle class and the improvement in living standards across the board owe substantially to the public policies of the era, including those established already during the Roosevelt administration and others right up through the early 1970's.

The New Deal ushered in a large number of domestic public policies that previously had seemed outside of the realm of possibility in the U.S. governing context. The Democratic Party held the presidency and enjoyed large majorities in both chambers of Congress—the political requirements for overwhelming the institutional obstacles that more typically slowed (if not imperiled) the lawmaking process.[81] Several of the other early policies Roosevelt signed into law, however, including the National Industrial Recovery Act (NRA)[82]—which had guaranteed a minimum wage and the right of workers to join unions—were quickly overturned by the Supreme Court. In 1935, the Court argued that the NRA violated the Constitution's Commerce Clause by

[79] President John F. Kennedy, Remarks in Heber Springs, Arkansas, at the Dedication of Greers Ferry Dam, para. 11 (Oct. 3, 1963), available at www.presidency.ucsb.edu/ws/index.php?pid=9455.

[80] Econ. Pol'y Inst., The State of Working America (last updated Sept. 25, 2014), http://www.stateofworkingamerica.org/charts/real-annual-family-income-growth-by-quintile-1947-79-and-1979-2010/.

[81] See generally George Tsebelis, Veto Players: How Political Institutions Work (2002).

[82] Pub. L. No. 713-67, 48 Stat. 195 (1933).

attempting to regulate intrastate commerce, rather than limiting the scope of intervention in the economy only to trade between the states or with other nations.[83] Roosevelt grew impatient with the Court, none of whose members appeared ready to retire; he floated what became known as the "court-packing plan," proposing to increase the number of justices from nine to twelve so that he could appoint some who were friendly to the New Deal.[84] This initiative worried even many of Roosevelt's supporters, who saw in it a grab at executive authority that too closely resembled concurrent developments in Europe, where dictatorships were on the rise.[85]

In 1937, however, an earthshaking change of course—essentially a constitutional revolution—occurred through two court decisions. First, in *West Coast Hotel Co. v. Parrish*, the Court upheld a minimum wage law for women and children in Washington State, simultaneously overturning the 1923 *Adkins* decision and denying the existence of an absolute "freedom of contract."[86] Second, in *NLRB v. Jones & Laughlin Steel Corp.*, the Court upheld the National Labor Relations Act of 1935, a law that guaranteed workers the right to form and participate in labor organizations,[87] and henceforth permitted Congress to enact legislation to intervene in the economy to a significantly greater extent than in the past. Through what became known as "the switch in time that saved nine," one justice-Owen Roberts—stopped voting with the four justices who routinely disapproved of New Deal legislation and took to voting with the proponents, switching the balance of the Court from 5-4 opposed to 5-4 in favor. Thereafter the Court came to view nearly all stages of the production process of goods as interdependent, as part of the flow of "interstate commerce," and therefore within the reach of activities that could be regulated by laws created by Congress.[88] A crucial restriction that had been in place since 1787 and had protected business power for decades had been lifted, and that shift would prove crucial to government's capacity to mitigate inequality going forward.

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[83] A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 554 (1935).

[84] Mettler, note 74, at 182.

[85] Id.

[86] 300 U.S. 379 (1937).

[87] 301 U.S. 1 (1937).

[88] For a more detailed account, see Melvyn Dubofsky, The State and Labor in Modern America 144-45 (1994); Mettler, note 74, at 179-83.

V. Mitigating Inequality Through Labor Protections and the Social State

Among the many laws Roosevelt signed, three in particular constituted landmark achievements to help lessen economic inequality in American society: the National Labor Relations Act of 1935[89] and the Fair Labor Standards Act of 1938,[90] which provided crucial labor protections, and the Social Security Act of 1935,[91] which included numerous provisions to mitigate economic insecurity, forming the bedrock of what Piketty terms the "social state."[92] All three of these laws remain in place today, at least formally, though they vary greatly in the extent to which they continue to produce the effects for which they were established.

Through the National Labor Relations Act, workers at last gained rights in their relationship vis-à-vis employers, and they became governed by laws created by Congress rather than common law at the hands of judges.[93] It enabled them to organize and to select representatives to work on their behalf in collective bargaining with management. The law immediately unleashed a wave of labor activity throughout the United States. The newly formed Committee for Industrial Organization, unlike the longstanding craft-based American Federation of Labor, organized unskilled workers in mass production industries. In 1937 alone, the number of union members in the nation doubled, and included a far more diverse swathe of the workforce than had been mobilized previously.[94] Organized labor received a severe blow in 1947 with the enactment of the Taft-Hartley Act which amended the NLRA, outlawing several types of strikes and permitting states to pass "right-to-work" laws that made it illegal for employers to hire only union members ("closed shops").[95] Many Sunbelt states that experienced rapid population growth in the following decades—such as Texas and Florida—enacted these laws, creating permanent obstacles to labor organizing within their borders.[96] Still, the ranks of organized workers continued to climb nationally, as seen in Figure 2, and then to hold steady at approximately one in four workers up until the early 1980's.

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[89] Pub. L. No. 74-198, 49 Stat. 449 (1935).

[90] Pub. L. No. 75-718, 52 Stat. 1060 (1938).

[91] Pub. L. No. 74-271, 49 Stat. 620 (1935).

[92] Piketty, note 1, at 471.

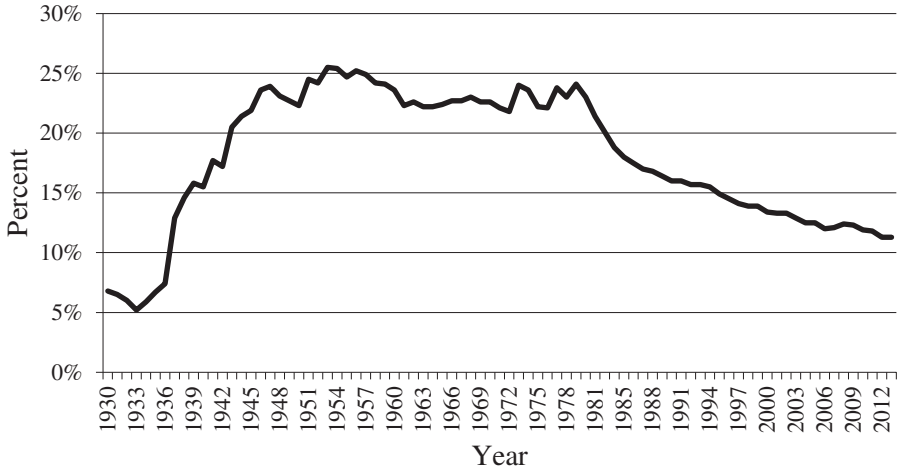
[93] See Orren, note 33, at 209.

[94] Dubofsky, note 88, at 137; Robert H. Zieger, American Workers, American Unions 26 (1994).

[95] Labor Management Relations Act of 1947, Pub. L. No. 80-101, 61 Stat. 136.

[96] David Brian Robertson, Capital, Labor, & State: The Battle for American Labor Markets from the Civil War to the New Deal 260-62 (2000).

FIGURE 2
UNION MEMBERSHIP AS PERCENTAGE OF THE LABOR FORCE, 1930-2013[97]



As a result, U.S. workers enjoyed greater leverage with respect to employers throughout the middle of the twentieth century than they had before or have since. Unionization created spillover effects for nonunionized workers, who were also able to command higher wages and better working conditions throughout the period.[98]

The change in the Court's interpretation of the Constitution also permitted Roosevelt to advance what became the Fair Labor Standards Act, a law including federal minimum wage guarantees, maximum hours provision, and rules about overtime pay.[99] Initially many occupations—particularly those employing predominantly women and minority men—were excluded, still deemed to be within the jurisdiction of "intrastate commerce," but Congress gradually expanded its reach so that by 1974 nearly all workers were covered.[100] Congress also kept increasing the minimum wage rate and its real value grew up through 1968, when it peaked at $10.56 in 2012 dollars, as seen in Figure 3.

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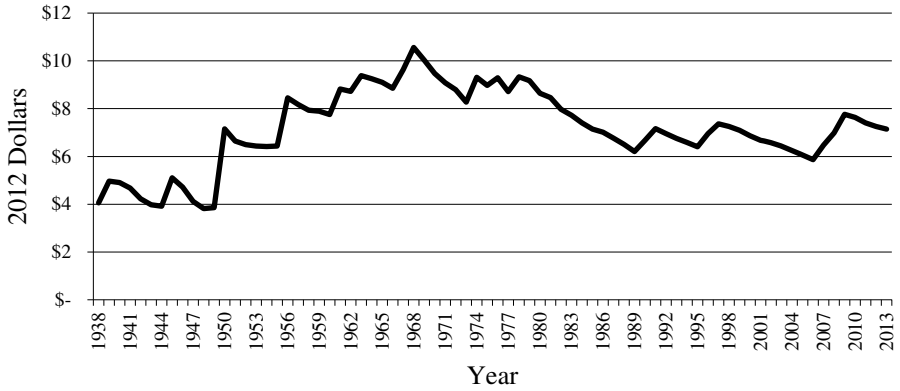
[97] Author's calculations based on U.S. Bureau of Labor Statistics, Table 1: Union Affiliation of Employed Wage and Salary Workers by Selected Characteristics, available at http://www.bls.gov/webapps/legacy/cpslutab1.htm; Bureau of Labor Statistics, U.S. Dep't of Labor, Handbook of Labor Statistics 389 (reference ed. 1975); Handbook of U.S. Labor Statistics: Employment, Earnings, Prices, Productivity, and Other Labor Data 378-79 (6th ed. 2003); Bureau of Nat'l Affairs, Inc., Union Membership and Earnings Data Book: Compilations from the Current Population Survey 10 (1997).

[98] Richard B. Freeman & James L. Medoff, What Do Unions Do? 43-60 (1984).

[99] Pub. L. No. 75-718, 52 Stat. 1060 (1938).

[100] Mettler, note 74, at 199; Louis Weiner, Federal Wage and Hour Law 8, 62-64, 73-74 (1977).

