THE NEED FOR A WEALTH INEQUALITY AMENDMENT

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"*Ultimately, constitutional law is about the meaning of a just society and how best to achieve it*."[1]

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1 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, at xxi (3d ed. 2006).

I. INTRODUCTION

President Barack Obama described economic inequality as the "defining challenge of our time."[2] He argued that "[t]he combined trends of increased inequality and decreasing mobility pose a fundamental threat to the American Dream, [and] our way of life."[3] And he is not alone in viewing inequality as an existential threat to both our society and our democracy.[4] But why is economic inequality so harmful? How did we become the most unequal advanced democracy in the world? What could or should the government do about the problem? This Article attempts to answer all of those questions. It ultimately argues that our government has a fundamental responsibility to limit the amount of inequality in society and that the best way to do this is to place a constitutional limit on the government's ability to increase wealth inequality.

The concept of inequality is central to this Article, so it makes sense to begin by defining it. In a general sense, inequality just means a "difference in size, degree, [or] circumstances."[5] Of course, there are many kinds of inequality, not all of which have a profound impact on our lives. Some kinds of inequality

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2 *Full Transcript: President Obama's December 4 Remarks on the Economy*, WASH. POST, https://www.washingtonpost.com/politics/running-transcript-president-obamas-december-4-remarks-on-the-economy/2013/12/04/7cec31ba-5cff-11e3-be07-006c776266ed_story.html?noredirect=on (last visited Sept. 1, 2019).

3 *Id.* President Obama's quote implies that increasing inequality and decreasing social mobility are separate issues. In fact, they are related. High levels of inequality decrease social mobility. *See infra* text accompanying notes 70–71.

4 *See* Kate E. Pickett & Richard G. Wilkinson, *Income Inequality and Health: A Causal Review*, 128 SOC. SCI. & MED. 316, 316 (2015) (noting that various world leaders, including the U.S. President, the Pope, and the U.K. Prime Minister have all identified inequality as one of the most important problems of our time); *see also* Eduardo Porter, *Income Inequality Is Costing the U.S. on Social Issues*, N.Y. TIMES, Apr. 28, 2015, at B1 ("The bloated incarceration rates and rock-bottom life expectancy, the unraveling families and the stagnant college graduation rates amount to an existential threat to the nation's future.").

5 *Inequality*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010).

are very important, however. Legal scholars, for example, have written extensively about the effects of racial and gender inequality.[6] While these are important forms of inequality, this Article focuses on a different kind of inequality: economic inequality, specifically wealth inequality. Wealth inequality has not been the focus of as much legal scholarship as other forms of inequality.[7] It has, however, been extensively studied in fields like economics, political science, sociology, psychology, and public health.[8] That research demonstrates that the adverse consequences of high economic inequality are profound. Highly unequal societies have slower economic growth than more equal societies.[9] High economic inequality also causes a wide variety of health problems, including lower life expectancies, higher infant mortality rates, and higher rates of mental illness.[10] It is associated with numerous societal problems, including lower rates of trust, lower social cohesion, and higher rates of violent crime.[11] There is also growing evidence that high levels of inequality result in environmental degradation.[12] Finally, high rates of inequality undermine democracy.[13]

High rates of economic inequality do not just mean that some people have more money than others. The consequences of high levels of inequality are stark. It undermines the economy, society, public health, and even democracy itself. Our government has a duty to maintain the economy, society, public health, and its own democratic character.[14] By undermining the general welfare,

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6 For example, the phrase "gender discrimination" has appeared in the titles of 135 law review articles. The phrase "racial discrimination" has appeared in the titles of 338 articles. By comparison, the phrase "economic inequality" has appeared in the titles of 58 articles, and the specific phrase "wealth inequality" has appeared in the title of only 19 articles. All searches were conducted using LexisAdvance on September 1, 2019. Searches were conducted on those documents appearing in the "Law Reviews and Journals" database.

7 *See supra* note 6. Having said that, some of the most relevant legal contributions to this field include the following: Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419 (2015); Katharine T. Bartlett, *Feminism and Economic Inequality*, 35 LAW & INEQ. 265 (2017); Brendan A. Cappiello, *The Price of Inequality and the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act*, 17 N.C. BANKING INST. 401 (2013); John J. Chung, *Wealth Inequality as Explained by Quantitative Easing and Law's Inertia*, 85 UMKC L. REV. 275 (2017); Stephen M. Feldman, *The End of the Cold War: Can American Constitutionalism Survive Victory?*, 41 OHIO N.U. L. REV. 261 (2015); Thomas W. Mitchell, *Growing Inequality and Racial Economic Gaps*, 56 HOW. L.J. 849 (2013).

8 *See infra* Part III (describing the extensive literature on economic inequality in other fields).

9 *See infra* Section III.C.

10 *See infra* Section III.D.

11 *See infra* Section III.A.

12 *See infra* Section III.E.

13 *See infra* Section III.B.

14 *See infra* Part V.

high economic inequality becomes a proper subject of governmental action.[15] Thus, the government should take action to rein in high levels of economic inequality before it undermines society as a whole.

It should not come as a surprise to anyone that the U.S. is currently experiencing extremely high levels of economic inequality. Rates of economic inequality have been growing since the 1980s and have now reached levels not seen since the "Gilded Age" of the 1920s.[16] This is not a singularly U.S. affliction. Economic inequality has been growing all over the world.[17] But the U.S. has higher levels of inequality than any other advanced democracy.[18] The consequences of that can be seen everywhere. As predicted by the research on economic inequality, the U.S. has a lower life expectancy, higher infant mortality rates, and higher rates of violent crime than more equal countries.[19] In some ways, living in the U.S. today is more like living in a developing country than a rich nation.[20] And as inequality continues to increase, the effects are likely to grow worse. Economic inequality now represents an existential threat to U.S. society.[21]

It is for this reason that this Article proposes amending the Constitution to limit further increases in wealth inequality.[22] To be clear, this proposed Amendment does not try to simply eliminate or outlaw inequality. Rather, it imposes an obligation on the U.S. government to assess the impact on wealth inequality of any new laws or rules.[23] It then prohibits the government from passing laws that increase inequality unless the government identifies an important governmental purpose that justifies that increase.[24] While this will not automatically eliminate existing inequality, it would make it very unlikely that wealth inequality will continue to increase. And, in the long run, it will probably lead to lower levels of wealth inequality.[25] This would result in greater trust in government and society, better public health, and greater economic growth. It would, in effect, make the U.S. a better place to live for everybody.

This Article proceeds as follows. Part II defines the various forms of economic inequality. Part III summarizes the research on economic inequality across a number of different fields. The state of inequality in the U.S. today is

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15 *See infra* Part V.

16 *See infra* Part IV.

17 *See infra* text accompanying note 157.

18 *See infra* text accompanying note 147.

19 *See infra* text accompanying notes 158–164.

20 *See infra* text accompanying notes 176–186.

21 *See supra* text accompanying notes 2–4.

22 *See infra* Part VI.

23 *See infra* Section VI.B.

24 *See infra* Section VI.F.

25 *See infra* text accompanying notes 229–235.

examined in Part IV. Part V explains why it is necessary for the government to take an active role in limiting wealth inequality. Part VI proposes an Amendment to the Constitution to address the threat of rising wealth inequality and discusses the provisions of the proposed Amendment. This Article's conclusions are presented in Part VII.

II. DEFINING INEQUALITY

There are three different kinds of inequality discussed in this Article: income inequality, wealth inequality, and economic inequality. While the inequality literature sometimes treats these terms as being interchangeable, they have distinct meanings.

Income inequality refers to differences in income between different members of a society. Income is usually defined as all money earned by a household (including cash transfers like food stamps or tax credits) in a given year minus any taxes paid.[26] Income inequality is usually measured either using a Gini coefficient or the P90/P10 ratio.[27] The Gini coefficient for income inequality represents the amount of inequality as a number between zero (perfect equality—everyone has the same income) and one (perfect inequality—one person has all the income).[28] Higher Gini coefficients indicate higher levels of inequality. Income inequality is also sometimes expressed in terms of the P90/P10 ratio. This compares the income of the person at the 90th percentile of the income distribution to the person at the 10th percentile of the income distribution.[29] The greater the ratio of the income of the 90th percentile to the 10th percentile, the more unequal the distribution of income in society.

Wealth inequality focuses on differences in overall wealth rather than differences in income. Wealth is defined as total assets owned by a household minus debts or liabilities.[30] It includes pension wealth.[31] Wealth inequality is also measured using both the Gini coefficient and the P90/P10 ratio.[32] The higher the

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26 *See, e.g.*, Jonathan Fisher & Timothy M. Smeeding, *Income Inequality*, PATHWAYS: A MAG. ON POVERTY, INEQ. & SOC. POL'Y (SPECIAL ISSUE), 2016, at 32; OECD, OECD FACTBOOK 2011-2012: ECONOMIC, ENVIRONMENTAL AND SOCIAL STATISTICS 80 (2011).

27 Fisher & Smeeding, *supra* note 26.

28 *Id.*

29 *Id.* at 32–34.

30 Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, 131 Q.J. ECON. 519, 525 (2016) ("Wealth is the current market value of all the assets owned by households net of all their debts."); Gabriel Zucman, *Wealth Inequality*, PATHWAYS: A MAG. ON POVERTY, INEQ. & SOC. POL'Y (SPECIAL ISSUE), 2016, at 39.

31 Saez & Zucman, *supra* note 30, at 525–26; Zucman, *supra* note 30.

32 *See supra* text accompanying notes 27–29 (describing the Gini coefficient and the P90/P10 ratio).

Gini coefficient or the P90/P10 ratio the more unequally wealth is distributed in a given society. Wealth inequality is generally much higher than income inequality.[33] This is because income inequality has a "snowballing effect" on wealth inequality as those with the highest incomes save at higher rates.[34] This "snowballing effect" has dramatically affected the distribution of wealth in the U.S. since the late 1970s.[35]

Income inequality and wealth inequality measure different things, although both can be used as proxies for economic inequality. In terms of understanding the real level of inequality in the U.S., however, wealth inequality is a better measure of overall inequality than income inequality. There are several reasons to focus on wealth inequality. First, the correlation between income and wealth is low, suggesting that the impact of wealth inequality is separate from the impact of income inequality.[36] In addition, there are benefits associated with wealth that do not necessarily accrue to income, like long-term financial security.[37] Moreover, wealth inequality is significantly higher than income inequality.[38] Thus looking only at income inequality will tend to underestimate the overall level of inequality in society. And finally, at least for some problems, wealth inequality appears to have worse consequences than income inequality.[39] For these reasons, wealth inequality is a better measure of overall inequality than income inequality because it more accurately captures the true state of economic inequality in the U.S.[40]

As a result, this Article will focus on the effects of wealth inequality where possible. However, less is known about wealth inequality than income inequality because there is less reliable data about wealth inequality.[41] So, even

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33 *See* Kathryn N. Neckerman & Florencia Torche, *Inequality: Causes and Consequences*, 33 ANN. REV. SOC. 335, 338 (2007) ("Wealth is much more unequally distributed than income."); Saez & Zucman, *supra* note 30 at 521; *see also* Mitchell, *supra* note 7, at 856.

34 *See* Saez & Zucman, *supra* note 30, at 531.

35 *Id.* at 521.

36 *See* Lisa A. Keister & Stephanie Moller, *Wealth Inequality in the United States*, 26 ANN. REV. SOC. 63, 65 (2000) ("Omitting wealth from studies of inequality leaves an important part of the . . . story untold."); Alexandra Killewald et al., *Wealth Inequality and Accumulation*, 43 ANN. REV. SOC. 379, 390 (2017) ("Thus, our results also confirm that . . . wealth remains distinct, even from long-term measures of income.").

37 *See* Keister & Moller, *supra* note 36, at 64.

38 *See supra* text accompanying note 33.

39 *See infra* text accompanying note 116 (finding that wealth inequality produces a greater drag on economic growth than income inequality).

40 *See* Cappiello, *supra* note 7, at 403–04 (arguing that wealth inequality is "more problematic" than income inequality); Keister & Moller, *supra* note 36, at 64 (noting that "recent evidence suggests that inequality is much worse if wealth is taken into account").

41 *See* Facundo Alvaredo et al., WORLD INEQUALITY REPORT 2018, at 206 ("Unfortunately relatively little is . . . known about the recent evolution of wealth inequality at a global level. Wealth inequality data discussed in public debates up to now essentially relied on sources which

though wealth inequality is a better measure of overall inequality, this Article will also cite research that discusses the effects of income inequality.

Economic inequality is a broader concept than either income inequality or wealth inequality and includes the totality of ways in which people's economic opportunities are different.[42] Income and wealth inequality make up a large part of economic inequality, but it also includes other ways in which people's economic opportunities are different.[43] Economic inequality (in its broadest sense) is difficult to measure, however, and it is most often measured by differences in income or wealth.[44] For that reason, the literature often treats economic inequality as being synonymous with income or wealth inequality.[45]

The lax approach to terminology in the literature is somewhat problematic. Economic inequality is broader than income or wealth inequality, but this Article will follow the convention in the literature and treat all three terms as being largely synonymous, at least when discussing that literature (i.e., in Part III). But when it comes to discussing the proposed constitutional amendment (i.e., in Part VI), this Article will use specific terms rather than

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do not allow for a sound analysis of wealth dynamics."); Keister & Moller, *supra* note 36, at 64 (noting that income is "the most commonly studied indicator of financial wellbeing" because of the availability of "accurate data on wages and salaries").

42 *See* Hari Bapuji, *Individuals, Interactions and Institutions: How Economic Inequality Affects Organizations*, 68 HUM. REL. 1059, 1061 (2015) (noting that economic inequality represents a "broader conceptualization" than income or wealth inequality and could include inequalities in opportunities, education, health or social status); Amartya K. Sen, *From Income Inequality to Economic Inequality*, 64 S. ECON. J. 384, 398 (1997) (arguing that economic inequality is broader than income inequality and includes "influences on individual well-being and freedom that are economic in nature but that are not captured by the simple statistics of incomes and commodity holdings."); *How Is Economic Inequality Defined?*, EQUALITY TR., https://www.equalitytrust.org.uk/how-economic-inequality-defined (last visited Sept. 1, 2019).

43 *Cf.* Bartlett, *supra* note 7, at 284–85 (discussing the difference between poverty and economic inequality).

44 *See How Is Economic Inequality Defined?*, *supra* note 42; *see also* Nancy Bermeo, *Does Electoral Democracy Boost Economic Equality?*, 20 J. DEMOCRACY 21, 22 (2009) (defining economic inequality as "a measure of the distribution of material resources that emerges from the ranking of all the economic actors . . . according to the amount of material resources that they possess").

45 *See, e.g.*, Bapuji, *supra* note 42, at 1061 ("It is common to find economic inequality being used interchangeably with income inequality and wealth inequality . . . ."); Stéphane Côté et al., *High Economic Inequality Leads Higher-Income Individuals to Be Less Generous*, 112 PNAS 15838, 15838 (2015) (defining economic inequality as "the extent to which wealth is concentrated in the hands of a small proportion of the population"); B. Keith Payne et al., *Economic Inequality Increases Risk Taking*, 114 PNAS 4643, 4643 (2017) (defining inequality as "the variance in an income distribution (as is measured using measures such as the Gini coefficient)"); Frederick Solt, *Economic Inequality and Democratic Political Engagement*, 52 AM. J. POL. SCI. 48, 51–52 (2008) [hereinafter Solt, *Democratic Political Engagement*] (treating income inequality as a measure of economic inequality). *But see* Sen, *supra* note 42, at 384–85 (arguing that economic inequality is significantly broader than income inequality and that the focus on income inequality is an "inadequate" way of assessing economic inequality).

treating all three forms of inequality as if they are interchangeable. In particular, it will focus on wealth inequality rather than the related concept of economic inequality.

III. THE CONSEQUENCES OF HIGH LEVELS OF INEQUALITY

This section will review the literature about the effects of economic inequality. Economic inequality has been studied across many fields and this section attempts to synthesize that vast and diverse body of work. The papers discussed below come from a variety of different fields including economics, political science, sociology, psychology, public health, and ecology.

Moreover, the discussion below focuses on empirical studies of the effects of inequality. This is important because it is often possible to come up with multiple plausible predictions about the effect of inequality. For example, in political science, there has been a debate about the effect of inequality on voting.[46] One hypothesis is that as economic inequality increases, the rich will dominate the political agenda, which will push issues that affect the poor off the agenda, and ultimately result in lower voting rates among poorer citizens.[47] Another competing hypothesis is that as inequality widens, the increasing differences between rich and poor will motivate poorer citizens to vote in larger numbers.[48] Both theories seem plausible, but they can't both be true. The only way to know which hypothesis holds true in the real world is to test them against the evidence.

As it turns out, the evidence indicates that increased economic inequality reduces voting by the poorest members of society.[49] But in the absence of evidence, both theories sound like they could be true. This highlights the need not just for plausible theories about the effects of inequality but also for empirical methods that test those theories. For that reason, this section focuses on empirical work (i.e., articles that test their theories against the evidence, often using statistical methods to do so). As a result, the discussion below is both multi-disciplinary and empirical in its approach.

There are many ways one could divide and categorize the ways in which inequality harms society. This Article has opted to classify them under five headings: societal effects, democratic effects, effects on economic growth, public

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46 *See* Frederick Solt, *Does Economic Inequality Depress Electoral Participation? Testing the Schattschneider Hypothesis*, 32 POL. BEHAV. 285, 286–88 (2010) [hereinafter Solt, *Testing the Schattschneider Hypothesis*] (describing different theories about how inequality could affect voting patterns).

47 *Id.* at 286–87.

48 *Id.* at 288.

49 *Id.* at 294–97; *see also* Solt, *Democratic Political Engagement*, *supra* note 45, at 57 (noting that high levels of inequality depress electoral participation by the poor rather than increasing support for redistribution).

health effects, and environmental effects. Each subsection below addresses one of those groupings.

A. The Effect of Inequality on Society

There are numerous ways in which inequality tears at the fabric of society. Inequality is associated with lower levels of social cohesion.[50] For example, studies show that people in more unequal societies show higher levels of status anxiety and lower levels of trust.[51] They also show lower levels of concern for social harmony and are less willing to help others.[52] Higher levels of inequality also result in less participation in civic life.[53] And, as inequality has increased, our neighborhoods have been economically segregated as the wealthy increasingly live apart from both the middle class and the poor.[54] Finally, it seems that the more unequal the society, the less happy its members.[55]

And the adverse effects extend beyond a general decrease in trust, civic participation, and happiness. For example, increases in inequality cause increases in violent crime.[56] This finding may seem startling, but it has been replicated

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[50] *See* Pickett & Wilkinson, *supra* note 4, at 322–23. For an excellent discussion of the relationship between inequality, trust, and social cohesion, see Bo Rothstein & Eric M. Uslaner, *All for All: Equality, Corruption, and Social Trust*, 58 WORLD POL. 41, 41–53 (2005).

[51] *See* Pickett & Wilkinson, *supra* note 4, at 323; *see also* Nicholas R. Buttrick & Shigehiro Oishi, *The Psychological Consequences of Income Inequality*, 11 SOC. & PERSONALITY PSYCHOL. COMPASS 1, 2 (2017) ("Surveys show that the more the income inequality in a given area, the less the members of that area trust each other." (citation omitted)); Rothstein & Uslaner, *supra* note 50, at 47–48 & fig.1 (showing that there is a strong relationship between high levels of inequality and lower trust across societies).

[52] *See* Pickett & Wilkinson, *supra* note 4, at 323.

[53] *See* Buttrick & Oishi, *supra* note 51, at 3.

[54] *See* Neckerman & Torche, *supra* note 33, at 344 ("Although inequality across regions has declined, the affluent and the poor have become more segregated from each other across metropolitan areas, municipalities, and neighborhoods.").

[55] *See* Buttrick & Oishi, *supra* note 51, at 5 (noting that studies have found that high inequality is associated with lower levels of happiness within society); Neckerman & Torche, *supra* note 33, at 342–43 (noting that studies have found that high inequality is correlated with lower levels of life satisfaction).

[56] *See* Mario Coccia, *Economic Inequality Can Generate Unhappiness that Leads to Violent Crime in Society*, 4 INT'L J. HAPPINESS & DEV. 1, 5 (2018) (noting that "there is a growing consensus" that inequality can cause increases in violent crime); Pablo Fajnzylber et al., *Inequality and Violent Crime*, 45 J.L. & ECON. 1 (2002) ("Crime rates and inequality are positively correlated within countries and, particularly, between countries, and this correlation reflects causation from inequality to crime rates, even after controlling for other crime determinants."); *see also* Hector Gutierrez Rufrancos et al., *Income Inequality and Crime: A Review and Explanation of the Time-Series Evidence*, 1 SOC. & CRIMINOLOGY 1 (2013) (finding a strong correlation between income inequality and violent crime).

many times.[57] And it is not just violent crime that is affected by inequality. Property crime is also "very strongly" related to income inequality.[58] As one researcher has noted, a decrease in income inequality "is associated with a sizeable reduction in crime."[59]

High levels of inequality are also correlated with poor educational outcomes for children. In one study of 23 high-income countries, higher inequality was associated with lower math scores, lower reading scores, lower science scores, and lower enrollment in higher education.[60] The same is true in the U.S., where educational performance decreases and the likelihood of dropping out of school increases as income inequality increases.[61] Nor is the effect on children limited to education. Across high-income countries, high levels of inequality are negatively correlated with child wellbeing as a whole (i.e., as inequality increases child wellbeing decreases).[62]

Unequal societies also cause rich people to become less generous to others.[63] Research indicates that the rich show higher levels of entitlement and narcissism,[64] as well as a greater tendency to engage in self-serving unethical behavior.[65] This may be related to the finding, discussed below, that increasing inequality increases corruption.[66] Higher inequality is also associated with higher

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57 *See* Neckerman & Torche, *supra* note 33, at 343 (noting that "[m]any but not all of these studies find crime rates are higher in areas with higher income inequality"); Pickett & Wilkinson, *supra* note 4, at 318 (noting that this finding has been replicated many times).

58 Rufrancos et al., *supra* note 56.

59 *Id.*

60 *See* Kate E. Pickett & Richard G. Wilkinson, *Child Wellbeing and Income Inequality in Rich Societies: Ecological Cross Sectional Study*, 335 BRIT. MED. J. 1080 (2007) [hereinafter *Ecological Cross Sectional Study*]. Not all of the findings were statistically significant, but the results for the math scores and further education were significant. Even for the ones that were not significant, however, it is striking that all of the educational variables were negatively correlated with inequality (i.e., as inequality increased educational attainment decreased).

61 *Id.*

62 *Id.*

63 *See* Côté et al., *supra* note 45.

64 *See* Paul K. Piff, *Wealth and the Inflated Self: Class, Entitlement, and Narcissism*, 40 PERSONALITY & SOC. PSYCHOL. BULL. 34 (2013).

65 *See* Paul K. Piff et al., *Higher Social Class Predicts Increased Unethical Behavior*, 109 PNAS 4086 (2012). This may also be a function of lower levels of trust within society. *See* Buttrick & Oishi, *supra* note 51, at 3 ("People who trust others less are more likely to engage in unethical behavior . . . .").

66 *See infra* text accompanying notes 101–103.

levels of risk taking.[67] For example, highly unequal societies have higher rates of drug use[68] and gambling.[69]

Greater inequality also decreases social mobility.[70] This means that children of poor parents are more likely to become poor adults, while the children of rich parents are likely to remain rich.[71] As a result, "rags to riches" life trajectories are much less common in highly unequal societies. And inequality has enormous adverse public health effects, which are discussed below.[72] By virtually any measure (crime, happiness, social cohesion and trust, social mobility, drug use, child wellbeing, etc.) unequal societies are worse places to live than more equal societies.

B. The Effect of Inequality on Democracy

High levels of economic inequality also have wide-ranging impacts on the health of our democracy. To begin with, higher levels of inequality lower the rate at which people vote in the U.S.[73] Moreover, the effects are asymmetrical. High levels of inequality decrease voting rates of the poorest more than rates for the wealthiest.[74] While the composition of the electorate is always skewed in favor of the wealthy (who vote at higher rates than the poor at all levels of inequality), this trend becomes even more pronounced as economic inequality increases.[75] High levels of inequality also decrease both interest in politics and discussion of politics, particularly for the poorest members of society.[76]

Highly unequal societies also have less trust in democratic government.[77] While this result is not unique to the U.S., there is evidence that high levels of inequality are undermining our commitment to democracy. For

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67 *See* Payne et al., *supra* note 45.

68 *See* Pickett & Wilkinson, *supra* note 4, at 320.

69 *See* Elizabeth A. Freund & Irwin L. Morris, *Gambling and Income Inequality in the States*, 24 POL'Y STUD. J. 265 (2006).

70 *See* Miles Corak, *Income Inequality, Equality of Opportunity, and Intergenerational Mobility*, 27 J. ECON. PERSP. 79 (2013); Pickett & Wilkinson, *supra* note 4, at 321.

71 Mitchell, *supra* note 7, at 851.

72 *See infra* Section III.D.

73 *See* Solt, *Testing the Schattschneider Hypothesis*, *supra* note 46, at 294–97 (finding that states with the highest levels of inequality in the study had voting rates approximately 20% lower than states with the lowest levels of inequality).

74 *Id.* at 294–97; *see also* Solt, *Democratic Political Engagement*, *supra* note 45, at 56–57.

75 *See* Solt, *Testing the Schattschneider Hypothesis*, *supra* note 46, at 294–297.

76 *See* Solt, *Democratic Political Engagement*, *supra* note 45, at 54–56.