FIGURE 3
REAL VALUE OF THE MINIMUM WAGES, 1938-2013
(2012 DOLLARS)[101]



The Social Security Act of 1935 included several forms of social welfare policy, not only a contributory "old age insurance" for retired workers (which came to be known simply as "Social Security"), but also unemployment insurance, a public assistance program for seniors not included in the contributory program, and a public assistance program for mothers raising children in the absence of male breadwinners, among others.[102] Each of these programs developed a different trajectory over time, with the contributory program becoming by far the most well-established and generous. Initially it reached only a small portion of the work force, but over time lawmakers expanded the number of covered occupations, and included survivors and spouses as well.[103] It gained advocates among Republicans as well as Democrats; in 1956, President Dwight D. Eisenhower signed into law coverage of disabled workers,[104] and in 1972, President Richard M. Nixon approved cost-of-living adjustments for benefits.[105] As a result of these transformations, by 1980 approximately 16% of the U.S. population was receiving benefits under the program, and the real value of benefits has actually increased in real terms in recent decades.[106]

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[101] U.S. Dep't of Labor, History of Federal Minimum Wage Rates Under the Fair Labor Standards Act, 1938–2009, available at http://www.dol.gov/whd/minwage/chart.htm.

[102] Pub. L. No. 74-271, 49 Stat. 620 (1935).

[103] E.g., Social Security Act Amendments of 1939, Pub. L. No. 76-379, 53 Stat. 1360 (expansion to survivors); Social Security Act Amendments of 1950, Pub. L. No. 81-734, 64 Stat. 477 (expansion to farm and domestic workers).

[104] Social Security Amendments of 1956, Pub. L. No. 84-880, 49 Stat. 622.

[105] Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329.

[106] See Suzanne Mettler & Andrew Milstein, American Political Development from Citizens' Perspective: Tracking Federal Government's Presence in Individual Lives over Time, 21 Stud. Am. Pol. Dev. 110, 121 fig.6 (2007).

VI. Mitigating Inequality Through Promoting Higher Education

Perhaps the most striking way in which the United States reduced inequality and provided channels of opportunity in the mid-twentieth century occurred through investment in higher education. Although the United States proceeded more slowly than comparable nations to create labor protections and social welfare policies, the federal government had long promoted higher education, through land grants to states beginning with the Northwest Ordinance of 1787[107] up through the Morrill Acts of 1862[108] and 1890,[109] which established the nation's vast array of public universities and colleges. Still, few Americans actually managed to attend these institutions, and on the eve of World War II among twenty-five to twenty-nine year olds, only one in twenty possessed a bachelor's degree; by 1977, by contrast, the rate had soared to one in four of that age group.[110] Certainly increased rates of graduation from high school provided a larger pool of college-ready young people, but changes in public policy facilitated their ability to enroll and to graduate.

The first federal student aid bill emerged in the form of the G.I. Bill of 1944 (formally called the Servicemen's Readjustment Act), which granted several benefits to returning World War II veterans, including full coverage of tuition and a living stipend to permit enrollment in college, graduate school, or a vocational training program.[111] Out of 15 million veterans, fully 7.8 million—51%—took advantage of the education and training benefits, nearly one-third of them for higher education.[112] The law fit the U.S. tradition of generous social benefits for those who had risen to the call of military service. The Roosevelt Administration put forward a bill that would have limited college enrollment primarily to those who performed well on standardized tests; it appeared elitist once the American Legion, a veterans' civic organization, advanced an alternate bill that called for more generous educational benefits that would be available to all veterans for a duration commensurate with their term of duty in the military.[113] The Legion

[107] 1 Stat. 51.

[108] 37 Stat. 503.

[109] 26 Stat. 417.

[110] Claudia Goldin & Lawrence F. Katz, The Race Between Education and Technology 245-64 (2008); U.S. Census Bureau, Educational Attainment in the United States: 2009, Current Population Reports 11 (2012), available at http://www.census.gov/prod/2012pubs/p20–566.pdf.

[111] Pub. L. No. 78-346, 58 Stat. 248m (1944).

[112] President's Comm'n on Veterans' Pensions, Veterans' Benefits in the United States 287, 300-04 (1956), available at www.ssa.gov/policy/docs/ssb/v19n8/v19n8p12.pdf.

[113] See R.B. Pitkin, How the First GI Bill Was Written (pt. 1), Am. Legion Mag., Jan. 1969, at 51-53, available at www.legion.org/documents/legion/pdf/gibillpitkinpt1.pdf.

provided the organizational muscle to promote the bill's passage by mobilizing its members across the nation. The bill passed quickly with unanimous support across both parties in Congress.[114]

The G.I. Bill genuinely promoted upward mobility. The higher education provisions did so first and foremost by elevating educational attainment.[115] These were administered in a manner that was broad and inclusive for nonblack males, such that their utilization of the benefits depended little on socioeconomic factors from childhood.[116] Scholars found that it increased individuals' formal schooling by three years beyond what they would have acquired in its absence.[117] As a result, national college graduation rates among men, which had been growing slowly and steadily, suddenly ratcheted upward.[118]

Sociologists studying American society in the 1960's and 1970's observed a striking development: Where previously a man's job status had been very similar to that of his father's and grandfather's, suddenly men seemed to be experiencing dramatic upward leaps.[119] The GI Bill's education and training provisions helped to facilitate this mobility among nonblack male veterans. Comparing the nonblack male veterans' occupations in the 1960's with those of their fathers when they were children, in the 1920's, I found that those who did not use the educational provisions ended up working in very similar jobs to their fathers.[120] Some modest improvements were evident, as sons of some unskilled workers gained semi-skilled jobs, and sons of semi-skilled workers moved into skilled work, but most typically, a farmer's

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[114] See Servicemen's Readjustment Act (1944), www.ourdocuments.gov (noting unanimity of both houses of Congress).

[115] John Bound & Sarah Turner, Going to War and Going to College: Did World War II and the G.I. Bill Increase Educational Attainment for Returning Veterans?, 20 J. Lab. Econ. 784, 796 (2002); Charles B. Nam, Impact of the "G.I. Bills" on the Educational Level of the Male Population, 43 Soc. Forces 26, 31 (1964).

[116] Suzanne Mettler, Soldiers to Citizens: The G.I. Bill and the Making of the Greatest Generation 48-53 (2005).

[117] Jere R. Behrman, Robert A. Pollack & Paul Taubman, Family Resources, Family Size, and Access to Financing College Education, 97 J. Pol. Econ. 398 (1989); Neil Fligstein, The GI Bill: Its Effects on the Educational and Occupational Attainments of U.S. Males: 1940-1973, at 22 (Ctr. for Demography & Ecology, Working Paper 76-9, 1976), available at www.ssc.wisc.edu/cde/cdewp/76-9.pdf.

[118] Mettler, note 116, at 136 fig.1.

[119] Peter M. Blau & Otis Dudley Duncan, The American Occupational Structure 6-7 (1967); see also Otis Dudley Duncan, David L. Featherman & Beverly Duncan, Socioeconomic Background and Achievement 4 (1972); David L. Featherman & Robert M. Hauser, Opportunity and Change 63-115 (1978); Christopher Jenks, Susan Bartlett, Mary Corcoran, James Crouse, David Eaglesfield, Gregory Jackson, Kent McClelland, Peter Mueser, Michael Olneck, Joseph Schwartz, Sherry Ward & Jim Williams, Who Gets Ahead? The Determinants of Economic Success in America 213-21 (1979); Michael D. Ornstein, Entry into the American Labor Force (1971); Albert J. Reiss, Jr., Occupations and Social Status 83-88 (1961).

[120] Mettler, note 116, at 94-98.

son became a farmer, an autoworker's son became an autoworker, and so forth. The relatively few non-beneficiaries who became stockbrokers, business executives, and attorneys were the sons of men who had similarly prestigious occupations; these individuals were likely to have attended college prior to the war, able to afford it themselves.[121]

Nonblack male veterans who used the bill for vocational training, by contrast, found greater improvement in their socio-economic status, as they acquired skills that in the postwar economy provided access to jobs with better pay and good benefits.[122] Their fathers typically had been employed as laborers, coal miners, farmers, mechanics, or factory or railroad workers; the sons most often became owners of small or medium businesses, acquired jobs in a supervisory of managerial capacity, or became commissioned military officers.[123]

Among the nonblack male veterans who used the G.I. Bill to attend college, evidence abounds of transformative change across a single generation: the son of a shoe salesman became the chief of seismological services for the U.S. government, the son of a cobbler became an engineer, the son of a longshoreman became an attorney, the son of a window cleaner became a chemist, and so forth.[124] The typical beneficiary advanced by several steps along the occupational scales long employed by sociologists.[125]

For African American male G.I. Bill beneficiaries, by contrast, the occupational status gains were more modest, reflecting the institutionalized racism that still pervaded the job market, and the scope and limits of the antidiscrimination provisions enacted through various public policies up through that time, which focused primarily on government employment.[126] Similarly, African Americans had been largely marginalized in earlier New Deal social and labor programs, also, as social insurance, unemployment insurance, and labor standards at the outset failed to include the occupations in which most worked, and labor unions mobilization also circumvented them.[127] Yet African American veterans who used the G.I. Bill became active in the civil rights movement, and helped to build the momentum for

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[121] John Eric Fredland & Roger D. Little, Long-Term Returns to Vocational Training: Evidence from Military Sources, 15 J. Hum. Resources 49, 56 (1980).

[122] Id. at 65.

[123] Id. at 56-58.

[124] See Mettler, note 116, at 94-98.

[125] Id.

[126] Id.

[127] Ira Katznelson, When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth Century America (2006); Mettler, note 74, at 65; see generally, Robert Lieberman, Shifting the Color Line: Race and the American Welfare State (1998).

civil rights in the 1950's and for more inclusive social and educational policies in the 1960's and 1970's.[128]

Meanwhile, the World War II G.I. Bill marked only the beginning of government support for increased access to college in the mid-twentieth century. Congress established additional G.I. Bills for veterans of the Korean Conflict[129] and Vietnam War,[130] and because of the high rates of military service (consider that 80% of men born in the 1920's served in the military), large portions of the male populations of the generations that took part in these wars later qualified for—and a high percentage utilized—such education benefits.[131] Policymakers proceeded to develop student aid bills for civilian students as well. The National Defense Education Act of 1958 included student loans;[132] the Higher Education Act of 1965 expanded on these and added grants and work study;[133] and amendments to the latter in 1972 featured Pell grants for low-income students.[134] Also, because these latter policies were enacted after civil rights laws had dismantled Jim Crow segregation in the South and other discriminatory practices in the North, including gender and religion quotas, college-going became accessible to Americans regardless of sex, race, and ethnic group. Deondra Rose has found, for example, that the federal student aid policies for civilian students dramatically increased college graduation rates among women.[135]

Equally important, state governments invested more than ever before in higher education.[136] Enrollment in public colleges and universities soared from 2 million in 1960 to 9.5 million in 1980.[137] The number of public institutions more than doubled, from 700 to 1500, outpacing the growth of private colleges.[138] These institutions were highly subsidized by states themselves, and typically charged only nominal tuition. They increasingly accommodated the vast majority of young people who sought to attend college.

In sum, policymakers in the mid-twentieth century dramatically broadened access to college through landmark federal student aid

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[128] Mettler, note 116, at 136-44.

[129] Veterans' Readjustment Assistance Act of 1952, Pub. L. No. 82-550, 66 Stat. 663.

[130] Veterans' Readjustment Benefits Act of 1966, Pub. L. No. 89-358, 80 Stat. 12.

[131] Mettler, note 116, at 113-15.

[132] Pub. L. No. 85-864, 72 Stat. 1580 (1958).

[133] Pub. L. No. 89-329, 79 Stat. 1219 (1965).

[134] Educational Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235.

[135] Deondra Eunique Rose, The Development of U.S. Higher Education Policy and Its Impact on the Gender Dynamics of American Citizenship (Aug. 2012) (unpublished Ph.D. dissertation, Cornell University).

[136] Clark Kerr, The Great Transformation in Higher Education, 1960-1980, at xiii (1991).

[137] Id. at xiv.

[138] Id. at xv.

laws, enormous investment in the public institutions by state governments, and civil rights laws that terminated discriminatory practices that previously had reduced the access available to women, African Americans, and others. The United States led the world in the attainment of college degrees, and for a sizable share of those who achieved a diploma, they were the first in their families to do so. They proceeded to attain a socio-economic status significantly different from that of the homes they had grown up in. The nation's ideals of opportunity and social mobility became more fully realized than they had ever been in the past, or since.

VII. The Rise of Egalitarian Democracy

As the United States entered the 1970's, it seemed to be heading toward a more egalitarian future. Even then it featured economic inequality greater than existed in comparable nations, but such disparities among Americans had been reduced dramatically since the early twentieth century.[139] The fruits of the vibrant economy were widely distributed, owing to the social and labor policies described above, and individuals found means of upward mobility through the era's educational policies. In addition, the Great Society initiative of the Johnson Administration ushered in several new social programs, including food stamps,[140] Medicare, and Medicaid,[141] which amplified these effects.

Furthermore, groups that had been marginalized or completely disenfranchised previously, including women and African Americans, were at last becoming formally included within the nation's promise of full equality, as new civil rights and other laws prohibited the discrimination and exclusion of the past.[142] Certainly racial divisions in wealth, income, education, and other socio-economic indicators still persisted,[143] as did gender disparities in wages and opportunities,[144] but from the vantage point of the early 1970's, it appeared that those would begin to dissipate as well: The future looked bright.

What had made possible this period of remarkable transformation? Answers that focus only on the vibrant postwar economy—remarkable though it was—fail to explain how its fruits could have been so

[139] See Piketty, note 1, at 24.

[140] Federal Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703.

[141] Social Security Act of 1965, Pub. L. No. 89-97, 79 Stat. 286.

[142] E.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

[143] Shelly Lundberg & Richard Startz, On the Persistence of Racial Inequality, 16 J. Lab. Econ. 292, 292-93 (1998).

[144] Cecilia L. Ridgeway, Interaction and the Conservation of Gender Inequality: Considering Employment, 62 Am. Soc. Rev. 218, 224-25 (1997).

distributed so broadly across the U.S. population. Neither does a focus on the economy alone explain the source of the increased degree of innovation, skill, and creativity that helped to fuel it. The higher education policies of the era promoted an immense increase in the nation's "human capital" that in turn fostered economic growth. The labor policies elevated the wages of workers, raising up the bottom and lower middle rungs of the wage scale. Social welfare policies provided consumers with funds to bolster household incomes. In order to understand how these policies emerged during this period, a political explanation is necessary.

First, U.S. political institutions became transformed in crucial ways as courts effectively removed constraints on governance that had been in place since the Constitution was written. The "first constitutional revolution" smashed the pillars of dual federalism that had prevented Congress and the states from enacting legislation that managed the economy, particularly by protecting workers and constraining business.[145] The "second constitutional revolution" extended formal civil and political rights to Americans regardless of race, sex, and ethnicity by applying the guarantees of the Fourteenth Amendment and the Bill of Rights to the states.[146]

Second, national lawmakers themselves utilized their new-found policymaking authority, creating the wide array of major public policies discussed above, and many others. The political circumstances of the period made it possible for them to create sufficiently large majorities in Congress and support in the White House to overwhelm the typically stubborn obstacles that interfere with policymaking in the U.S. political context. The Democrats controlled both chambers of Congress by quite large majorities during this era, and in the periods of greatest legislative productivity, they controlled the White House as well. Partisan polarization also hovered at its lowest points in the twentieth century, and many moderate Republicans joined Democrats in supporting numerous bills. Those facts alone fail to convey the high degree of political maneuvering required to steer bills toward enactment even in that political context, because the Democratic Party combined disparate groups, both anti-civil rights southerners and working class, urban, ethnic voters in the North. Congressional leaders and presidents often had to struggle to find compromises that could keep these groups together, a task that became all the more challenging by the late 1930's particularly as growing labor militancy unleased by the NLRA began to alienate southerners from the

[145] See text accompanying note 86.

[146] See Craig R. Ducat, Constitutional Interpretation 1357-58 (9th ed. 2009).

party.[147] As a result, labor policies began to grow weaker, even though union membership rates remained at historic highs. The educational policies, however, attracted wide bipartisan support throughout the entire period, and provided the central means through which inequality could be mitigated.

Not coincidentally, it was during this same period that political scientists began to embrace the "median voter theory," the idea that in a two-party system, both parties are likely to take positions at the center of the distribution of voters' most preferred positions. Both parties therefore lean in a centrist direction and in the process, represent the preferences of the majority.[148] The policy regime established through the middle decades of the twentieth century bore such characteristics. It came about in a political environment in which popular organizations, including labor unions and civic associations, mobilized broad groups of Americans and made their voices heard to public officials.[149] Democracy grew stronger and inequality began to diminish as a result.

VIII. The Great Divergence, 1980-2014

A major transformation began in the United States in the mid-1970's, when economic growth slowed, fiscal crises emerged for government, and conservatism—which had been bubbling not far beneath the surface of political life for decades—grew ascendant, more widely acceptable, and politically powerful. In part the shift emanated from below, as anti-tax movements roiled many states and localities, and social conservatives organized to protest the rise of abortion rights and gay rights. A new cadre of conservatives in Congress, mobilized by freshmen House members Newt Gingrich, Dick Cheney, and others, sought to capitalize on these developments to transform the Republican Party into a competitive force in Washington.[150] The 1980 election marked a pivotal moment in this process, as Ronald Reagan won the presidency and the GOP also took the majority in the Senate. Reagan's first inaugural address indicated a major shift in governing

[147] Eric Schickler, New Deal Liberalism and Racial Liberalism in the Mass Public, 1937-1968, 11 Persp. on Pol. 75, 90 (2013).

[148] Anthony Downs, An Economic Theory of Democracy 54-55 (2003).

[149] Kristin A. Goss, The Paradox of Gender Equality: How American Women's Groups Gained and Lost Their Public Voice 48-62 (2013); Theda Skocpol, Diminished Democracy: From Membership to Management in American Civic Life 127-74 (2003).

[150] See Mark D. Brewer & Jeffrey M. Stonecash, Split: Class and Cultural Divides in American Politics 116-22 (2006); Sinclair, note 42, at 36-66, 111-30.

philosophy, when he told the nation "government is not the solution to our problem; government is the problem."[151]

Reagan's approach to governance combined with the new degree of competitiveness between congressional Republicans and Democrats changed business-as-usual in Washington, but it did not transform the United States overnight, nor did it do so in the ways that many analysts expected at the outset. Lawmakers did eventually—in 1996—terminate Aid to Families with Dependent Children or "welfare" as it was commonly termed, replacing it with Temporary Assistance to Needy Families,[152] a program with time limits, work requirements, and more discretion for states.[153] But thirty-five years after Reagan's inauguration, most of the American welfare state remains intact and some components—such as Medicaid and disability—have been strengthened or expanded over the period.[154] Policies geared to senior citizens, both Social Security and Medicare, have remained as generous as in the past, protected both by policy design and well-organized supporters.[155] Focusing on these policies alone would tell us little about why economic inequality has grown so dramatically over the past several decades.

And yet, American society has changed in fundamental ways, morphing into one very different from that of the 1970's. Part of the story is indicated by Figure 1, which shows that unlike the mid-twentieth century, in the decades since, economic gains have been modest at best for households of low- and middle-income levels and strongest for those in the top quintile. As Piketty has demonstrated, the economic gains have been accrued particularly by those at the very top, the new CEOs and other super-rich individuals within the 1%.[156] Meanwhile, social mobility has declined. A group of scholars who compared mobility in nine nations found the United States to be an international outlier in the extent to which the quality of children's lives is determined by their parents' socio-economic status, particu-

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[151] Ronald Reagan, Inaugural Address (Jan. 20, 1981), available at http://www.presidency.ucsb.edu/ws/?pid=43130.

[152] Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

[153] See Joe Soss, Richard C. Fording & Sanford F. Schram, Disciplining the Poor: Neoliberal Paternalism and the Persistent Power of Race 112-14 (2011).

[154] See, e.g., Christopher Howard, The Welfare State Nobody Knows: Debunking Myths About U.S. Social Policy 92-108 (2007); Paul Pierson, Dismantling the Welfare State? Reagan, Thatcher, and the Politics of Retrenchment 126, 132-42 (1994).

[155] See Andrea L. Campbell, How Policies Make Citizens: Senior Political Activism and the American Welfare State 2 (2003).