77 *See* Roberto Stefan Foa & Yascha Mounk, *The End of the Consolidation Paradigm: A Response to Our Critics*, J. DEMOCRACY, June 24, 2017, at 1, 15 fig.5 (showing that there is a strong correlation between income inequality and attitudes towards democracy with the electorate in highly unequal societies becoming increasingly disenchanted with democracy).

example, satisfaction with U.S. democracy is declining over time, particularly amongst the young.[78] By 2011, less than 30% of young Americans thought that democracy was a good way to run the country.[79] In response to a 2016 survey, 46% of respondents said they had "never had" faith in U.S. democracy or had "lost" that faith.[80] This suggests that growing inequality is an existential threat to democracy itself.[81]

A big part of the problem is that our government has been captured by moneyed interests. It is much more responsive to the needs of the rich than the needs of the middle class or the poor.[82] This has occurred, in part, because the wealthy are more politically active than those who are less well off, but also because they give far more money to politicians and political organizations and have far more access to public officials.[83] The influence of the affluent might not

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78 *Id.* at fig.1.

79 *Id.*

80 *Id.* at 6.

81 *Id.* at 3–5 (arguing that stable democracies can "deconsolidate"—transition to a non-democratic form of government—if support for democracy becomes too low); *id.* at 17 (noting that "countries in which more than 20 percent of respondents express cynicism of democratic governance have, historically, been highly susceptible to the rise of authoritarian parties, candidates and political movements").

82 *See* Bermeo, *supra* note 44, at 25 (2009) (noting that "a raft of convincing research shows that public policies more often reflect the preferences of the wealthy than those of the average voter" (citation omitted)); Martin Gilens, *Inequality and Democratic Responsiveness*, 69 PUB. OPINION Q. (SPECIAL ISSUE) 778 (2005) (finding that the government is very responsive to the policy preferences of the wealthy and almost totally unresponsive to the policy preferences of poor and middle-income people when their policy preferences diverge from those of the wealthy); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 572 (2014) (finding that average citizens have "little or no independent influence on policy" while economic elites have a "substantial, highly significant, independent impact on policy"); Neckerman & Torche, *supra* note 33, at 345 (noting that "elected officials in the United States are far more responsive to their affluent constituents than to the middle class or the poor"); Benjamin I. Page et al., *Democracy and the Policy Preferences of Wealthy Americans*, 11 PERSP. ON POL. 51, 51 (2013) (noting that there is now significant evidence that "the wealthiest Americans exert more political influence than their less fortunate fellow citizens do"); *cf.* Lawrence R. Jacobs & Benjamin I. Page, *Who Influences U.S. Foreign Policy?*, 99 AM. POL. SCI. REV. 107, 120–21 (2005) (finding that business leaders have a "strong, consistent, and perhaps lopsided influence" on U.S. foreign policy while the views of the public have "little or no significant effect on government officials.").

83 *See* Jacob S. Hacker & Paul Pierson, *Winner-Take-All Politics: Public Policy, Political Organization, and the Precipitous Rise of Top Incomes in the United States*, 38 POL. & SOC'Y 152, 175–78 (2010) (noting that beginning in the mid-1970s moneyed business interests became very successful at organizing in ways that permitted them to influence the policy-making process in the United States through both direct giving to politicians and through massive spending on lobbying efforts); Page et al., *supra* note 82, at 53–54; Jeffrey A. Winters & Benjamin I. Page, *Oligarchy in the United States?*, 7 PERSP. ON POL. 731, 740–43 (2009) (describing ways in which the wealthy are able to influence government policy, including lobbying).

be a huge problem if the wealthiest Americans and poor to middle-class Americans agreed on the role of government,[84] but they do not.[85]

The wealthiest Americans say that budget deficits are the most important problem facing the U.S.[86] And they would prefer to cut government spending on Social Security, food stamps, health care, and environmental protection.[87] Most Americans do not agree. They see jobs and the economy as the most important issue,[88] and support increasing government spending on Social Security, health care, and the environment.[89]

There are also significant differences on tax policy. The wealthiest Americans do not want to increase the marginal income tax rate or the estate tax.[90] In contrast, most Americans support a higher marginal income tax rate on the wealthy as well as an increase in the estate tax.[91] Finally, the wealthiest Americans are adamantly opposed to having the government take active steps to reduce economic inequality in the U.S.[92]

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84 *See* Page et al., *supra* note 82, at 52 (noting that "[i]f . . . the policy preferences of the affluent were much the same as everyone else's, then their unequal influence would make little practical difference" (citation omitted)).

85 *See generally* Page et al., *supra* note 82 (finding that the views of the wealthiest Americans diverge from those of the public); *see also* Hacker & Pierson, *supra* note 83, at 181–82 (2010) (noting that wealthy Americans are "less supportive of economic redistribution and measures to provide economic security" than the median voter).

86 *See* Page et al., *supra* note 82, at 55.

87 *Id.* at 56.

88 *Id.* at 55–56.

89 *Id.* at 56; *see also Little Public Support for Reductions in Federal Spending*, PEW RES. CTR. (Apr. 11, 2019), https://www.people-press.org/2019/04/11/little-public-support-for-reductions-in-federal-spending/ (finding that large numbers of Americans support increases in spending for Medicare, health care, and Social Security, while very few Americans support reducing spending on those areas).

90 *See* Page et al., *supra* note 82, at 61–62.

91 *Id.* at 62; *see also* Matthew Sheffield, *Poll: A Majority of Americans Support Raising the Top Tax Rate to 70 Percent*, HILL (Jan. 15, 2019), https://thehill.com/hilltv/what-americas-thinking/425422-a-majority-of-americans-support-raising-the-top-tax-rate-to-70 (reporting on a recent public opinion poll that showed nearly 60% of registered voters favored increasing the highest marginal income tax rate to 70%); *Growing Partisan Divide Over Fairness of the Nation's Tax System*, PEW RES. CTR. (Apr. 4, 2019), https://www.people-press.org/2019/04/04/growing-partisan-divide-over-fairness-of-the-nations-tax-system/ (showing that a majority of American believe the U.S. tax system is not fair and that more than 60% of Americans believe that the wealthy and corporations do not pay enough in taxes); *Taxes*, GALLUP, https://news.gallup.com/poll/1714/taxes.aspx (last visited Sept. 1, 2019) (showing that, in public opinion polls conducted over more than twenty five years, a majority of Americans consistently indicate that "upper-income people" and "corporations" pay too little in federal taxes).

92 *See* Page et al., *supra* note 82, at 63–64 (noting that 87% of the wealthy said that the government did not have a responsibility to reduce inequality and that 83% of the wealthy said that the government should not use taxes to redistribute wealth).

While there are some areas of agreement,[93] the wealthiest Americans have significantly different views from average Americans about a number of important issues, including the deficit, health care and Social Security spending, and tax policy. Moreover, the differences become stronger the richer you are. Americans with more than $40 million in wealth were significantly more likely to favor cutting social programs and reducing regulation of businesses than those with only $5 million in wealth.[94] As Professor Page suggests, these differences in views and the ability to influence the government help explain why marginal tax rates have gone down and cutting Social Security always seems to be on the agenda, despite the fact that these policies do not have widespread support.[95]

The wealthiest Americans have been very successful at securing policies that advance their wealth and blocking proposals that would reduce that wealth.[96] Average tax rates, particularly for the wealthiest Americans, have dropped dramatically since the 1970s.[97] And the research suggests that is the result of intensive efforts by interest groups funded by the wealthiest Americans, who have been successful in "keeping tax cuts on the agenda and shaping policy to focus the gains of tax-policy changes on those at the very top of the income distribution."[98] The reality of the American political system today is that it is one in which the wealthy use their influence over policy to channel ever larger proportions of the country's wealth to themselves, and the poor and middle class are largely powerless to prevent it.[99]

Looking beyond the U.S., high levels of inequality have been linked to other ills, including more human rights abuses, a greater acceptance of

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93 Both the wealthiest Americans and the public as a whole support government spending on both public infrastructure, scientific research and education. *See* Page et al., *supra* note 82, at tbl.1.

94 Page et al., *supra* note 82, at 64–65.

95 *See* Page et al., *supra* note 82, at 68; *see also* Gilens & Page, *supra* note 82, at 576 (noting that "even when fairly large majorities of Americans favor policy change, they generally do not get it" when those policy changes are opposed by economic elites).

96 *See* Andrias, *supra* note 7, at 435–61 (describing how the wealthy have been able to exert considerable power over the government, particularly over issues that would affect their own wealth like tax policy or corporate regulation); Feldman, *supra* note 7, at 312–13 (describing how corporate interests are able to block or otherwise undermine legislation that would adversely affect their profitability).

97 *See* Hacker & Pierson, *supra* note 83, at 184 fig.5.

98 *Id.* at 184–85.

99 *See id.* at 189–92 (noting that wealthy business interests were able to prevent changes that would have reined in executive compensation and that the rise in executive compensation in the 1990s contributed significantly to inequality); *see also* Feldman, *supra* note 7, at 306 ("With ever-increasing proficiency, corporations manipulate elections and government for their own advantage—benefiting the respective corporations as well as corporate business in toto." (citation omitted)); *Growing Partisan Divide Over Fairness of the Nation's Tax System*, *supra* note 91 (showing that more than 60% of Americans believe that the U.S. economic system unfairly favors powerful interests at the expense of most Americans).

authoritarian rule, more influence peddling, and the erosion of the rule of law.[100] One study found that high levels of inequality caused increases in corruption.[101] This, in turn, can cause further increases in inequality.[102] "As a result, many societies are likely to be trapped in vicious circles of inequality and corruption."[103]

Inequality also effects whether democracies rise or fall.[104] Greater inequality in society makes it less likely that countries will transition to a stable democracy.[105] And high levels of inequality are associated with the failure of young democracies.[106] But, inequality is not just a problem for young or transitional democracies. There is evidence that even stable democracies can be undermined by high levels of inequality.[107] These findings led one scholar to conclude that "persistently high economic inequality harms the *quality* of democracy in profound ways."[108]

C. *The Effect of Inequality on the Economy*

Inequality also affects the economy. There is evidence that highly unequal societies have lower rates of economic growth than more equal societies.[109] This relationship has been studied extensively over the last several

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100 *See* Bermeo, *supra* note 44, at 25; *see also* Feldman, *supra* note 7, at 332 (noting that "gross inequality in a pluralist democratic regime" undermines the rule of law (citation omitted)).

101 *See* Jong-sung You & Sanjeev Khagram, *A Comparative Study of Inequality and Corruption*, 70 AM. SOC. REV. 136, 151 (2005) ("Thus, the weight of the evidence supports our hypothesis that inequality increases corruption." (citation omitted)).

102 *Id.* at 153 ("[I]nequality causes higher levels of corruption, and higher levels of corruption intensify inequality.").

103 *Id.*

104 *See* Florian Jung & Uwe Sunde, *Income, Inequality, and the Stability of Democracy—Another Look at the Lipset Hypothesis*, 35 EUR. J. POL. ECON. 52 (2014).

105 *See* Solt, *Democratic Political Engagement*, *supra* note 45, at 52.

106 *See* Ethan B. Kapstein & Nathan Converse, *Poverty, Inequality and Democracy: Why Democracies Fail*, 19 J. DEMOCRACY 57 (2008).

107 *See* Foa & Mounk, *supra* note 77, at fig.5 (noting that there is a strong correlation between income inequality and attitudes towards democracy with the electorate in highly unequal societies becoming increasingly disenchanted with democracy).

108 Bermeo, *supra* note 44, at 24; *see also* Solt, *Democratic Political Engagement*, *supra* note 45, at 58.

109 *See, e.g.*, Dierk Herzer & Sebastian Vollmer, *Inequality and Growth: Evidence From Panel Cointegration*, 10 J. ECON. INEQ. 489, 501 (2012) (finding that "the long-run effect of inequality on growth is negative" and that this relationship holds true for rich and poor countries as well as democratic and non-democratic countries).

decades.[110] While most studies have found a negative relationship between inequality and growth,[111] that result is not universal[112] and some of the studies finding a relationship have been criticized on methodological grounds.[113] A recent meta-analysis by Neves et al., however, re-analyzed the existing empirical studies of the relationship between inequality and growth.[114] While Neves et al. found some problems with the prior studies,[115] their meta-analysis concluded that inequality does have a negative effect on growth, particularly in developing countries, and that wealth inequality has a greater negative effect than income inequality.[116]

The takeaway from this research is that inequality, particularly wealth inequality, has a negative impact on economic growth.[117] This may be, in part, because high levels of inequality decrease productivity.[118] For example, there is evidence that high levels of pay inequality within businesses can decrease cooperation, diminish job satisfaction, hamper innovation, increase turnover, and have a "negative effect on individual, team and organizational performance."[119]

These findings directly contradict an argument frequently made by wealthy interests that increasing taxes on the wealthy will reduce economic

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[110] *See* Pedro Cunha Neves et al., *A Meta-Analytic Reassessment of the Effects of Inequality on Growth*, 78 WORLD DEV. 386, 387–88 (2016) (summarizing the history of empirical study of the relationship between inequality and growth from the mid-1990s to the present).

[111] *Id.* at 390 (noting that 36 of their estimates found a negative relationship between inequality and growth while only 13 found a positive relationship); *see also* Erik Thorbecke & Chutatong Charumilind, *Economic Inequality and Its Socioeconomic Impact*, 30 WORLD DEV. 1477, 1482 (2002) (reviewing a number of studies that have found a negative correlation between inequality and economic growth).