[156] See Piketty, note 1, at 294-96.

larly their educational attainment.[157] For those born to the less well-educated, these consequences have grown much more severe: In 1980, a male with a college degree earned approximately 20% more on average than one with a high school degree; by 2011, he outearned him by roughly 45%.[158] Therefore, we must ask about both the changes in public policy that have prevented low- and middle-income Americans from experiencing greater economic benefits and social mobility over this time period, and also about those that have enabled upper-income Americans to thrive. I briefly address deterioration in labor policy and the minimum wage, and then focus on: (1) why higher education policy evolved such that today it fails to facilitate greater educational opportunity, and (2) the expansion of the "submerged state," that is, policies such as tax expenditures that particularly benefit upper-income Americans.

How has the U.S. political system permitted these changes to occur? After all, the Constitution remains intact, and the "constitutional revolutions" that took place in the middle of the twentieth century—and helped to mitigate inequality—have not been reversed, even if their further development has been in many ways curtailed. Some longstanding congressional rules and procedures have mutated and in combination with contemporary politics, they now play a different role than in the past. Most notably, the Senate filibuster, once rarely used, has become a routine weapon wielded by the minority to block legislation. It was used on a total of only sixteen occasions between 1840 and 1900; in 2009-2010 alone, it was invoked 130 times.[159] More broadly, the existing institutions of government collided with political circumstances that accentuate their tendency to impede action while facilitating the power of the wealthy.

My analysis of contemporary politics identifies a three-pronged development: the pairing of what I term the "policyscape" with the rise of both partisan polarization and plutocracy. While our complicated governing arrangements established by the Constitution persist, today we dwell in a political context in which public policies have also

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[157] See John Ermisch, Markus Jäntti, Timothy Smeeding & James A. Wilson, Advantage in Comparative Perspective, in From Parents to Children: The Intergenerational Transmission of Advantage 18 (John Ermisch, Markus Jäntti & Timothy M. Smeeding eds., 2012).

[158] See Lawrence Mishel, John Bivens, Elise Gould & Heidi Shierholz, Econ. Pol'y Inst., The State of Working America 211 fig.4N (12th ed. 2012), available at http://stateofworkingamerica.org/chart/swa-wages-figures-4n-college-wage-premium.

[159] See Ezra Klein, Is the Filibuster Unconstitutional?, Wash. Post, May 15, 2012, at A11; see also Peter K. Enns, Nathan J. Kelly, Jana Morgan, Thomas Volscho & Christopher Witko, Conditional Status Quo Bias and Top Income Shares: How U.S. Political Institutions Have Benefited the Rich, 76 J. Pol. 289, 291, 295, 298 (2014) (discussing how Senate procedure, including the filibuster, contributes to a bias toward maintaining the status quo, leading to economic inequality.)

evolved to become institutions that themselves shape the political environment, require maintenance, and present challenges to reform. Most of the landmark policies established earlier in the twentieth century, particularly from the New Deal through the early 1970's, remain in place, but they do not necessarily continue to function, however, as lawmakers intended. This "policyscape" generates various policy effects. Existing policies may become altered by *policy design effects*, which gradually render some more sustainable and enlarged, and others prone to deterioration. They may engender *unintended consequences*, for example by providing incentives to market actors to offer goods or services they otherwise would not, because the policies subsidize consumption of them and thus offer profitable opportunities. To the extent this occurs, those who benefit may attempt to influence the political system, driving policy development in a manner that benefits themselves but which may undermine its broader public purposes. Policies may also be harmed by *lateral effects*, as other policies grow and develop in a manner which crowds out their resources or political support, and affects their sustainability.

None of these policy effects is foreordained; their development depends on the political context. As recently as the late 1980's and early 1990's, lawmakers were beginning to find ways to navigate the altered political environment and to engage in reform. Yet no sooner were such efforts underway than partisan polarization—already on the rise—grew much wider. Both chambers of Congress, in recent years, have evolved to become more polarized than at any point in at least a century. The Congresses of the mid-twentieth century right up through the 1980's featured a larger number of moderates and more members who would cross party lines on various votes, such that overlap existed between the parties. Since the early 1990's, by contrast, moderates have largely disappeared, particularly in the GOP, due either to retirement and replacement by those with more extreme positions or by a shift in behavior of those who remain in office.[160] Conservative southern Democrats have been largely replaced by conservative Republicans.[161] Polarization, particularly since 1990, has been asymmetric, with Republicans veering further to the right while Democrats overall have stayed the course.[162] Members of each party

[160] See Nolan McCarty, Keith T. Poole & Howard Rosenthal, Polarized America: The Dance of Ideology and Unequal Riches 11 (2006).

[161] See id. For more recent analysis, see Adam Bonica, Nolan McCarty, Keith T. Poole & Howard Rosenthal, Why Hasn't Democracy Slowed Rising Inequality?, J. Econ. Persp., Summer 2013, at 103-24.

[162] See Jacob S. Hacker & Paul Pierson, Off Center: The Republican Revolution and the Erosion of American Democracy 2-7 (2005); Thomas E. Mann & Norman J. Ornstein, It's Even Worse Than It Looks 51-52 (2012).

now exhibit greater "teamsmanship," as Frances Lee terms it, voting with their party routinely, even on nonideological votes, and devoting greater resources to public relations efforts to promote their own brand and to discredit the opposition.[163] The fact that since the 1980's the parties have been engaged in tight contests for the control of both chambers has fueled this competitive environment.

Polarization leads to stalemate, particularly in the context of U.S. political institutions that present obstacles to lawmaking even under more fluid political circumstances.[164] As a result, lawmakers routinely fail to respond effectively to major crises, including rising economic inequality. They not only encounter insurmountable difficulties in enacting major new legislation, but they also find even routine maintenance of existing policies to require a degree of compromise and negotiation that proves unattainable.[165]

But while polarization explains much of the deadlock that ensues, today it co-exists with a twin dynamic that I term plutocracy, which also exacerbates economic inequality. Because of plutocratic tendencies, when lawmakers do manage to act, it is most often in response to the demands of the wealthiest Americans and powerful industries. Much recent scholarship by political scientists has illuminated the underpinnings of these dynamics.[166] Larry Bartels found that U.S. Senators of both parties vote in ways that indicate responsiveness especially to the views of their higher-income constituents, but that the views of their low-income constituents bore a negligible impact.[167] Martin Gilens examined thousands of changes in public policy over the past four decades and confirmed a broader pattern: that those policies favored by the affluent were frequently enacted while those they opposed rarely were; low- and middle-income citizens, by contrast, witnessed responsiveness only when their views coincided with

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[163] See Frances E. Lee, Beyond Ideology: Politics, Principles, and Partisanship in the U.S. Senate 23, 156-61 (2009).

[164] Divided government need not foster stalemate, as David R. Mayhew has shown in Divided We Govern 175-99 (2005), but polarization in combination with divided government tends to do so, as shown by Sarah A. Binder, Stalemate: Causes and Consequences of Legislative Gridlock 67-69 (2003), and more recently, Sarah Binder, Ctr. for Effective Pub. Mgmt., Brookings Inst., Polarized We Govern? 12 (2014), available at http://www.brookings.edu/~/media/research/files/papers/2014/05/27%20polarized%20we%20govern%20binder/brookingscepm_polarized_figreplacedtextrevtablerev.pdf.

[165] For example, although "Congressional efforts to raise the debt limit are not rare events," in 2011, Republicans in Congress attached preconditions to raising the debt ceiling for the first time, prompting the 2011 fiscal crisis and "underscor[ing] for many Americans the utter dysfunction in our politics and the disdain of our elected officials for finding solutions to big problems." Mann & Ornstein, note 162, at 3-8.

[166] See, e.g., Jacob S. Hacker & Paul Pierson, Winner-Take-All Politics: How Washington Made the Rich Richer—and Turned Its Back on the Middle Class 41-72 (2010).

[167] Larry M. Bartels, Unequal Democracy: The Political Economy of the New Gilded Age 253-54 (2008).

those further up the income scale.[168] Such unequal responsiveness has grown more distinct over time.[169] This tendency of public officials to respond particularly to elites undermines both interpretations of the political system as responsive primarily to the median voter and also the pluralist view that the public's preferences are realized through the competition of interest groups.[170]

Plutocratic governance likely emanates from a variety of mechanisms. Members of Congress themselves tend to be far wealthier than ordinary Americans, and those with working class backgrounds—who typically exhibit more liberal voting patterns—have become nearly obsolete.[171] They likely also hear more from wealthy Americans, and given the soaring costs of campaigns over the past two decades, rely disproportionately on them.[172] A recent study by Benjamin I. Page, Larry M. Bartels, and Jason Seawright focused on the political activities and views of the top 1% of the income distribution, and found that they are extremely involved in politics and considerably more conservative than ordinary Americans with respect to taxation, economic regulation, and social welfare programs.[173] These attitudinal differences are even more distinct among the wealthiest one-tenth of the top 1%.[174] In addition, the interest group environment is heavily tilted to business interests, and a high proportion of public interest group lobbying represents conservative views, such that the voices of ordinary Americans and the disadvantaged are muted by comparison.[175] This situation has grown more extreme as U.S. civic organizations, prominent during the mid-twentieth century, have declined and been replaced by inside-the-beltway advocacy organizations that lack the grassroots organizing muscle to sway public officials.[176]

Because of the persistence of existing policies, at first blush it may appear that little has changed in U.S. politics over the course of the past few decades, as inequality has grown. On closer inspection, how-

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[168] Martin Gilens, Affluence & Influence: Economic Inequality and Political Power in America 193-233 (2012).

[169] See id.

[170] See Martin Gilens & Benjamin I. Page, Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens, 12 Persp. on Pol. 564, 575-77 (2014).

[171] See Nicholas Carnes, White-Collar Government: The Hidden Role of Class in Economic Policy Making 5-6 (2013) (noting that just 2% of legislators in Congress come from working-class jobs and the high net worth of both the average Republican and Democrat).

[172] See Bonica et al., note 161, at 111-18.

[173] See Benjamin I. Page, Larry M. Bartels & Jason Seawright, Democracy and the Policy Preferences of Wealthy Americans, 11 Persp. on Pol. 51, 53-55, 57-58, 60-63, 68 (2013).

[174] See id. at 64-65.

[175] See Kay Lehman Schlozman, Sidney Verba & Henry E. Brady, The Unheavenly Chorus: Unequal Political Voice and the Broken Promise of American Democracy 393-443 (2012).