[112] *See, e.g.*, Robert J. Barro, *Inequality and Growth in a Panel of Countries*, 5 J. ECON. GROWTH 5 (2000) (finding that inequality impeded growth in developing countries but had a positive correlation with growth in high income countries).

[113] *See* Neves et al., *supra* note 110.

[114] *Id.* at 388–90 (describing how the data for the meta-analysis was collected).

[115] For example, they found some evidence of publication bias in the magnitude of the results that may have inflated the reported effect sizes. *Id.* at 392–93.

[116] *Id.* at 398.

[117] *Id.*; *see also* Andrew Berg et al., *Redistribution, Inequality and Growth: New Evidence*, 23 J. ECON. GROWTH 259 (2018) (finding that lower inequality is correlated with higher rates of economic growth); Vicente Royuela et al., *The Short-Run Relationship Between Inequality and Growth: Evidence From the OECD Regions During the Great Recession*, 53 REGIONAL STUD. (forthcoming 2019) (finding a negative relationship between inequality and growth among OECD countries during the 2003–2013 period).

[118] *See* Bapuji, *supra* note 42, at 1068.

[119] *Id.*

growth by reducing the incentive for the rich to earn more.[120] In reality, decreasing taxes on the wealthy increases inequality,[121] which leads to lower growth.[122] Thus, the evidence suggests that increasing taxes on the wealthy is a better route to long-term economic growth because increasing taxes on the wealthy reduces inequality, and a reduction in inequality will probably lead to higher long-term growth rates.

D. The Effect of Inequality on Public Health

The health effects of high economic inequality are stark,[123] particularly in affluent countries like the U.S. Affluent countries with high levels of economic inequality are simply less healthy than more equal countries.[124] Highly unequal countries suffer from a variety of poor health outcomes including lower life expectancies, higher infant mortality rates, higher teenage birth rates, higher rates of drug use, higher rates of obesity, and higher rates of mental illness.[125] The size of the effects are large, with high rates of inequality resulting in a tripling of the rates of mental illness and obesity and years less of life expectancy.[126] This association has been found in hundreds of studies that have compared outcomes in many countries, at different levels of development, over a period of more than 30 years.[127] As some of the leading researchers in this area have said: "There can now be no doubt that worse health is . . . *associated* with greater inequality."[128] This association is so well known in the public health and

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120 *See, e.g.*, Eduardo Porter, *Tax Cuts, Sold as Fuel for Growth, Widen Gap Between Rich and Poor*, N.Y. TIMES (Oct. 3, 2017), https://www.nytimes.com/2017/10/03/business/economy/tax-rates-growth.html (describing arguments made in favor of reducing taxes on the wealthy).

121 *Id.*

122 *See supra* text accompanying notes 109–116.

123 *See* Richard G. Wilkinson & Kate E. Pickett, *Income Inequality and Social Dysfunction*, 35 ANN. REV. SOC. 493, 494 (2009) (reviewing the literature and finding that most of the studies that have examined the relationship between inequality and health have concluded that increased inequality is associated with worse health outcomes).

124 *See* Pickett & Wilkinson, *supra* note 4, at 317–18. This appears to be the case for children as well as adults, as child wellbeing tends to decrease as inequality increases. *See Ecological Cross Sectional Study*, *supra* note 60.

125 *See* Pickett & Wilkinson, *supra* note 4, at 320; Wilkinson & Pickett, *supra* note 123, at 494–95.

126 *See* Wilkinson & Pickett, *supra* note 123, at 494, 505.

127 *See* Pickett & Wilkinson, *supra* note 4, at 317–18 (describing how hundreds of studies across a wide variety of countries have shown that countries that are more unequal have poorer health).

128 *Id.* at 318.

epidemiology literature that it even has its own name: "the inequality hypothesis."[129]

But there is not just evidence of association, there is also now "strong" evidence that inequality causes these adverse health outcomes.[130] After several decades of research, the evidence is clear that the result of increasing inequality is worse health outcomes for everyone, not just the poor.[131] As one researcher put it, "[i]t appears to be impossible to create a society with high rates of economic inequality and good health."[132]

E. The Effect of Inequality on the Environment

There is a consensus that degradation of the environment can worsen inequality because the poor are more dependent on the environment than those who are well off.[133] Thus, they suffer more from pollution and climate change than the wealthy.[134] But, increasingly, there is evidence that the causation can run the other way too—increasing inequality can also have adverse environmental impacts.[135] While not all of the studies agree on whether there is a relationship,[136] there is some evidence that greater inequality is associated with weaker environmental protection policies and greater biodiversity loss.[137] There is also evidence that highly unequal affluent societies produce more climate change inducing CO_2 emissions than more equal societies.[138] While there is need

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129 *See* SV Subramanian & Ichiro Kawachi, *Response: In Defence of the Income Inequality Hypothesis*, 32 INT'L J. EPIDEMIOLOGY 1037 (2003).

130 *See* Pickett & Wilkinson, *supra* note 4, at 323; *see also* Bapuji, *supra* note 42, at 1063 ("[I]t is fair to conclude (based on over 300 peer-reviewed studies) that the relationship between high levels of income inequality and poor health has met the epidemiological criteria for causality . . . .").

131 Pickett & Wilkinson, *supra* note 4, at 322 (noting that studies have found that the adverse effects of economic inequality, while felt most strongly amongst the poor, "extend to the majority of the population"); Wilkinson & Pickett, *supra* note 123, at 505 (noting that the adverse health and social effects of inequality also impact the top quartile of the population by income).

132 Danny Dorling, *The Mother of Underlying Causes – Economic Ranking and Health Inequality*, 128 SOC. SCI. & MED. 327, 330 (2015).

133 *See* Alexandre Berthe & Luc Elie, *Mechanisms Explaining the Impact of Economic Inequality on Environmental Deterioration*, 116 ECOLOGICAL ECON. 191, 191 (2015).

134 *Id.*

135 *Id.*

136 *Id.* at tbl.1.

137 *Id.* at 198.

138 *See* Nicole Grunewald et al., *The Trade-Off Between Income Inequality and Carbon Dioxide Emissions*, 142 ECOLOGICAL ECON. 249 (2017) (finding that high levels of inequality increased carbon dioxide emissions in middle and high income countries); Andrew Jorgenson et al., *Domestic Inequality and Carbon Emissions in Comparative Perspective*, 31 SOC. F. 770 (2016) (finding that inequality is linked with increased carbon emissions in high income countries); Andrew K.

for additional research in this area,[139] increasing economic inequality is likely to have adverse environmental impacts, particularly in affluent countries like the United States.[140]

IV. INEQUALITY IN THE UNITED STATES TODAY

The section above lays out the evidence about the adverse effects of inequality. Those consequences are profound. Highly unequal societies can expect to have high crime rates, low social cohesion and happiness, poor public health, slow economic growth, a poorly functioning democracy, and environmental degradation. But how bad is inequality in the U.S.? There is good reason to believe that most people don't understand how bad it really is.[141] This section briefly reviews the state of inequality in the U.S. today.

Income inequality in the U.S. has grown dramatically since 1980.[142] It has also grown in every state within the U.S. over that same time period.[143] Moreover, the more income one has, the more pronounced the changes. While families in the top 1% of the U.S. population have seen their income more than double since the 1980s, families in the top 0.1% have seen their income quadruple over that period.[144] Very little of this money has made its way to the poor or middle class. Between 1979 and 2005, the average incomes of the poorest quintile of the population increased by only 6% in real terms, while the incomes of those in the middle quintile increased by only 21%.[145] In contrast, the income of the richest 1% of households increased by more than 230% over that same period.[146] As a result of these changes, the U.S. now has greater income inequality than any other advanced democracy.[147]

Jorgenson et al., *Income Inequality and Residential Carbon Emissions in the United States: A Preliminary Analysis*, 22 HUM. ECOLOGY REV. 93 (2015) (finding a link between increased inequality and higher carbon emissions in the United States). *But see* Sebastian Mader, *The Nexus Between Social Inequality and CO2 Emissions Revisited: Challenging Its Empirical Validity*, 89 ENVTL. SCI. & POL'Y 322 (2018) (arguing that studies showing a positive relationship between inequality and carbon dioxide emissions are flawed).

139 *See* Berthe & Elie, *supra* note 133, at 199.

140 *Id.*

141 *See* Michael I. Norton & Dan Ariely, *Building a Better America—One Wealth Quintile at a Time*, 6 PERSP. ON PSYCHOL. SCI. 9 (2011) (finding that most Americans do not understand how unequal our society has become).

142 *See* Hacker & Pierson, *supra* note 83, at 155–56; Mitchell, *supra* note 7, at 853–55; Neckerman & Torche, *supra* note 33, at 336–37 (describing the sharp rise in inequality that began in the late 1980s).

143 *See* Solt, *Testing the Schattschneider Hypothesis*, *supra* note 46, at 290.

144 *See* Hacker & Pierson, *supra* note 83, at 155.

145 *Id.* at 157.

146 *Id.*

147 *Id.* at 160; *see also id.* at fig.2.

Table 1 below shows the current P90/P10 ratios for all Organization for Economic Co-operation and Development ("OECD") countries.[148] The U.S. has a ratio of 6.3, which puts the U.S. 34th out of 36 countries. The U.S. has worse income inequality than every country in Europe and is only slightly better than Chile and Mexico. The OECD also provides information on the Gini coefficients of income inequality, and the results are essentially the same.[149]

Table 1 – Income Inequality in OECD Countries	
	P90/P10 ratio
Denmark	2.9
Czech Republic	3
Finland	3
Iceland	3
Norway	3.1
Slovak Republic	3.1
Slovenia	3.1
Belgium	3.3
Sweden	3.3
France	3.4
Netherlands	3.4
Austria	3.5
Hungary	3.6
Ireland	3.6
Switzerland	3.6
Germany	3.7
Poland	3.7
Luxembourg	4
Canada	4.1
United Kingdom	4.2
Australia	4.3
New Zealand	4.3
Korea	4.4
Italy	4.5
Portugal	4.5
Estonia	4.7
Greece	4.7
Japan	5.2
Latvia	5.3

148 The data was retrieved from the OECD website on Feb. 13, 2019. *Income Inequality*, OECD DATA, https://data.oecd.org/inequality/income-inequality.htm (last visited Aug. 28, 2019). The data includes only OECD countries and only data on the P90/P10 ratio.

149 When ranked by Gini coefficients, the U.S. ranks 33rd out of 36 countries. *Id.* It ranks marginally above Turkey, but still ranks below the rest of Europe. *Id.*

Spain	5.3
Israel	5.4
Turkey	5.7
Lithuania	5.8
United States	**6.3**
Chile	7
Mexico	7.2

Wealth inequality has moved in the same direction as income inequality.[150] It was very high by the late 1920s but dropped significantly thereafter to a low in the early 1980s.[151] Since the 1980s, wealth inequality has grown precipitously.[152] And while the richest 10% of families have benefited from this rising inequality, the biggest gains have gone to a relatively small number of families at the very top—the richest of the rich.[153]

Today, the wealthiest 0.1% of families in the U.S. own approximately the same amount of wealth as the bottom 90% of U.S. families put together.[154] This means that the 160 thousand richest families have the same total amount of wealth as the bottom 144 million families.[155] Or, to put it another way, the bottom 90% of American families have an average wealth of about $84,000 per family, while the richest 0.1% have an average wealth of almost $73 million.[156] While wealth inequality has risen globally since the 1980s, wealth inequality in the U.S. has grown even faster and the U.S. now has some of the highest wealth inequality in the world, surpassed only by highly unequal countries like Russia.[157]

The U.S. is one of the richest countries in the world.[158] Yet the U.S. is also one of the most unequal countries.[159] The research discussed above in Section III indicates that, despite our enormous overall wealth, there ought to be

150 *See* Killewald et al., *supra* note 36, at 383 tbl.1 (showing that wealth inequality has increased steadily since the 1980s); *see also* Keister & Moller, *supra* note 36, at 67–69 (noting that multiple studies have shown that wealth inequality is high in the U.S. and that it has worsened in recent decades).

151 *See* Saez & Zucman, *supra* note 30, at 54 fig.6.

152 *Id.*

153 *Id.* at 552.

154 *Id.* at 551–52.

155 *Id.*

156 *Id.* at 47 tbl.1.

157 *See* Alvaredo et al., *supra* note 41, at 206–08 fig.4.2.1 (showing that the U.S. has higher wealth inequality than France, China or the United Kingdom, and only slightly lower wealth inequality than Russia).

158 According to data from the OECD, its per capita GDP is surpassed only by a handful of countries. *See Gross Domestic Product (GDP)*, OECD DATA, https://data.oecd.org/gdp/gross-domestic-product-gdp.htm (last visited Aug. 28, 2019).

159 *See supra* Table 1.

serious consequences that stem from that inequality. And there are. The U.S. is both the most unequal high-income nation and (unsurprisingly) the one with the worst health and social outcomes.[160] For example, our crime rate is much higher than in other rich democracies.[161] In addition, infant mortality rates are high[162] and life expectancy is low.[163] And the U.S. does extremely poorly on indicators of child wellbeing compared to most other rich democracies.[164] Overall life satisfaction in the U.S. is significantly lower than in much of Europe,[165] and we have a worse sense of community as well.[166]

Social mobility is also lower in the U.S. than in any other rich country.[167] But Americans generally do not recognize this and tend to overestimate the

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160 *See* Wilkinson & Pickett, *supra* note 123, at 497 fig.1.

161 For example, the average homicide rate among OECD countries is 3.6 murders per 100,000 people. *See Safety*, OECD BETTER LIFE INDEX, http://www.oecdbetterlifeindex.org/topics/safety/ (last visited Aug. 28, 2019). This rate in the US is 4.9 murders per 100,000 people. *Id.* This puts the U.S. on par with Chile, which has a murder rate of 4.5 per 100,000. The U.S. is far worse than the majority of Europe. *Id.* For example, murder rates in France are 0.6 per 100,000, while murder rates in Germany are 0.4 per 100,000. *Id.*

162 The U.S. has 5.9 deaths per 1,000 live births. *Infant Mortality Rates*, OECD DATA, https://data.oecd.org/healthstat/infant-mortality-rates.htm#indicator-chart (last visited Aug. 28, 2019). This is essentially the same infant mortality rate as Russia. *Id.* Most European countries have much lower rates. For example, the rates in Iceland, Finland, Slovenia, Norway, Estonia, Sweden, Spain, the Czech Republic, Italy, and Ireland are 3 or less deaths per 1,000 live births. *Id.* Essentially, a large number of European states have infant mortality rates half that of the U.S. or less.

163 Life expectancy at birth in the U.S. is 78.60 years. *Life Expectancy at Birth*, OECD DATA, https://data.oecd.org/healthstat/life-expectancy-at-birth.htm (last visited Aug. 28, 2019). This is roughly the same as life expectancy in Poland or the Czech Republic. *Id.* It is more than three years less than many European countries, including Switzerland, Spain, Norway, France, and Sweden. *Id.* It is also significantly less than many other advanced democracies, including Japan, Australia, Korea, and Canada.

164 *See* Pickett & Wilkinson, *supra* note 60.

165 Life satisfaction scores in the U.S. are significantly worse than in some European countries, like Denmark, Norway, Switzerland, and Finland. *See Life Satisfaction*, OECD BETTER LIFE INDEX, http://www.oecdbetterlifeindex.org/topics/life-satisfaction/ (last visited Aug. 28, 2019). It is better, however, than some European countries like Greece, Portugal, or Hungary. *Id.* Overall, the U.S. ranks 15th out of 38 OECD countries on life satisfaction.

166 According to the OECD, the strength of social networks in the U.S. is relatively low, with the U.S. ranking 23 out of 38 OECD countries. *Community*, OECD BETTER LIFE INDEX, http://www.oecdbetterlifeindex.org/topics/community/ (last visited Aug. 28, 2019). Our results put us on par with Russia and Japan, and significantly behind Spain, Denmark, Ireland, and Iceland. *Id.*

167 *See* Neckerman & Torche, *supra* note 33, at 39 ("In other words, children of poor families are more likely to remain poor, and the children of wealthy families are more likely to remain wealthy in the United States than in any other rich country."); *see also* Mitchell, *supra* note 7, at 861–66 (describing the state of social mobility in the U.S. today).

amount of social mobility in our society.[168] "Americans believe they live in a country that is significantly more equal and upwardly mobile than it actually is."[169] Somewhat ironically, Americans would vastly prefer to live in a country with the inequality levels of Sweden rather than the U.S.[170]

The U.S. also has worse public corruption than most European countries.[171] Corruption in the U.S. has been getting worse recently[172] and is now similar to that experienced in the United Arab Emirates or Uruguay.[173] U.S. democracy is also showing signs of poor health.[174] According to one prominent measure of democratic health, the U.S. is ranked far below many European countries and on par with Belize and Croatia.[175] Taken together, these results are exactly what one would expect from a highly unequal society.

The contrast with Denmark and Norway is particularly illuminating. Denmark and Norway both have comparable per capita gross domestic product ("GDP") to the U.S.[176] but have significantly lower income inequality.[177] Their

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168 *See* Shai Davidai & Thomas Gilovich, *How Should We Think About Americans' Beliefs About Economic Mobility?*, 13 JUDGMENT & DECISION MAKING 297, 301 (2018) (finding that participants, when asked to rank a group of countries by their social mobility, consistently ranked the U.S. much higher than its actual rank).

169 *Id.* at 302; *see also* Mitchell, *supra* note 7, at 869–71 (describing how Americans significantly underestimate the amount of inequality in the country).

170 *See* Norton & Ariely, *supra* note 141, at 10 (finding that the Americans in their survey preferred the wealth distribution of Sweden over the U.S. by a rate of 92% to 8%).

171 The U.S. had a corruption score of 71 in the 2018 Corruption Perceptions Index created by Transparency International. *See Corruption Perceptions Index 2018*, TRANSPARENCY INT'L, https://www.transparency.org/cpi2018 (last visited Sept. 19, 2019). The corruption score of the U.S. is significantly worse than that of countries like Denmark, Finland, Sweden, and Switzerland. *Id.*

172 The scores for the U.S. have fallen pretty consistently over the last four years from a score of 76 in 2015 to 71 in 2018. *Id.*

173 The U.S. had a corruption score of 71 in 2018. The United Arab Emirates and Uruguay had scores of 70. *Id.*

174 *See supra* Section III.B.

175 *See Freedom in the World 2018*, FREEDOM HOUSE, https://freedomhouse.org/report/freedom-world-2018-table-country-scores (last visited Aug. 29, 2019). The U.S. had an aggregate score of 86 out of 100, the same as Belize and Croatia. *Id.* Three European countries received scores of 100 out of 100, and even Canada scored 99 out of 100. *Id.*

176 Per capita GDP in the U.S. is approximately $58,000 per year. Norway is the same (at $58,000), while Denmark is slightly lower (at $51,000). *See Gross Domestic Product (GDP)*, *supra* note 158.

177 *See Income Inequality*, *supra* note 148. On February 8, 2019, Norway and Denmark had Gini coefficients of income inequality of 0.26. The U.S. had a Gini coefficient of 0.39.

poverty rates are much lower,[178] as are their crime rates.[179] Life expectancy, on the other hand, is higher in Denmark and Norway,[180] as is social mobility.[181] Life satisfaction is also higher than in the U.S.[182] They are less corrupt[183] and more democratic.[184] By most measures, Denmark and Norway are simply better places to live than the U.S.

These differences are not accidents. They are the expected result of the enormous income and wealth inequality that is present in the U.S. The U.S. may be one of the wealthiest countries in the world, but the unequal distribution of that wealth has made it a significantly worse place to live than other countries with similar levels of overall wealth but a more equal distribution of that wealth. In effect, living in the U.S. is, by many measures, more like living in Russia[185] or Chile[186] than it is like living in Norway or Denmark.

While many Americans would likely balk at being compared to Russia or Chile rather than other advanced democracies, these comparisons should not be surprising. After all, our level of income inequality is quite similar to that in Chile,[187] and our level of wealth inequality is like that found in Russia.[188] Given our level of inequality, it makes sense that life in the U.S. is similar to life in those two countries.

V. WHAT TO DO ABOUT INEQUALITY?

One key question that must be answered is whether the government could or should do something about inequality. After all, the wealthy are not evil.[189] They are simply acting in their own interest by seeking to increase their

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178 *See Poverty Rate*, OECD DATA, https://data.oecd.org/inequality/poverty-rate.htm#indicator-chart (last visited Aug. 28, 2019).

179 The murder rate in Denmark is 0.7 per 100,000. The murder rate in Norway is 0.6 per 100,000. The rate in the U.S. is 4.9 per 100,000. *See Safety*, *supra* note 161.

180 *Life Expectancy at Birth*, *supra* note 163.

181 *See* Corak, *supra* note 70, at 3 fig.1.

182 *Life Satisfaction*, *supra* note 165.

183 According to Transparency International's Corruption Perceptions Index 2018, Denmark is the least corrupt country in the world. Norway is not far behind. Both are far ahead of the U.S. *See Corruption Perceptions Index 2018*, *supra* note 171.

184 According to Freedom House's Freedom in the World 2018 data, Norway has an aggregate democracy score of 100, while Norway has a score of 97. The U.S. ranks much farther down the list with a score of 86. *See Freedom in the World 2018*, *supra* note 175.

185 The U.S. has essentially the same infant mortality rate as Russia. *See supra* note 162.

186 The U.S. actually has a worse murder rate than Chile. *See supra* note 161.

187 *See supra* Table 1.

188 *See supra* note 157.

189 *See* Winters & Page, *supra* note 83, at 738 (rejecting the idea that the wealthy form a "cabal" or "conspiracy").

wealth.[190] Yet, it is clear that increasing inequality is not harmless.[191] There is now ample evidence that permitting inequality to grow unchecked has very serious consequences. The results of extremely high inequality include poor health, a weaker society, slower economic growth, and a weakening of democracy.[192] There is even some evidence that high levels of inequality degrade the environment.[193] Moreover, the consequences of extremely high inequality are felt throughout society.[194] Even the wealthy, who are in many ways insulated from the worst effects of inequality by their wealth, suffer some of the adverse effects of that inequality.

But should government take action to limit inequality? The answer is emphatically yes.[195] After all, what is the purpose of our government? The Constitution explicitly states that a key function of our government is to promote the general welfare of its citizens.[196] Similarly, the Declaration of Independence argues that the purpose of government is to secure for its citizens "life, liberty and the pursuit of happiness."[197] Other Founding-era documents advocate similar

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190 *See id.* at 738 ("Though some of [the wealthiest Americans] undoubtedly network with each other, most are not even mutually acquainted. They are bound together—if at all—by material self-interest and political clout, not by social ties.").

191 Arguments to the contrary tend towards the ridiculous. For example, John Tamny's claim that surging inequality is "a happy sign" is hard to take seriously. *See* John Tamny, *Surging Wealth Inequality Is a Happy Sign that Life Is Becoming Much More Convenient*, FORBES (Nov. 11, 2018, 9:00 AM), https://www.forbes.com/sites/johntamny/2018/11/11/surging-wealth-inequality-is-a-happy-sign-that-life-is-becoming-much-more-convenient. His argument simply ignores the mountain of evidence of the harmful consequences of high levels of inequality. He also presents straw man arguments. For example, the claim that surging inequality is desirable because two hundred years ago society was more equal, and people's lives were worse is deeply flawed. The comparison that matters is whether people's lives would be better today with less inequality, not whether people's lives are better now than two hundred years ago despite an increase in inequality.

192 *See supra* Part III.

193 *See supra* Section III.E.

194 *See supra* text accompanying note 131.

195 *Cf.* Bartlett, *supra* note 7, at 286 (arguing that once we recognize the problem of inequality, we have a moral obligation to solve it) ("[I]f the problem is that some people have been the beneficiaries of a system that is rigged in their favor, the only real solution is that the seemingly beneficent assumptions of the system be exposed and discredited, and the system changed.").

196 *See* U.S. CONST. pmbl. (noting that the U.S. government was created, in part, to "promote the general Welfare"); *id.*, art. I, § 8 (granting to Congress the power to collect taxes in order to "provide for the . . . general Welfare of the United States"); *see also* Feldman, *supra* note 7, at 264 ("Ultimately, the constitutional framers . . . sought to enhance the protection of property rights, but they simultaneously empowered government to act for the common good.").

197 *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident: that all men are created equal; that they are endowed, by their Creator, with certain unalienable rights; that among these are life, liberty and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed . . . .").

positions.[198] High levels of inequality undermine these goals. They harm the general welfare in many ways, including by slowing economic growth, increasing crime, decreasing public health, decreasing trust and social cohesion, and lowering citizens' happiness and life satisfaction. Thus, inequality is a proper subject of government action because regulating inequality is in the public interest.

It is also important to recognize that our current levels of inequality are themselves the product of government action.[199] High levels of inequality are not the inexorable consequence of capitalism. The drop in wealth inequality beginning in the 1930s and lasting through the late 1970s was the result of policy changes that accompanied the New Deal, particularly high marginal tax rates on the wealthy and the implementation of an estate tax.[200] The return of wealth inequality since the 1980s was also the result of government policies, particularly the lowering of income tax rates for the highest earners, reductions in the estate tax, and financial deregulation.[201] Since our current high levels of inequality are the result of government action, it makes sense that addressing that inequality will also require government action.

In addition to undermining the general welfare, high levels of inequality also represent a direct threat to our democracy.[202] Governmental power in a democracy comes from the consent of the governed.[203] And the ability of the

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198 *See* Feldman, *supra* note 7, at 264 n.21 (noting other Founding-era documents that stressed that government is supposed to work for the common benefit rather than for the interests of particular groups); *see also* Andrias, *supra* note 7, at 433–34, 444 n.124 (arguing that the Federalist papers show that the Framers were concerned about the possibility of government being used to favor a particular faction rather than the general good).