[176] See Skocpol, note 149, at 127-74.

ever, partisan polarization has prevented updating and reforming of existing public policies, not to mention the creation of new policies that could help mitigate inequality. In addition, plutocratic governance affects which policies get created or reformed, and which are left to deteriorate or to head off course. There are exceptions to the rule: As a case in point, the enactment of the Patient Protection and Affordable Care Act in 2010[177] marked the culmination of over six decades of efforts by reformers to create health coverage for working age adults. In the main, however, the political system has failed to respond effectively to the needs of low- to moderate-income Americans.

Policies that improved the pay of working Americans during the mid-twentieth century, for example, grew considerably weaker in recent decades. Congressional support for labor policy has long been divided by a combination of partisan and regional cleavages, as southern Democrats from the 1930's onward typically joined forces with Republicans in opposition.[178] Presidential support and the strength of the National Labor Relations Board declined sharply following Reagan's inauguration in 1981.[179] Existing laws have become "ossified," and unable to address the needs of the twenty-first century workforce.[180] Even when Democrats have held the majority in both chambers as they did in 2009-2010, they have had difficulty finding broad enough support to mount a supermajority to withstand a filibuster.[181] Without stronger protections of workers' right to join unions, the ranks of organized labor have shrunk from 24.1% of the workforce in 1979 to 11.3% in 2013, as seen in Figure 2.[182]

Meanwhile Congress permitted the real value of the minimum wage, in 2012 dollars, to plummet from $10.56 in 1968 to $5.87 in 2006, as seen in Figure 3.[183] Congress raised its value modestly in 2007, and by 2013 the real value stood at $7.15, still well below its value in the 1960's. Public opinion has consistently and strongly supported increases in the minimum wage, so its deterioration in recent decades

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[177] Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 21 U.S.C., 25 U.S.C., 26 U.S.C., 29 U.S.C., 42 U.S.C.).

[178] See Dorian T. Warren, The Unsurprising Failure of Labor Law Reform and the Turn to Administrative Action, in Reaching for a New Deal: Ambitious Governance, Economic Meltdown, and Polarized Politics in Obama's First Two Years 191, 200 (Theda Skocpol & Lawrence R. Jacobs eds., 2012).

[179] See id. at 199.

[180] Cynthia L. Estlund, The Ossification of American Labor Law, 102 Colum. L. Rev. 1527, 1530 (2002).

[181] See Warren, note 178, at 192.

[182] See note 97 and accompanying text.

[183] See note 101 and accompanying text.

cannot be interpreted as a response to changing views.[184] Rather, partisan polarization around the issue paired with the composition of Congress explains much more. Recently, the Obama Administration championed increasing the rate to $10.10 but the Republican-controlled House opposed it and Democrats in the Senate found only one Republican ally (Bob Corker of Tennessee) such that they lacked a filibuster-proof supermajority to support the increase.[185] In short, a public policy has been subject to design effects, in this case, deterioration over time due to the lack of automatic increases with inflation, and lawmakers failed to take action to correct those changes. Meanwhile, some states used their autonomy to enact more generous minimum wage laws than the national government requires, but nonetheless the forces of interstate economic competition act as a drag on such progressive developments.[186]

Certainly several changes began in the 1970's that would affect labor markets—not least technological advances, deindustrialization, and globalization—but these shifts in themselves did not foreordain diminished government support for workers. Public officials could have responded to the ensuing rise in market-based inequality by fortifying policies that governed workplace organization and labor standards. To the contrary, political transformations in the United States led to a weakening of such policies. Workers who lacked advanced education no sooner found their jobs and incomes to be upended by market forces than they saw their government withdraw—even from the modest degree of support it had offered them throughout the middle of the twentieth century. For their children, the route to a better life would require a college degree. I next examine the extent to which they would find that to be within their grasp.

IX. The Demise of Opportunity

Throughout the period from the 1940's through the 1970's, more and more Americans became the first in their families to go to college and earn degrees, but in the decades since such progress stalled.[187] Certainly more Americans than ever *enroll* in college, and they come from across the income spectrum, but only a portion of them actually finish bachelors' degrees within the next six years, and those who do

[184] See Bartels, note 167, at 224.

[185] See Kristina Peterson, Sen. Corker Casts Lone GOP Vote to Advance Minimum Wage Bill, Wall St. J., Apr. 30, 2014, http://blogs.wsj.com/washwire/2014/04/30/sen-corker-casts-lone-gop-vote-to-advance-minimum-wage-bill/.

[186] See Richard B. Freeman & Joel Rogers, The Promise of Progressive Federalism, in Remaking America: Democracy and Public Policy in an Age of Inequality 211-12, 219 (Joe Soss, Jacob S. Hacker & Suzanne Mettler eds., 2007).

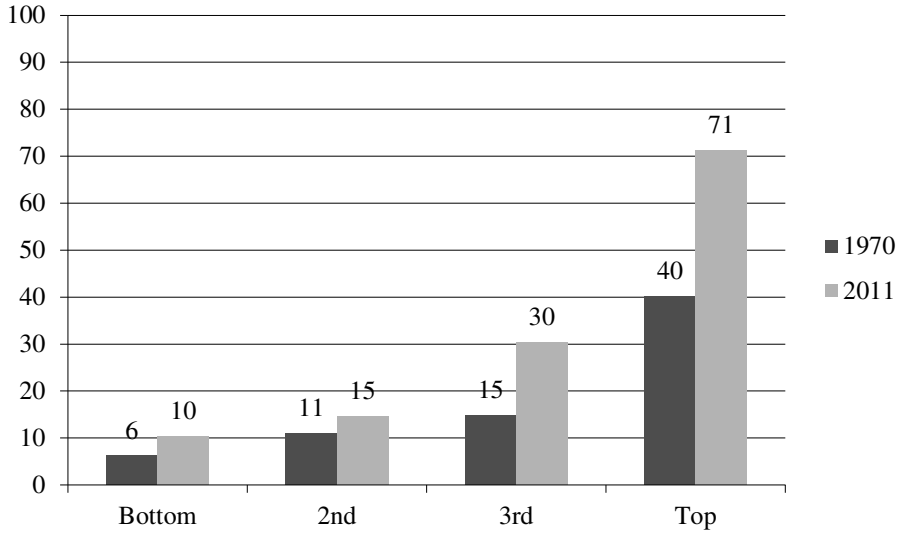
[187] See Mettler, note 23, at 6-8.

are most likely to be the children of parents in the highest income bracket, people who themselves possess college degrees.[188] The broad inclusivity and access that characterized college-going in the mid-twentieth century altered the American class structure and raised many people's socio-economic status, with long-run implications for their families;[189] in the decades since, however, the American class structure has become more rigid as the nation's system of higher education has grown less capable of mitigating inequality and in some ways functions as a caste system, itself reinforcing social stratification.[190] If we examine higher education in the United States today, three trends become apparent. First, the United States has gone from being the world's leader in the percentage of young people who attained four-year college degrees to holding a position back in the middle of the pack among affluent nations.[191] Americans who are now in their sixties remain more likely to have college diplomas than their cohort in any other nation, but among those now in their thirties, young adults in ten other nations have surpassed them.[192] After the soaring success of the mid-twentieth century, U.S. college graduation rates grew at much slower rates in recent years, while other nations devoted themselves to moving upward.[193]

Second, the ranks of college graduates reinforce income inequality, as seen in Figure 4.

[188] See id. at 23-25.
[189] See id. at 7.
[190] See id. at 8.
[191] See id. at 21, 22 fig.1.1.
[192] See id. at 21.
[193] See OECD, Education at a Glance 2012: OECD Indicators 26 & chart A1.1, 29 chart A1.3, 30, 36 tbl.A1.3a (2012), available at http://www.oecd.org/edu/EAG%202012_e-book_EN_200912.pdf.

FIGURE 4
INEQUALITY IN COLLEGE DEGREES: PERCENTAGE OF AMERICANS WITH A FOUR-YEAR DEGREE BY AGE 24, BY FAMILY INCOME QUARTILE, 1970 AND 2011[194]



Since the 1970's, going to college—and graduating—has become like a rite of passage for young people from the upper-income quartile; in 2011 71% complete bachelors' degrees by age 24.[195] Rates among those who grew up in the third highest quartile have increased greatly over these four decades, but they still hover around just 30%.[196] Among young people who grow up below median income, however, the improvements have been meager, and still only one in ten in the bottom quartile and 15% in the next quartile attain diplomas by age 24.[197] The percentage of those in the top quartile who earn degrees, in fact, is larger than those in the bottom three quartiles combined.[198] Differences in ability fail to explain these gaps, and the predominant reasons why young people drop out of college, once enrolled—as do many in the bottom three-quarters of the income spectrum—is that they cannot afford the tuition and living expenses or because trying to do so means working so many hours that they cannot keep up with their studies.[199] The consequences are substantial: In 2012, among young adults ages 25 to 40, those with four-year col-

[194] Metter, note 26, at 24.
[195] Id.
[196] Id.
[197] Id.
[198] See id.
[199] See id. at 25-27.

lege degrees earned a median salary of $46,900 while those with high school degrees earned $30,000.[200]

Third, today the higher education system exacerbates inequality not only on the basis of whether or not students enroll, but in addition, through the attributes of the particular sector and institution they attend. Different colleges and universities yield very different outcomes for students because they vary dramatically in terms of how much they actually charge students in tuition, how much financial aid they offer, the extent to which students are required to take out loans, the likelihood that students will graduate, and the value of the degree as perceived by employers. For-profit colleges—schools such as the University of Phoenix and Kaplan, fourteen of which are publicly traded on Wall Street—constitute the sector of higher education that has grown most rapidly over the past twenty-five years. They enrolled just 1.6% of all college students in 1993 but today enroll approximately 10%.[201] To their credit, these colleges have sought to attract low-income, first generation college students who had not been accommodated by traditional colleges; they did so by utilizing more online courses, moving away from the traditional semester schedule, and abandoning other rigid practices of academe. Yet, they charge very high tuition, typically much higher than public universities and colleges that often offer the same training programs,[202] and as a result nearly all of their students borrow—94% of those who attain bachelors' degrees—and they borrow large amounts—$32,700 on average—but graduation rates hover at very low rates, 22%.[203] Many of their students end up worse off than if they had never attended because they become heavily indebted but cannot find employment that is sufficiently remunerative to repay their loans. Among private nonprofit colleges, graduation rates are much higher (65% on average) but schools vary considerably in terms of how much they recruit low-income students and the extent to which they provide sufficient financial aid to keep their borrowing within reason.[204] Finally, public colleges and universities, though still by far the most affordable, have experienced rapid increases in tuition themselves,[205] and for their mostly low- to middle-income students, these changes can make the

[200] Inst. of Educ. Sci., Nat'l Ctr. for Educ. Statistics, Fast Facts: Income of Young Adults, http://nces.ed.gov/fastfacts/display.asp?id=77 (last visited Jan. 25, 2015).