199 *See, e.g.*, Kevin G. Bender, *Giving the Average Investor the Keys to the Kingdom: How the Federal Securities Laws Facilitate Wealth Inequality*, 15 J. BUS. & SEC. L. 1 (2016) (arguing that federal securities laws facilitate growing wealth inequality); Cappiello, *supra* note 7, at 402 (arguing that bankruptcy laws in the U.S. were "designed by the credit industry for the credit industry" and increase economic inequality); Chung, *supra* note 7, at 276–77, 293–303 (arguing that wealth inequality was exacerbated by the Federal Reserve's decision to engage in quantitative easing after the Great Recession); Feldman, *supra* note 7, at 316–19 (arguing that the Supreme Court's decision in *Citizen's United* greatly increased the influence of wealthy corporate interests over government policy in ways that increased inequality).

200 *See* Saez & Zucman, *supra* note 30, at 554.

201 *Id.*

202 *See* Feldman, *supra* note 7, at 332 ("Exorbitant material inequality threatens to crack the pillars of democratic culture."); Solt, *Democratic Political Engagement*, *supra* note 45, at 57 ("That democratic regimes depend for their very existence on a relatively equal distribution of economic resources across citizens is one of the oldest and best established insights in the study of politics."); *see also* Foa & Mounk, *supra* note 77, at 15 fig.5 (showing that increases in inequality are associated with decreases in the electorate's satisfaction with democracy).

203 *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed . . . .").

governed to affect government policy through the democratic process is a key measure of the health of democracies.[204] But that linkage no longer works in the U.S.[205] The wealthy have significant influence over the government and use that influence to protect and increase their wealth, even when that is not what the majority of Americans want.[206] High levels of inequality also undermine popular support for democracy and increase the risk that a country will become authoritarian.[207] In effect, if our current high levels of inequality persist, we run a real risk that the U.S. will become authoritarian.[208] Thus, our current high level of inequality both undermines democratic accountability and increases the risk of authoritarianism. It may also raise Constitutional concerns about the separation of powers[209] and the Due Process clause.[210]

In the face of this evidence, many political scientists have come to the conclusion that the influence the wealthy have over government policy, particularly their ability to prevent the majority from taking actions which are widely supported, demonstrates that our democracy is not functioning properly.[211] Some have gone further and argued that the U.S. is no longer a

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204 *See* Andrias, *supra* note 7, at 426 n.26 ("[T]here is general agreement among theorists that citizens in a democracy ought have equal opportunity to influence the political process, and that government ought to be responsive to their views."); Gilens, *supra* note 82, at 778 ("The ability of citizens to influence public policy is the 'bottom line' of democratic government."); *id.* at 779 ("[T]he connection between what citizens want and what government does is a central consideration in evaluating the quality of democratic governance.").

205 *See* Andrias, *supra* note 7, at 426 ("In particular, wealth's dominance undermines the promise that our system of political checks will produce a government roughly responsive to the majority will.").

206 *See supra* Section III.B.

207 *Id.*

208 *See* Foa & Mounk, *supra* note 77, at 17 (noting that "countries in which more than 20 percent of respondents express cynicism of democratic governance have, historically, been highly susceptible to the rise of authoritarian parties, candidates, and political movements").

209 *See* Andrias, *supra* note 7, at 486 (arguing that as a result of "wealth's disproportionate influence at every step of the political and governing process . . . the democratic accountability promised by inter-branch competition, as well as by alternative mechanisms of political competition, is missing"). The separation of powers between the various branches of our constitutional system was intended, in part, to ensure democratic accountability and prevent one group from dominating all the levers of power. *See id.* at 485–87.

210 *Cf.* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (suggesting that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are more other types of legislation"). Regrettably, the suggestion in *Carolene Products* that attempts to undermine democratic accountability could violate the Fourteenth Amendment's Due Process clause has never been developed by the Supreme Court.

211 *See* Gilens, *supra* note 82, at 794 ("[A] government that is democratic in form but is in practice only responsive to its most affluent citizens is a democracy in name only."); Gilens & Page, *supra* note 82, at 576 ("In the United States, . . . the majority does *not* rule . . . . When a

democracy at all but is now functionally an oligarchy.[212] Now is the time for the government to strengthen our democracy by reducing inequality. To do nothing and permit the U.S. to descend into authoritarianism would be unacceptable.[213]

Unfortunately, change does not seem possible through the normal lawmaking process. The wealthy have been very successful at preventing the government from taking actions that would reduce inequality.[214] Moreover, even if a law was passed that reduced inequality, that law would immediately face a well-funded and well-organized campaign to dilute or eliminate it. For this reason, this Article advocates a constitutional Amendment. Constitutional amendments are difficult to pass.[215] This is, in fact, one of their defining features.[216] That makes it less likely that any constitutional amendment will be adopted. But once adopted, it would also be extremely difficult to remove.[217] This means that it would be much harder for the wealthy to undermine the Amendment.

As President Obama declared in 2013, "[growing inequality] is the defining challenge of our time."[218] The level of inequality we are now

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majority of citizens disagrees with economic elites or with organized interests, they generally lose."); *see also* Andrias, *supra* note 7, at 471–75 (arguing that the wealthy have been able to strategically create governmental gridlock in ways that have benefitted their interests).

212 *See generally* Winters & Page, *supra* note 83.

213 For example, the Declaration of Independence argues that governments that fail to ensure the "Safety and Happiness" of their citizens can and should be changed, even abolished, if necessary. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to [a]ffect their Safety and Happiness.").

214 *See supra* Section III.B.

215 *See* U.S. CONST. art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.").

216 *See* CHEMERINSKY, *supra* note 1, at 7.

217 The only time a constitutional amendment has been removed is when the 21st Amendment repealed the 18th Amendment. The 18th Amendment instituted prohibition. *See* U.S. CONST. amend. XVIII ("After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."). This was subsequently repealed by the 21st Amendment. *See id.* amend. XXI ("The eighteenth article of amendment to the Constitution of the United States is hereby repealed.").

218 *Full Transcript: President Obama's December 4 Remarks on the Economy*, *supra* note 2. *See also* Pickett & Wilkinson, *supra* note 4, at 316 (noting that various world leaders, including the U.S. President, the Pope, and the UN Secretary General have all identified inequality as one of the most important problems of our time).

experiencing represents an existential threat to our society and democracy and something must be done about it.[219] Ultimately, if we are to take seriously Professor Erwin Chemerinsky's claim that "constitutional law is about the meaning of a just society and how best to achieve it,"[220] then a constitutional amendment that addresses inequality is necessary.

VI. THE PROPOSED CONSTITUTIONAL AMENDMENT

If a constitutional amendment is the appropriate method for addressing inequality, what should that amendment look like? One possibility would be to simply eliminate inequality, but that is not what this Article proposes. There are a couple of reasons why eliminating all economic inequality is not desirable. We have a capitalist economy and that implies a certain level of inequality. Indeed, some amount of economic inequality is probably beneficial as the possibility of achieving more wealth than others can be a powerful motivator that can drive innovations that benefit society as a whole.[221] Moreover, while Americans want a society with dramatically lower inequality than we have now, they do not want a society with perfect wealth equality.[222] In addition, trying to simply eliminate inequality, particularly abruptly, would probably result in widespread economic chaos.[223] So this Amendment does not try to eliminate all inequality.

Nor does the proposed Amendment require the U.S. to reach a particular level of inequality. One could imagine an amendment that specified a particular

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219 *Full Transcript: President Obama's December 4 Remarks on the Economy*, *supra* note 2 ("The combined trends of increased inequality and decreasing mobility pose a fundamental threat to the American Dream, our way of life, and what we stand for around the globe."); *id.* ("And finally, rising inequality and declining mobility are bad for our democracy. Ordinary folks can't write massive campaign checks or hire high-priced lobbyists and lawyers to secure policies that tilt the playing field in their favor at everyone else's expense."); *see also* Porter, *supra* note 4 ("The bloated incarceration rates and rock-bottom life expectancy, the unraveling families and the stagnant college graduation rates amount to an existential threat to the nation's future.").

220 CHEMERINSKY, *supra* note 1.

221 *See* Bermeo, *supra* note 44, at 26 ("The idea that differential rewards provide incentives for productivity and innovation is intrinsic to capitalism . . . ."); *Full Transcript: President Obama's December 4 Remarks on the Economy*, *supra* note 2 ("We admire folks who start new businesses, create jobs and invent the products that enrich our lives. And we expect them to be rewarded handsomely for it.").

222 *See* Norton & Ariely, *supra* note 141, at 10 (noting that when Americans were asked to construct a society with an ideal amount of wealth inequality, they picked one that was somewhat unequal but with dramatically lower levels of wealth inequality than is actually present in the U.S. today).

223 It took nearly 50 years for inequality to retreat from the highs of the late 1920s to the lows of the late 1970s. *See supra* text accompanying notes 199–201. Then, it took another 40 years from the 1980s until today for inequality to increase to its current high levels. *Id.* So, it will presumably take a significant amount of time for inequality levels to retreat. Trying to make these changes occur very quickly might well result in economic chaos.

level of wealth inequality and required the government to achieve it.[224] There are several problems with such an amendment. The most important problem is that we do not know the ideal amount of inequality. We know that lower inequality is associated with many benefits,[225] but inequality also has some benefits.[226] Unfortunately, we do not know where to draw the right balance between the benefits of inequality and its adverse consequences.[227] For this reason, the Amendment does not try to specify a particular goal for wealth inequality.[228]

Rather, it advocates a less radical and more incremental approach to addressing inequality. Specifically, it imposes a requirement that the federal government evaluate the impact on wealth inequality of every new law or rule. And it prohibits the passage of laws that would increase inequality unless the government can demonstrate that the law is necessary to achieve an important governmental purpose. The text of the proposed Amendment follows:

> Excessive wealth inequality is harmful. The United States must assess the impact on wealth inequality of all new legislation and rulemaking prior to adoption. The nature of the assessment must be proportional to the expected impact of the legislation or rule. Such assessments must be public and are subject to judicial review. The assessment is entitled to judicial deference if it is both scientific and reasonable. A law or rule may not increase wealth inequality unless that law or rule is narrowly tailored to achieve an important governmental purpose, and the expected benefit of achieving that purpose exceeds the cost of increasing wealth inequality. Individuals or organizations have standing to challenge that law or rule if they will fairly and adequately

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224 The simplest way to implement this might be to require that there be an annual wealth tax and that the amount of the wealth tax would increase incrementally until the desired Gini coefficient of wealth inequality was achieved. The wealth tax could then be decreased to whatever is the minimum level necessary to maintain wealth inequality at or below the target level.

225 *See supra* Part III.

226 *See supra* text accompanying note 221.

227 *See* Bartlett, *supra* note 7, at 282 (noting that "current levels of economic inequality are unacceptable, but there remains the question of how much inequality is too much"). Indeed, there may not be one ideal level of inequality for all societies. The "correct" level of inequality probably depends on how many of the costs of inequality a society wishes to endure to achieve the benefits. And the correct balance may be different for different societies. Thus, the ideal level of inequality for the U.S. might end up being different from the ideal level for other countries. Of course, one could ask Americans what their preferred level of inequality would be. *Cf.* Norton & Ariely, *supra* note 141 (surveying Americans about their preferred inequality levels). But there is no guarantee that individuals' preferences would correspond to the theoretically "ideal" level of inequality.

228 If, as our understanding of the effects of inequality increase, we are eventually able to identify what the "ideal" level of inequality is, then it may make sense to specify that as a concrete goal. It is not clear, however, whether that will ever be possible. *See supra* note 227 (suggesting that there may not be a single ideal level of inequality that all societies should pursue).

represent the public interest in opposing excessive wealth inequality.

One potential criticism of this approach is that it does not require any reduction in wealth inequality. It simply prevents the government from increasing inequality further. In theory, it could simply lock in the status quo. Yet, the status quo is enormously harmful.[229] Thus, the argument would go, we should do more than simply prevent additional inequality and take concrete steps to reduce existing levels of inequality.

It is true that, in theory, the amendment could simply lock in the existing high level of inequality because it does not explicitly mandate reductions in that inequality. In practice, that outcome is extremely unlikely because it would require Congress to never pass another law that reduced inequality. Rather than viewing the amendment as locking in the status quo, it is better to think of the amendment as a one-way ratchet.[230] Congress will very rarely be able to pass a law that increases inequality.[231] It will, however, be able to freely pass laws that decrease inequality.

While not all laws have an effect on inequality, Congress does pass laws that reduce inequality, sometimes dramatically. For example, in 1935, the passage of the Social Security Act "created a social insurance program designed to pay retired workers age 65 or older a continuing income after retirement."[232] The passage of the Social Security Act Amendments of 1965 had the effect of creating Medicare, a "basic program of hospital insurance for persons age 65 and older, and a supplementary medical insurance program to aid the elderly in paying doctor bills and other health care bills." [233] More recently, the passage of the Affordable Care Act led to "historic gains in health insurance coverage by extending Medicaid coverage to many low-income individuals" who had not previously been able to afford health insurance.[234] Thus, after the amendment is adopted, more and more laws will be passed that reduce inequality, often by small amounts, occasionally by large amounts, but very few or no laws will be passed that increase inequality. In effect, the amendment makes it very likely that

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229 *See supra* Part IV (describing the adverse effects of inequality in the United States today).