[201] See Thomas D. Snyder & Sally A. Dillow, Inst. of Educ. Sci., Nat'l Ctr. for Educ. Statistics, Digest of Education Statistics 2010, at 291 tbl.197, 292 tbl.198, 295 tbl.201 (2011), available at http://nces.ed.gov/pubs2011/2011015.pdf.

[202] See Mettler, note 23, at 35.

[203] See id. at 29 tbl.1.

[204] See id.

[205] See id. at 8, 11.

difference between whether they can afford to attend. Furthermore, squeezed resources on campuses—more online courses, courses taught by adjuncts, and larger class sizes—all make it more difficult for students to succeed in college and to graduate, particularly if they come from less advantaged backgrounds.[206]

Changes in public policy explain why the U.S. system of higher education has become less successful in developing the nation's human capital across the income spectrum. First, federal student aid, though more costly to the nation than ever, has grown less efficient and effective in mitigating inequality. The policyscape in this area has developed in ways different than policy framers intended, largely due to problematic policy design effects that worsened as partisan polarization undermined lawmakers' capacity to engage in policy maintenance. For example, a Pell grant, the nation's primary aid to low-income college students, covered nearly 80% of tuition, fees, and room and board at the average four-year public university in 1980-1981; as of 2009-2010, it covered less than 40%.[207]

Part of the problem is that tuition has increased because states have failed to maintain their commitment to higher education, as I explain below. The other hindrance is that Pell grants lack automatic cost-of-living adjustments, and therefore they necessarily deteriorate unless lawmakers manage to raise rates by going through the gauntlet of the complex annual budget process in Congress, which requires approval by multiple committees and the full assembly in both chambers.[208] This has proven difficult ever since partisan polarization escalated, so rates fell behind and (as seen in Figure 5) even recent increases leave the benefits far less valuable—relative to tuition, which has risen steeply—than they were at the outset.

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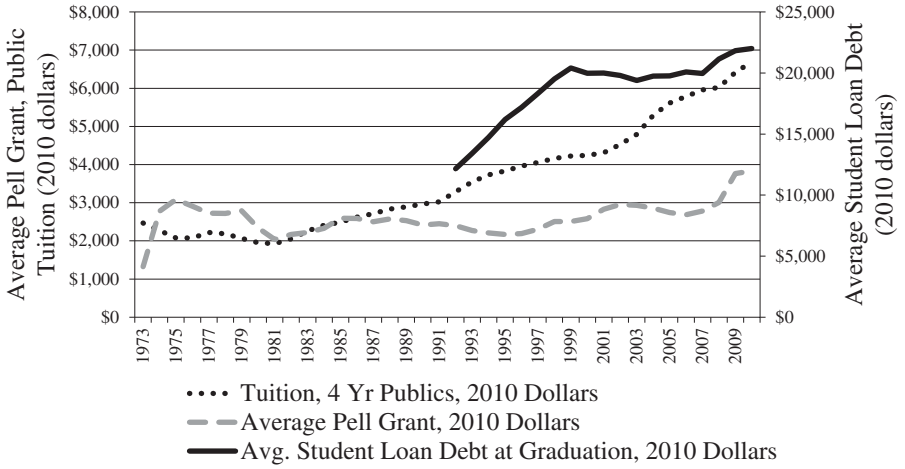
[206] See id. at 32-33; John Bound, Michael F. Lovenheim & Sarah Turner, Increasing Time to Baccalaureate Degree in the United States, 7 Educ. Fin. & Pol'y 375, 377-78, 386 (2012).

[207] See College Board, Trends in Student Aid 2013, at 25 fig.14B (2013), available at http://trends.collegeboard.org/sites/default/files/student-aid-2013-full-report.pdf; see also David S. Baime & Christopher M. Mullin, Am. Ass'n of Cmty. Colls., Promoting Educational Opportunity: The Pell Grant Program at Community Colleges 9, 25 tbl.A3 (2011), available at http://www.aacc.nche.edu/Publications/Briefs/Documents/PolicyBrief_Pell%20Grant.pdf (noting that in 1977-1978 the maximum Pell grant covered 40.8% of the total budget of a full-time community college student living off-campus but it covered only 28.9% of total cost of attendance in 2010-2011); Shannon M. Mahan, Cong. Research Serv., R41437, Federal Pell Grant Program of the Higher Education Act: Background, Recent Changes, and Current Legislative Issues 25 fig.6 (2011), available at http://www.nasfaa.org/EntrancePDF.aspx?id=5410 (stating that a maximum Pell grant covered nearly 80% of tuition, fees, and room and board at a four-year public university in 1980-1981 but covered less than 40% in 2009-2010).

[208] See Mettler, note 23, at 15.

FIGURE 5
PELL GRANTS FALL BEHIND AND STUDENT BORROWING SOARS AS TUITION RISES AT 4-YEAR PUBLIC INSTITUTIONS (2010 DOLLARS)[209]



Student loans proved far easier to sustain and grow: lawmakers only had to agree to permit more students to borrow more money. As a result, in recent decades as tuition has soared but grants have fallen behind in real value, student borrowing has escalated.[210]

The rise of partisan polarization has also undermined possibilities for creating innovative new approaches to federal student aid. Landmark student aid laws were created in the mid-twentieth century with minimal gaps in party support,[211] but even votes on the reauthorization of the Higher Education Act in recent decades have been marked by sharp partisan divides.[212] The only novel development in federal student aid over this period has been through tax expenditures, an approach that President Bill Clinton was the first to sign into law but which became the template for future initiatives by his successors.[213] The version promoted by the Obama Administration aids primarily students from families with incomes just below the cap of $180,000 per year; because it is distributed long after tuition is

[209] Inst. of Educ. Sci., Nat'l Ctr. for Educ. Statistics, Digest of Education Statistics 2012, at tbl.381, available at http://nces.ed.gov/programs/digest/d12/tables/dt12_381.asp; U.S. Dep't of Educ., 2010-2011 Federal Pell Grant End-of-Year Report tbl.1, available at http://www2.ed.gov/finaid/prof/resources/data/pell-2010-11/pell-eoy-2010-11.pdf, Mark Kantrowitz, Debt at Graduation for Bachelor's Degree Recipients with Geometric Interpolation/Projection (2012), available at www.finaid.org/loans/DebtAtGraduation.xlsx.

[210] See Mettler, note 23, at 51-86.

[211] See id. at 56-64.

[212] See id. at 54, 55 & fig. 2.2.

[213] See id. at 79-81.

due, it fails to expand access to those who would be unlikely to attend without greater financial aid.[214]

The second major trend, also noted in Figure 5, is that tuition has soared at public universities and colleges, those attended by 73% of all U.S. students.[215] The long mutually-conducive relationship between the federal government and states in supporting higher education has unraveled in the past two decades as state budgetary commitments rose in other areas and they could not keep up.[216] Lateral effects emanating from other parts of the policyscape—soaring mandatory costs for Medicaid, K-12 education, and incarceration—crowded out spending on higher education, which is the highest discretionary item in state budgets.[217] As a result, state funding per student declined by 26% between 1990 and 2010, even as expenses grew.[218]

Institutions made up the difference by squeezing resources and increasing tuition, which soared by 113% over the same period.[219] The vast majority of American college students from low- to middle-income backgrounds attend public institutions, but soaring costs and reduced resources undermine the capacity of these institutions to serve, as they did in the past, as engines of upward mobility.

The third development is that federal lawmakers have deregulated the for-profit colleges and permitted their owners to enrich themselves at the expense of the U.S. public, while leaving many of the most vulnerable college students at risk of financial ruin. Between 2007 and 2010, the Democratic-controlled Congress did expand federal student aid, creating both a generous new G.I. Bill for young veterans[220] and expanding Pell Grants.[221] Presidents George W. Bush and Obama signed these changes into law. But today nearly one in four federal student aid dollars go to the for-profit colleges, despite

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[214] See Stephen Burd, Educ. Sector, Moving On Up: How Tuition Tax Breaks Increasingly Favor the Upper-Middle Class 3-4 (2012), available at http://www.educationsector.org/sites/default/files/publications/TaxCredit_CYCT_RELEASED.pdf; Mettler, note 199, at 79-82, 146.

[215] See Mettler, note 23, at 11.

[216] See id. at 112-13.

[217] See id. at 113, 125, 126 & fig. 4.2.

[218] See id. at 120.

[219] See Sanford F. Schram, The Future of Higher Education and American Democracy: Introduction, 36 New Pol. Sci. 425, 431 (2014).

[220] Post-9/11 Veterans Educational Assistance Act of 2008, Pub. L. No. 110-252, 122 Stat. 2358 (codified at 33 U.S.C. §§ 3301-3324).

[221] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 806, 123 Stat. 115, 190.

their poor record in serving students.[222] This development owes primarily to plutocracy. As recently as the 1980's, Republicans—then primarily fiscal conservatives—regarded the for-profits with disdain because they depended so heavily on government funds.[223] During the 1990's, however, the Republican leadership warmed to the industry's "private sector" image and threw its weight behind it, and then, in a display of "teamsmanship," the entire party in Congress came on board.[224] In 1998, the GOP-led Congress altered a law that required the for-profits to raise at least 15% of their revenues from sources other than federal student aid (the "85/15 rule") and scaled it back to just 10% (the "90/10 rule").[225] Then in 2006, Congress abolished a rule that required schools using federal student aid to offer at least 50% of courses to be taught on campus, face-to-face with students; this change permitted schools offering completely on-line degrees to thrive at government expense.[226] Today, a sizable number of House Democrats routinely join with the Republicans to support the for-profits, creating a show of bipartisanship in an otherwise polarized Congress.[227] They claim that the institutions aid low-income, minority, and first-generation students by offering a chance at a college degree.[228] The industry's substantial campaign contributions, lobbying, and use of personal networks and resources to shore up Democratic support seem to explain more, however, about their stance on the issue.[229]

In sum, what was once an American innovation—a diverse and widespread array of colleges and universities that combined access and affordability with excellence—is evolving into a system that perpetuates social and economic inequalities. This transformation marks a political failure, one that has occurred as existing policies have deviated from their original purposes but lawmakers, rather than setting them back on course, have either ignored or even exacerbated such problems. The twin dynamics of polarization and plutocracy have made maintenance of the policyscape a task beyond the capacity of the political system. As a result, not only has the 1% pulled far away from other Americans over the past forty years, but moreover, the bottom 80% has found itself with little opportunity for social mobility.