230 *Cf.* Kevin M. Stack, *The Constitutional Ratchet Effect*, 102 CORNELL L. REV. 1702, 1704–05 (2017) (describing how there may be a "ratchet effect" whereby over time more and more of our law is transformed into constitutional law).

231 The Amendment does contemplate some circumstances under which it might be possible to increase wealth inequality, but those will probably be extremely rare. *See infra* Section VI.F. (describing the heightened scrutiny that will be applied to laws or rules that increase inequality).

232 *Historical Background and Development of Social Security*, SOC. SECURITY ADMIN., https://www.ssa.gov/history/briefhistory3.html (last visited Aug. 29, 2019).

233 *Social Security Act Amendments (1965)*, OUR DOCUMENTS, https://www.ourdocuments.gov/doc.php?flash=true&doc=99 (last visited Aug. 29, 2019).

234 *Key Facts about the Uninsured Population*, HENRY J. KAISER FAMILY FOUND. (Dec. 7, 2018), https://www.kff.org/uninsured/fact-sheet/key-facts-about-the-uninsured-population/.

inequality will be reduced incrementally over time. This gradual reduction in inequality over time is, in fact, the desired outcome.[235]

The components of the proposed amendment and what they mean are discussed in the sections below. Each section addresses one of the sentences in the amendment.

A. "Excessive wealth inequality is harmful."

The first sentence states the conclusion that justifies amending the Constitution. In some ways, it may appear unnecessary or contradictory to the general practice with regards to constitutional amendments to include this sentence. After all, the Thirteenth Amendment does not explicitly state that slavery is bad. It simply bans slavery.[236] Nevertheless, it seems desirable to explicitly state that excessive wealth inequality is harmful for several reasons.

First, it is important to embed this concept as firmly as possible in the Constitution. One thing that has been noticeable is that as inequality grows, those with wealth become more successful at capturing the organs of the government and using them to protect and expand their wealth.[237] Those with the most wealth are likely to see this Amendment as an impediment to their goals and attack it. And they will have the wealth and incentive to make a concerted and well-financed effort to undermine it over a long period of time. By embedding the idea that excessive wealth inequality is harmful directly in the Constitution, this Amendment establishes it as a fundamental tenet of our constitutional system on a par with the importance of due process or the prohibition of slavery. This

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[235] *See supra* note 223 (noting that it took 40 years for inequality levels to rise to their current levels and that trying to reverse that process very quickly would probably result in serious economic disruption).

[236] U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."). On the other hand, it is not unusual for statutes to contain statements of their purpose. *See, e.g.*, 42 U.S.C.A. § 4321 (West 2019) ("The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.").

[237] *See* The Editorial Board, *The Tax Bill that Inequality Created*, N.Y. TIMES (Dec. 16, 2017), https://www.nytimes.com/2017/12/16/opinion/sunday/tax-bill-inequality-created.html ("As a smaller and smaller group of people cornered an ever-larger share of the nation's wealth, so too did they gain an ever-larger share of political power. They became, in effect, kingmakers; the [2017] tax bill is a natural consequence of their long effort to bend American politics to serve their interests."); *see also supra* Section III.B; *cf.* Solt, *Testing the Schattschneider Hypothesis*, *supra* note 46, at 286–87 (noting that "[h]igher levels of economic inequality allow richer citizens to more successfully dominate the setting of the political agenda, pushing beyond debate those issues addressing the needs of poorer citizens").

makes it much harder for those who will seek to undermine this Amendment to blunt its impact.

When courts eventually adjudicate disputes about the constitutionality of particular laws or rules, they will have to do so in light of the clear statement in the Constitution that excessive wealth inequality is harmful. Whatever interpretation is given to the Amendment by future courts, it must begin with and accept that excessive wealth inequality is harmful.[238] This will limit attempts to blunt the impact of the Amendment by creative legal arguments that question or downplay the harm caused by excessive inequality.

Second, the introductory sentence is important because it makes it clear that it is excessive wealth inequality that is harmful, not wealth inequality itself. Ours is a capitalist society, and some level of inequality is unavoidable and probably even desirable.[239] So this Amendment does not try to eliminate all inequality. But the evidence is overwhelming that excessive wealth inequality is harmful.[240] In this sense, the word "excessive" may well be the most important word in the entire Amendment.[241]

Finally, this sentence makes it clear that the Amendment focuses specifically on wealth inequality, rather than income inequality or economic inequality. Wealth inequality was chosen over income inequality for a number of reasons.[242] Arguably, the most important reason is that wealth inequality is greater than income inequality.[243] As a result, a focus on wealth inequality better captures the true level of inequality in the U.S.[244]

Wealth inequality was also chosen over economic inequality, although for different reasons. At first glance, economic inequality appears to be a better focus for the Amendment. Economic inequality is a broader term that includes wealth inequality but also access to other economic opportunities.[245] Thus, in theory, economic inequality captures the true state of inequality in American better than wealth inequality.[246] But economic inequality is a much broader and more ambiguous concept. This is problematic because the Amendment depends on the ability of the government and litigants to measure both the current state

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238 This may help alleviate Professor Andrias's concern that judges are not the best group to scrutinize the effects of inequality because they are generally elites who may be predisposed to favor the interests of the wealthy. *See* Andrias, *supra* note 7, at 492.

239 *See supra* text accompanying notes 221–222.

240 *See supra* Part III.

241 The Amendment deliberately does not take a position on what level of wealth inequality is appropriate or desirable. *See supra* text accompanying notes 224–228.

242 *See supra* text accompanying notes 36–40.

243 *See supra* text accompanying notes 36–40.

244 *See supra* text accompanying notes 36–40.

245 *See supra* text accompanying notes 42–44.

246 *See supra* text accompanying notes 42–44.

of inequality and the effect of legislation on it. This would be very hard to do with economic inequality,[247] but would be much easier with wealth inequality. First, most of the information necessary to measure wealth inequality either already exists or would not be hard to obtain.[248] Second, while it would be very difficult to predict the impact of legislation and rulemaking on all forms of economic inequality, it is feasible to estimate the impact on wealth inequality.[249] Thus, wealth inequality does a pretty good job of capturing what makes America unequal, without causing the measurement and prediction problems that would stem from using economic inequality in the Amendment.

B. "The United States must assess the impact of all new legislation and rulemaking on wealth inequality prior to adoption."

This sentence addresses a number of issues. First, it defines which parts of our government are bound by the Amendment. The Amendment applies to the "United States," i.e., the federal government. It does not affect private action, it does not bind local governments and it does not bind the states. It only affects the federal government. This is roughly equivalent to the existing "state action" doctrine in constitutional law.[250] Of course, the federal government is the largest government in the country, so the effect will be far from negligible.

One might question why the Amendment does not apply to state and local governments. After all, if preventing the federal government from increasing inequality is desirable, wouldn't it also be desirable to do the same with state and local governments? The main reason to limit the Amendment to the federal government is because the federal government is the principal cause of the surge in inequality that has occurred since the 1980s. That surge was driven largely by decreases in the income tax, reductions in the estate tax, and the deregulation of industry.[251] Those changes were all implemented at the federal level. Thus, while it is almost certainly true that state and local governments have some impact on inequality, the principal driver of inequality is the federal government. For that reason, this Amendment applies only to the federal government.[252]

Second, it makes clear that the Amendment applies to only new legislation and rulemaking. It does not impose a requirement that the federal

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[247] *See supra* text accompanying notes 42–44.

[248] *See infra* text accompanying notes 257–261 (noting that the government already collects most of the information it needs to estimate the amount of wealth inequality in the United States).

[249] *See infra* text accompanying notes 262–265 (noting that some private groups already estimate the effect of major legislation on inequality).

[250] CHEMERINSKY, *supra* note 1, at 507–09.

[251] *See supra* text accompanying notes 199–201.

[252] Of course, nothing prevents states from implementing similar provisions in their own state constitutions.

government review all existing laws and rules for their effect on inequality. This was done for pragmatic reasons. A strong moral argument could be made that we should consider the consequences of the laws that formed the society we currently have. They clearly permit significant and damaging inequality.[253] But requiring us to quickly and completely re-imagine society (which a retrospective test for all existing law would necessitate), would require dramatic and wrenching changes. This Amendment makes a choice to accept all of the decisions that have already been made and focus on improving the future. Thus, the changes that will occur will be incremental and less disruptive to society and the economy.[254]

Third, the Amendment applies to laws passed by Congress and to rulemaking by federal agencies. While it has a broad reach, it does not cover all government action. For example, it does not cover much of the day to day operations of the federal government. Individual decisions taken pursuant to laws and rules are not subject to scrutiny. It is assumed that if the laws and rules comply with the Amendment, then the day to day application of those laws will also comply.[255]

While it might be possible to impose an obligation to assess the impact of every government action on wealth inequality, that does not seem prudent. After all, the government must still be able to function after the Amendment is added to the Constitution. If the government were required to evaluate the effect on inequality of every single act, it would make it hard for the government to get anything done. Most governmental acts, however, are presumably taken pursuant to either laws or rules. Thus, requiring the government to assess the effect of new laws and rules in advance should help ensure that the acts taken to effectuate those laws do not undermine the purpose of the Amendment.

Fourth, and most importantly, the Amendment requires the federal government to assess the impact on wealth inequality of all new laws and rules. This assessment must be undertaken prior to the law or rule being adopted. This

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253 *See supra* Part IV.

254 It has taken nearly 40 years for wealth inequality to reach its current levels from the lows of the late 1970s and early 1980s. *See supra* Part IV. It is unlikely that this process can be reversed very quickly. For this reason, an incremental approach is probably best.

255 This will not always true. There are lots of examples of governments applying facially neutral laws and rules in ways which have turned out to be discriminatory or harmful. *See, e.g.*, Rebecca Onion, *Take the Impossible "Literacy" Test Louisiana Gave Black Voters in the 1960s*, SLATE (June 28, 2013), https://slate.com/human-interest/2013/06/voting-rights-and-the-supreme-court-the-impossible-literacy-test-louisiana-used-to-give-black-voters.html (describing how facially neutral literacy tests were used to disenfranchise African-Americans during the 1960s). Nevertheless, it does seem reasonable to assume that most of the time, if a good faith effort is made to apply rules or laws that comply with this Amendment, then the effects on inequality will not be too great.

means that every rule or law, before it can be adopted, will have to be accompanied by a public[256] assessment of the effect of the rule on inequality.

For this assessment to be possible it first requires a way to measure wealth inequality. Fortunately, the calculation of wealth inequality is possible,[257] although not necessarily easy.[258] Still, if two researchers can do it on their own,[259] then the government (with all of the resources it could bring to bear) can certainly do it too.[260] In many cases, the data needed to calculate wealth inequality are already collected by financial institutions for use in managing their clients' accounts, and the additional cost of requiring those to be reported to the government would be relatively low.[261]

Next, it requires the ability to predict the effect of legislation and rulemaking on wealth inequality. While the government does not currently do that, there does not seem to be any reason why it could not. After all, the government already assesses the economic impact of major legislation. For example, the Congressional Budget Office ("CBO") conducted an in-depth assessment of the economic impact of the 2017 Tax Act.[262] However, despite predicting the impact of the 2017 Tax Act on GDP, corporate income tax rates, and investment,[263] it never mentions its effect on inequality.[264] But, a number of private groups already use sophisticated models to predict the economic effect of major legislation, including the impact on inequality.[265] In other words, the

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256 *See infra* Section VI.D (discussing the requirement that the assessments be public).

257 *See* Saez & Zucman, *supra* note 30, at 520 (describing a way to calculate wealth inequality from data collected for the payment of income taxes).

258 *Id.* at 527–40 (describing the complex process by which Saez and Zucman calculated wealth inequality in the United States).

259 *See generally id.*

260 Saez and Zucman note that the U.S. government could produce much better estimates of wealth inequality than they were able to simply by using data that the IRS already has and combining those with data that the Treasury Department could collect "at low cost." *Id.* at 525; *see also id.* at 574 ("The ideal source for studying wealth inequality would be high-quality annual wealth data collected by governments . . . .").

261 *Id.* at 574–75.

262 *See* CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: 2018 TO 2028, at 105 app.B (2018), https://www.cbo.gov/system/files/2019-04/53651-outlook-2.pdf.

263 *Id.* at 106.

264 This was confirmed by text searching the CBO report for the terms "economic inequality," "wealth inequality," and "inequality." None of those terms was found anywhere in the report.

265 For example, the Penn Wharton Budget Model can be used to predict the "distribution of income over time" of new policies. *Our Model*, PENN WHARTON BUDGET MODEL, http://budgetmodel.wharton.upenn.edu/our-model-0 (last visited Sept. 20, 2019). The Tax Policy Center has a "Microsimulation Model" that it has used to produce estimates of the effects of major legislation, like the 2017 Tax Act. *Donald Trump's Revised Tax Plan*, TAX POL'Y CTR. (Oct. 11, 2016), https://www.taxpolicycenter.org/model-estimates/donald-trumps-revised-tax-plan-oct-2016/t16-0211-donald-trumps-revised-tax-plan.

government could have estimated the effect of the 2017 Tax Act on inequality if it had wanted to.[266]

Perhaps more importantly, requiring the government to estimate the effect of legislation and rulemaking on inequality will force the government to think carefully about the impact of its actions. For example, the 2017 Tax Act "lowers . . . the tax rate paid by businesses subject to corporate income tax,"[267] reduces the marginal tax rate paid by the highest earners,[268] and reduces the taxation of wealth transferred at death.[269] These changes seem likely to increase economic inequality by reducing the taxes (and therefore increasing the income) of the wealthiest people.[270] The 2017 Tax Act might have been harder to pass if the government had been forced to publicly acknowledge this prior to it becoming law.