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[222] Sandy Baum & Kathleen Payea, Trends in For-Profit Postsecondary Education: Enrollment, Prices, Student Aid and Outcomes 3 (2011), available at http://trends.collegeboard.org/sites/default/files/trends-2011-for-profit-postsecondary-ed-outcomes-brief.pdf.

[223] See Mettler, note 23, at 94-95.

[224] See id. at 99-103.

[225] Id. at 103-04.

[226] Id. at 106-07.

[227] Id. at 109-10.

[228] Id. at 89.

[229] Id. at 163-200.

X. The Expansion of the Submerged State

Scholars routinely portray the U.S. welfare state as *smaller* than that of comparable nations, but it is more appropriate to say that it is simply *different*. As discussed above, in considering the late nineteenth and early twentieth century, that the American welfare state evolved in a novel way, favoring policies for veterans and women rather than male breadwinners and their families.[230] In the mid-twentieth century, the United States acquired social welfare policies that bear a closer resemblance to European forms, though they are typically smaller and less comprehensive. Meanwhile, however, U.S. public officials also pursued another more distinctive path by creating what I have termed the "submerged state," a constellation of policies through which government-subsidized social benefits are channeled through indirect means, either through private organizations, such as employers or banks, and/or through the tax code.[231] For example, beginning in 1965, the nation subsidized private banks if they would, in turn, lend money to students; these arrangements evolved to enable banks to make substantial profits at taxpayers' expense until lawmakers terminated the system in 2010.[232] The most substantial part of the submerged state involves tax expenditures, policies that permit individuals and households to owe less in taxes than they otherwise would as a means to reward or encourage them for some kind of circumstance or activity they are engaged in that is deemed worthy of public support. These benefits today amount to over $1 trillion in lost revenues to the U.S. federal government.[233] Whether government delivers these social benefits by sending out checks to households or by collecting less from them in taxes, the cost—from an accounting perspective—is the same. But because of such benefits' delivery through the tax code, beneficiaries typically do not think of the savings they enjoy as government benefits.

One of the chief differences between the "submerged" and direct social benefits, besides the extent of their visibility, is their distributive effect: With rare exceptions, most notably the Earned Income Tax Credit,[234] they tend to benefit affluent households most of all. A recent report by the Congressional Budget Office assessed the distribution of the ten largest tax expenditures, and found that in 2013 more

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[230] See note 72 and accompanying text.

[231] Suzanne Mettler, The Submerged State: How Invisible Government Policies Undermine American Democracy 8-13 (2011).

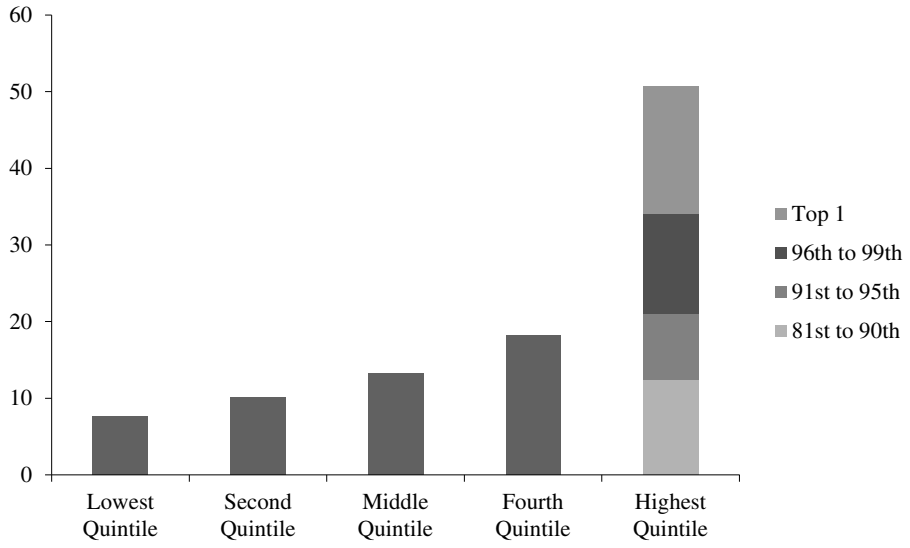
[232] Id. at 9-11.

[233] Joint Comm. on Tax'n, 113th Cong., Estimates of Federal Tax Expenditures for Fiscal Years 2014-2018 (Comm. Print 2014), available at https://www.jct.gov/publications.html?func=startdownid=4663.

[234] IRC § 32.

than half—51%—would accrue to households in the top fifth of the income distribution, as seen in Figure 6.

FIGURE 6
SHARES OF SELECTED MAJOR TAX EXPENDITURES, BY INCOME GROUP, 2013[235]



Put differently, those in the top quintile garnered more benefits than the bottom 80% of the population combined. The largest tax expenditures include the exclusion from taxable income of employer-provided benefits for health care, 34% of which goes to the top quintile, and retirement subsidies, 66% of which go to the top quintile.[236] Both of these benefits have become more upwardly redistributive in recent years as the jobs attained by those with lower wages have become less likely to offer benefits;[237] furthermore, the value of the government subsidy is much more substantial for those with higher

[235] Cong. Budget Office, Pub. No. 4308, The Distribution of Major Tax Expenditures in the Individual Tax System 10 fig.2 (2013), available at http://www.cbo.gov/sites/default/files/43768_DistributionTaxExpenditures.pdf. See id. at 3. ("The selected major tax expenditures are the exclusion of employers' contributions for health care, health insurance premiums, and long-term-care insurance premiums; the exclusion of net pension contributions and earnings; the exclusion of capital gains on assets transferred at death; the exclusion of a portion of Social Security and Railroad Retirement benefits; the deduction for mortgage interest on owner-occupied residences; the deduction of nonbusiness state and local government income, sales, real estate, and personal property taxes; the deduction for charitable contributions; reduced rates on dividends and long-term capital gains; the earned income tax credit; and the child tax credit.").

[236] Id. at 16.

[237] Mettler, note 23, at 98-101.

incomes because they are subject to higher tax brackets.[238] Most other large tax expenditures are even more skewed in their upward distribution: The top quintile gains 80% of the deductions for state and local taxes, 73% of home mortgage interest, 84% of charitable contributions, and 93% of the gains from the preferential tax rate on capital gains and dividends.[239] The only substantial policies in the Code that lack the upward distributive bias are the Earned Income Tax Credit, 51% of which goes to those in the lowest income quintile, and the Child Tax Credit,[240] which is fairly evenly distributed across the bottom four quintiles and only 4% of which goes to the highest.[241] Within the affluent quintile, furthermore, as seen in the right-hand bar in Figure 6, the benefits of the submerged state are unevenly distributed, with the largest bestowed on the super-rich: Those in the top 1% accrue 17% of all benefits, compared to 12% to the 81st to 90th percentile, 9% to the 91st to 95th, and 13% to the 96th through the 99th.[242]

Once the submerged policies are included in assessments of the size of the U.S. welfare state, it does not appear to be so different in size from those of comparable nations after all. Both Christopher Howard and Jacob Hacker have shown, in separate analyses, that when tax expenditures are included, the United States stands in the middle of the pack in terms of the percentage of its GDP used for social spending.[243] Today, the largest ten U.S. individual tax expenditures, combined, amount to 5.7% of its GDP,[244] compared to Social Security spending at 5% and Medicare at 3%.[245] The size of any single one of the largest individual tax expenditures—such as the home mortgage interest deduction—dwarfs that of any other visible direct policy, such as food stamps, unemployment insurance, or welfare benefits.[246] In short, the U.S. "social state" varies from that of other nations predominantly in its form and the extent to which it channels public aid upward to wealthier households rather than to lower- and middle-income ones.

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[238] CBO, note 235, at 17.

[239] Id. at 16 tbl.2.

[240] IRC § 24.

[241] CBO, note 235, at 16.

[242] Id.

[243] See Jacob S. Hacker, The Divided Welfare State: The Battle over Public and Private Social Benefits in the United States 13-16 (2002); Howard, note 154, at 13-26.

[244] CBO, note 235, at 1.

[245] Cong. Budget Office, Pub. No. 4308, The Distribution of Major Tax Expenditures in the Individual Tax System, Supp. Data fig.1 (2013), available at https://www.cbo.gov/sites/default/files/43768-SuppData.xls.

[246] Mettler, note 231, at 22.

The submerged state developed at the hands of a different set of lawmakers than those most responsible for direct social provision in the United States. Some components of it, such as the deduction for home mortgage interest, date back to the original 1913 income tax law.[247] Several other parts owed their beginnings to Republicans and conservative Democrats who preferred such benefits to direct social programs because they did not appear to increase the size of government. The excludability of employer-provided health benefits from taxes, for example, developed during World War II and became law due to Eisenhower.[248] From the 1980's to the present, political shifts made it difficult for lawmakers to find majorities in support of direct new social benefits, but they could garner bipartisan support for those channeled through the Code.[249] The number of individual tax expenditures increased from 81 to 151 between 1981 and 2010.[250] Once created, such benefits grow automatically, for example as the costs of the goods or services they subsidize increases in value; in contrast to most direct benefits, lawmakers need not approve these increases because they occur outside of the budget process. As a result, they can balloon in size and grow unchecked, akin to policies termed "entitlements."

The part of the submerged state that particularly benefits the superrich is the preferential treatment of capital gains and dividends, fully 68% of which accrue to those in the top 1%.[251] The top tax rate on ordinary income is now 39.6%,[252] but long-term capital gains and dividends are subject only to a 23.8% tax.[253] This disparity helps to explain why very wealthy Americans typically pay a lower tax rate on their returns than on those whose only income comes from earnings, even at fairly moderate levels. In the Tax Reform Act of 1986, through a grand compromise, lawmakers lowered regular income tax rates so the highest would be just 28%[254] but they also agreed to fully tax capital gains at that rate.[255] One year later, as conservatives worried that tax rates would increase in the future (as they did in the early 1990's), they chose to cap the capital gains tax at 28%.[256] This rate was then lowered to 20% in 1997 and 15% in 2003—an extraordinary

[247] Tariff Act of 1913, Pub. L. No. 63-16, ch. 16, § II.B, 38 Stat. 114, 167.
[248] Hacker, note 243, at 239-42.
[249] See Mettler, note 231, at 19.
[250] Id. at 20.
[251] CBO, note 235, at 15 tbl.2.
[252] IRC § 1(a).
[253] IRC §§ 1(h), 1411.
[254] Tax Reform Act of 1986, Pub. L. No. 99-514, § 101, 100 Stat. 2085, 2096.
[255] Id. §§ 301-302, 100 Stat. at 2216-19.
[256] Revenue Reconciliation Act of 1990, Pub. L. No. 101-508, § 11101(1), 104 Stat. 1388-400, 1388-403 to 1388-405.

benefit to wealthy Americans, particularly in the midst of the booming economy.[257] In 2012, through a compromise between Obama and congressional Republicans, it was raised to 23.8%.[258]

In sum, this substantial submerged part of the U.S. "social state" actually exacerbates economic inequality, in numerous ways. First, its policies bestow their greatest benefits on the affluent. Second, by diminishing the revenues collected by the federal government, these policies reduce the amount available that could otherwise by used to mitigate inequality, though policies directed to low- and middle-income households. Third, through a more complex set of mechanisms, the submerged policies make reform of existing policies difficult and undermine possibilities for public officials to fashion new policies that could foster greater equality. Several such policies, to the extent they encourage consumption of particular goods and services, such as real estate or health insurance, mobilize industries to become active in politics and to protect and expand the provisions that promote their profitability. In addition, they are largely unseen by ordinary citizens, leaving them unaware of the role that government plays in society in assisting particular groups—even, in the case of the affluent, themselves.[259] As a result, Americans can simultaneously benefit from government and yet possess anti-government attitudes and oppose changes that would enable ordinary people to be better off.

XI. The Rise of Oligarchy?

Remarkably, in the United States, a very different society and a very different polity have emerged over the past four decades, even as the nation's constitutional system and institutional arrangements have proven stalwart and most of the landmark public policies enacted during the mid-twentieth century have remained intact. In the early 1970's, economic inequality remained at a low point, poverty had been greatly reduced, social mobility was on the rise, and at last formal discrimination on the basis of race and gender had been dismantled, making the promise of opportunity more available to more citizens than ever before. From that vantage point, it might have seemed that by today, over four decades later, the United States would have be-

[257] Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 311, 111 Stat. 787, 791; Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. No. 108-27, § 301, 117 Stat. 752, 758; see Leonard E. Burman & Joel Slemrod, Taxes in America: What Everyone Needs to Know 41-42 (2013).

[258] American Taxpayer Relief Act of 2012, Pub. L. No 112-240, § 102, 126 Stat. 2313, 2318 (2013).

[259] Mettler, note 23, at 40-44.

come a far more egalitarian nation. Such expectations would prove misguided indeed.

Certainly it makes sense that the slowing of economic growth would have facilitated greater increases to capital than to incomes, but the extent to which these trends would exacerbate economic inequality depends on political responsiveness and policy effectiveness. In fact, U.S. politics themselves became transformed over these past decades in ways that have, overall, fostered the system's tendency toward inequality and restrained its capacity for convergence. The party system of the mid-twentieth century that enabled leaders to forge coalitions in support of policies that provided economic security and educational opportunity to ordinary Americans has been replaced by a deeply divided one that delivers dysfunction and stalemate for the many and policy rewards for the few.[260] The latter dynamic occurs as affluent individuals and vested interests manage to win responsiveness from a system that is best managed by those who are well organized and who can provide resources to candidates in increasingly expensive political campaigns.

The public policies created in the past do not simply continue to function as those who created them intended; rather they need maintenance and updating to serve new generations well. Yet the system of polarized plutocracy imperils even the reauthorization of existing policies and increases the likelihood that entrepreneurial third parties will find ways to benefit from laws at the expense of the common good. Such dynamics explain why the U.S. system of higher education no longer facilitates upward mobility as well as it did in the past and why it is widening the gaps between income groups.

All the more striking, public officials have responded to rising economic inequality in the past two decades by enlarging the advantages of the wealthy, as demonstrated by the lowering of capital gains taxes and the upward redistribution of tax expenditures generally.[261] Meanwhile, the persistence of these policies of the "submerged state" have energized industries that benefit from their existence;[262] they have successfully protected them at the expense of the American public, which could be better served by scaling them back and creating policies that more efficiently and directly address social needs.

An optimistic rendering of social change in the United States since the 1970's would necessarily highlight the rise of an African American middle class, the increase in the number of women in prominent positions in society, and the growth of ethnic diversity among younger

[260] Mettler, note 231, at 15-20.
[261] See notes 251-58 and accompanying text.
[262] See Mettler, note 231, at 114.

Americans. Yet it is also the case that rising economic inequality has simultaneously reinforced old social divisions. It has left immense socioeconomic distances between whites versus blacks and Latinos.[263] The rise of some women in the workforce, moreover, has itself exacerbated economic inequality as Americans increasingly partner with people of their same socioeconomic level.[264] Outright discrimination, though still shockingly apparent, explains less of individuals' status than in the past, while the socioeconomic status of one's family of origin explains more. As the importance of social rank grows, the old inequalities of the new world fade, while the divisions more like those of the old world become increasingly apparent.

XII. America's Future: Toward Greater Equality, or Inequality?

Thomas Piketty has offered a powerful analysis of economic development around the world and through time yet characterized by remarkable simplicity, summed up in the observation that $r > g$, and the dynamics that flow from it.[265] My own analysis—though of just one nation, and concentrating primarily on the past seventy-five years—lacks such elegance. And yet I hope that the task I have undertaken here, this sweeping, bird's eye view of U.S. political development surrounding matters of inequality, has illuminated some general patterns.

Considering that the United States features a system of representative government, one might assume that public opinion has driven the activities of public officials in recent decades, implying that Americans have grown unconcerned with inequality or are satisfied with the record of policies that exist to curtail it. Scholarship that focuses intently on these relationships suggest otherwise, implying that most Americans are troubled by the rise of inequality and would favor greater efforts by lawmakers to mitigate it through public policy.[266] The analysis here directs attention to enduring institutions and broader political forces rather than to the preferences of individuals. As I have shown, the United States has been endowed since its origins

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[263] Thomas Shapiro, Tatjana Meschede & Sam Osoro, Inst. on Assets and Soc. Pol'y, The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide 1-2 (2013), available at http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf.

[264] Jeremy Greenwood, Nezih Guner, Georgi Kocharkov & Cezar Santos, Marry Your Like: Assortative Mating and Income Inequality 2-3 (Nat'l Bureau Econ. Research, Working Paper No. 19829, 2014), available at http://www.nber.org/papers/w19829.

[265] See note 9 and accompanying text.

[266] See, e.g., Leslie McCall, The Undeserving Rich: American Beliefs About Inequality, Opportunity, and Redistribution 5-6 (2013); Benjamin I. Page & Lawrence R. Jacobs, Class War: What Americans Really Think About Economic Inequality 25-48 (2009).

with complex governing institutions that are incapable of quick or efficient policy responsiveness; rather, the system contains numerous obstacles and hurdles to action on the national level, and paired with the highly decentralized system of federalism that itself perpetuates inequality.[267] That broad structure can facilitate the mitigation of inequality—or policy responsiveness of any type—when and to the extent that lawmakers manage to forge political coalitions that overcome its fragmenting tendencies and create policies to address broad public issues. Such political cohesiveness functioned more effectively in the 1930's through the 1970's, when it helped to usher in policies to meet the economic needs of ordinary Americans, and eventually civil rights as well. More recently, however, the growing complexity of the policyscape paired with the political context of partisan polarization and plutocracy have made U.S. government increasingly responsive to the affluent and less so to everyone else.

What do these developments portend for the future? Is the United States destined to become increasingly unequal, or is a transformation to reduced inequality possible? Certainly the forces that have led to heighted inequality are powerful and may continue to foster more of the same. And yet the U.S. political system has shown itself, over time, to be capable of renewal, even in the context of its late nineteenth century framework. The 2008 presidential election, for example, energized many who had never taken part in politics before, leading to the election of the nation's first black president. While many liberals have been disappointed with the short list of Obama's legislative successes in office,[268] an eighty-year goal of progressives heads that list—the achievement of health coverage for working age Americans, at a time when rising health care costs had become a major factor in widening inequality. The Obama Administration took lessons from past failures by other reformers and found ways to work within the existing system, designing a policy on the framework of federalism and by involving vested interests as partners.[269] In an eleventh hour agreement by Democratic leaders, the Affordable Care Act was financed in part by a 3.8% tax increase on investment income.[270] In short, Obama succeeded in achieving historic reform that remains on track, despite innumerable hurdles, to scale back inequality.

The United States also boasts a remarkable history in using public policy to promote higher education, and it should be capable of revitalizing that tradition. From the Northwest Ordinance through the

[267] See notes 52-58 and accompanying text.

[268] See Mettler, note 231, at 1-3.

[269] Id. at 4-5.

[270] IRC § 1411; Lawrence R. Jacobs & Theda Skocpol, Health Care Reform and American Politics 133-41 (2010).

creation of Pell grants, American lawmakers treated education as a public good and designed innovative ways to promote it.[271] It should be possible to resurrect that tradition and to do so once again.

There is no substitute in the American system for widespread civic involvement and political participation, which can alter the scope of conflict and overwhelm the typical impediments to political responsiveness. Indeed, the more egalitarian policies of the past came about in times when Americans participated more in civic organizations that connected the broad public to public officials and in political participation that made the voices of ordinary Americans heard more audibly.[272] Reinvigorating such activism is no small task when the policies, organizations, and rules that facilitated it in the past lack the same robustness today. But a fundamental characteristic of politics—not least, of American politics—is that change is possible, and when circumstances align themselves correctly, it can and will occur.

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[271] See Part VI.

[272] See Mettler, note 231, at 111-12.