Indeed, there is some reason to believe that making the effects of legislation on wealth inequality public might itself reduce inequality over time. One group of scholars has argued that the lack of demand for redistributive policies is partly due to a lack of information about how unequal societies have become.[271] This suggests that if the true state of inequality or the effect of legislation on inequality were better known, this would increase demands for more fair policies.[272] Ultimately, increasing public awareness about inequality could itself contribute to decreasing it.

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[266] Indeed, the Tax Policy Center did estimate the distributional effect of the Tax Cuts and Jobs Act in real time. *Analysis of the Tax Cuts and Jobs Act*, TAX POL'Y CTR., https://www.taxpolicycenter.org/feature/analysis-tax-cuts-and-jobs-act (last updated May 3, 2019). If a think tank can do it, the U.S. government can do it too.

[267] *See* CONG. BUDGET OFFICE, *supra* note 262, at 107.

[268] *Id.* at 112.

[269] *Id.* at 113 (discussing the effect of changes to the estate and gift taxes).

[270] *Analysis of the Tax Cuts and Jobs Act*, *supra* note 266, at fig.1 (finding that the Act would provide the greatest benefit to Americans in the top 5% of the income distribution); Dylan Scott & Alvin Chang, *The Republican Tax Bill Will Exacerbate Income Inequality in America*, VOX (Dec. 4, 2017), https://www.vox.com/policy-and-politics/2017/12/2/16720952/senate-tax-bill-inequality (noting that the reduction in the corporate tax rate "is expected to disproportionately benefit the wealthy" and that "rolling back the estate tax" is an "unambiguous giveaway[] to the richest Americans"); The Editorial Board, *supra* note 237.

[271] *See generally* Vladimir Gimpelson & Daniel Treisman, *Misperceiving Inequality*, 30 ECON. & POL. 27 (2018).

[272] *Id.*; *see also* Leslie McCall et al., *Exposure to Rising Inequality Shapes Americans' Opportunity Beliefs and Policy Support*, 114 PNAS 9593 (2017) (finding that people exposed to information about the true level of inequality in the United States became more willing to support policies aimed at reducing inequality).

C. *"The nature of the assessment must be proportional to the expected impact of the legislation or rule."*

This sentence recognizes that evaluating the impact of laws and rules will not be a one-size-fits-all undertaking. Rather, the nature of the assessment is a function of the expected impact of the rule or law being considered. If a rule is expected to have a relatively small impact on inequality, then it makes sense that the government's assessment of its impact could be simpler than it would be if the rule were expected to have a large impact.

So, for example, the Food and Drug Administration ("FDA") has promulgated rules that govern the maximum levels of natural or unavoidable defects that present no health hazard that are permitted in foods for human use.[273] It seems unlikely that there is great potential for affecting wealth inequality in rules that govern the maximum permitted amount of insect parts in ground allspice.[274] Such a rule would probably be accompanied by a very simple assessment.

On the other hand, a law that has a larger expected impact would require a more sophisticated analysis. For example, a law like the 2017 Tax Act that significantly changes the tax code could be expected to have a significant impact on wealth inequality and would require a sophisticated assessment of its effect.[275] Of course, the federal government already creates sophisticated assessments of the economic impact of major legislation like the 2017 Tax Act.[276] So, extending that analysis to estimate the effect on wealth inequality would not impose an insurmountable new burden on the federal government.[277]

D. *"Such assessments must be public and are subject to judicial review."*

It is important that the government's assessments (and the reasoning and data that supports those assessments) be public.[278] This will permit citizens to evaluate the actions of their government. After all, if the government consistently

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[273] Natural or Unavoidable Defects in Food for Human Use that Present No Health Hazard, 21 C.F.R. § 110.110 (2019).

[274] *See Food Defect Levels Handbook*, U.S. FOOD & DRUG ADMIN. (Sept. 7, 2018), https://www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/sanitationtransportation/ucm056174.htm.

[275] *See supra* text accompanying notes 262–270 (assessing the economic effects of the 2017 Tax Act).

[276] *See supra* text accompanying notes 262–264 (describing the government's analysis of the 2017 Tax Act).

[277] *See supra* text accompanying note 265 (arguing that predicting the effect of legislation on wealth inequality is not an insurmountable problem).

[278] *Cf.* LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914) (noting that "[s]unlight is said to be the best of disinfectants" and arguing that more public disclosure would help people better restrain the damaging effects of wealth concentration).

passes laws that its own assessments predict will increase inequality, it is important that citizens know this so that they can decide whether their representatives are really representing their interests.[279] Making the government's assessment public (including the reasoning and data that support the assessment) will also make it easier for people to decide whether to challenge the government's assessment. If the assessment contains questionable assumptions or data, that will make it more likely that the assessment will be challenged.

Public disclosure may also help keep the government honest as it will have to show how it arrived at its assessment. There will be incentives for governments to produce assessments that minimize the impact of policies the government wishes to engage in. For example, the Council of Economic Advisors' estimate of the effect of the 2017 Tax Act, which predicted that reducing corporate tax rates would dramatically increase economic growth and offset the loss of revenue caused by the tax cut, was viewed as deeply flawed and self-serving by many experts.[280] In another example, the Trump Administration is changing the way it calculates the effect of climate change to simply eliminate consideration of harms that occur after 2040 as a means to justify rolling back environmental regulations designed to mitigate those future harms.[281] This has been described by scientists as "a pretty blatant attempt to politicize the science—to push the science in a direction that's consistent with their politics."[282] Making the reasoning and assumptions of all assessments public will make it harder (although not impossible) for governments to "massage" the numbers to achieve a preferred outcome.

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[279] Since increasing economic inequality places a greater and greater share of the resources into fewer and fewer hands, most people do not want a society characterized by excessive wealth inequality and they do not want their representatives in the federal government to deliberately increase wealth inequality unless there are powerful reasons to justify it. *See supra* Section III.B (describing the attitudes of the middle class and the poor towards wealth inequality); *see also* Norton & Ariely, *supra* note 141, at 10 (noting that when Americans were asked to construct a society with an ideal amount of wealth inequality, they picked one that was somewhat unequal but with dramatically lower levels of wealth inequality than is actually present in the U.S. today). Indeed, there is some evidence that making more information about the effects of legislation on inequality might increase demands for redistributive policies. *See* Gimpelson & Treisman, *supra* note 271.

[280] *See, e.g.*, Paul Krugman, Opinion, *Everybody Hates the Trump Tax Plan*, N.Y. TIMES (Nov. 16, 2017), https://www.nytimes.com/2017/11/16/opinion/trump-tax-plan-hate.html.

[281] *See* Coral Davenport & Mark Landler, *Trump Administration Hardens Its Attack on Climate Science*, N.Y. TIMES (May 27, 2019), https://www.nytimes.com/2019/05/27/us/politics/trump-climate-science.html.

[282] *Id.* (quoting Philip P. Duffy, president of the Woods Hold Research Center and one of the scientists that reviewed the government's last National Climate Assessment).

This portion of the proposed amendment also makes it clear that the government's assessments can be challenged in court.[283] The government's assessments are not sacrosanct. The courts will have an important role to play in ensuring that the government complies with the Amendment. This oversight by the courts will limit the government's ability to adopt flawed or self-serving assessments that are designed to minimize or hide expected increases in wealth inequality caused by proposed legislation or rulemaking.[284] The federal government must make a reasonable and scientific assessment,[285] and, if it does not, it risks having that assessment overturned by the courts and the resulting legislation held to be unconstitutional.

The availability of judicial review implicitly raises the question of severability. If the law is a single integrated whole that unconstitutionally increases inequality, then the entire act must be struck down.[286] For example, a law that contained a single provision that eliminated the estate tax would almost certainly violate this amendment because it would increase inequality but not serve any important governmental purpose.[287] Moreover, it would be difficult to imagine how such a law could be saved by severing part of it.[288] Removing the unconstitutional part (the elimination of the estate tax) would leave nothing behind. In effect, the entire law would have to be struck down.

But, what if we consider a law that includes provisions that both increase and decrease inequality? The recent 2017 Tax Act is an example of this, as it contained some tax reductions for the poor and middle class that (on their own) would have slightly reduced inequality,[289] but it also contained provisions that increased inequality by reducing taxes for the wealthy.[290] Could the courts strike down just those portions that increase inequality thus bringing the act into

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283 *See* Marbury v. Madison, 5 U.S. 137 (1803) (establishing that U.S. courts can review laws and find them unconstitutional).

284 *See supra* notes 280–282 (describing some recent attempts by the federal government to produce flawed assessments designed to justify a particular policy).

285 *See infra* Section VI.E.

286 *See* Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (noting that a statute that is not "fully operative as a law" after the unconstitutional part is removed must be struck down in its entirety).

287 It is hard to imagine what important governmental purpose would be served by permitting the extremely wealthy to transmit all of their wealth to their offspring.

288 *Cf. Alaska Airlines*, 480 U.S. at 684 (stating that the Court's goal is to "refrain from invalidating more of the statute than is necessary" (quoting Regan v. Time, Inc., 468 U.S. 641, 652 (1984))).

289 The Tax Policy Center's analysis indicated that the 2017 Tax Cuts and Jobs Act would slightly increase the after-tax income of people in the bottom three quintiles, although the average gain would be less than 1%, even as the Act provided the largest benefits for individuals in the top 5% of the income distribution. *See Analysis of the Tax Cuts and Jobs Act*, *supra* note 266.

290 *See supra* text accompanying notes 262–270 (describing the 2017 Tax Act and its effect on wealth inequality).

compliance with the amendment? Or, is it necessary to strike down the entire act and require Congress to start over?

This is a difficult issue.[291] While there is a general rule in favor of saving as much of the statute or rule as possible,[292] there are practical difficulties in implementing this rule. After all, if the judiciary decides which parts of the law to keep and which parts to invalidate, the court might end up effectively rewriting the law in ways that are not consistent with Congress's original intent.[293] Thus, the general practice is for the court to sever portions of a law only if Congress would have enacted the law even if it did not contain the unconstitutional provision.[294]

This imposes a difficult counterfactual on the court and it may not be easy to determine whether Congress (or an agency) would have passed the law or rule if it did not have the contested provision.[295] These difficult questions could be made easier if Congress and the various federal agencies routinely included severability clauses in laws and rules.[296] Severability clauses could give the courts guidance about which parts could be severed. But, ultimately, the courts will have to decide whether it makes sense to sever the parts of the statute that make it unconstitutional or whether to strike down the entire thing.[297] It is assumed that they will use the existing "well established" severability rules when making those decisions.[298]

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291 *See* Abbe R. Gluck & Michael J. Graetz, Opinion, *The Severability Doctrine*, N.Y. TIMES, Mar. 22, 2012 (discussing the difficult choices presented by severing the unconstitutional parts of a statute).

292 *See Alaska Airlines*, 480 U.S. at 684.

293 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 692 (Scalia, J., dissenting) ("The Judiciary, if it orders uncritical severance, then assumes the legislative function; for it imposes on the Nation, by the Court's own decree, its own statutory regime . . . .").

294 *See Alaska Airlines*, 480 U.S. at 684.

295 *See* Charles W. Tyler & E. Donald Elliott, *Administrative Severability Clauses*, 124 YALE L.J. 2286, 2295 (2015).

296 *See id.* at 2313–17 (describing the rise of severability clauses in statutes and agency rules).

297 *See Alaska Airlines*, 480 U.S. at 684. An alternative approach, although not one necessarily endorsed by this Article, would be to have the courts sever the unconstitutional parts of the statute and simultaneously temporarily enjoin that decision. This would give Congress time to rewrite the statute to save the parts that are important while also complying with the Constitution. *See generally* Robert L. Nightingale, *How to Trim a Christmas Tree: Beyond Severability and Inseverability for Omnibus Statutes*, 125 YALE L.J. 1672 (2016).

298 *See Alaska Airlines*, 480 U.S. at 684 (describing the severability rules discussed in *Alaska Airlines* as "well established").

E. "The assessment is entitled to judicial deference if it is both scientific and reasonable."

While it is important that the government's assessments be subject to judicial review, that does not mean that the courts should review all of the government's decision-making *de novo*.[299] Rather, the government will often be entitled to judicial deference with regards to its assessments. That judicial deference is not automatic, however. The courts should not give deference in situations where the government is not acting in good faith to assess the impact on inequality.[300] Rather than have the courts assess the government's good faith directly, however, the Amendment creates a safe harbor provision.

So long as the assessment is both scientific[301] and reasonable,[302] the assessment will be entitled to judicial deference. To be scientific, an assessment would have to be "grounded in the methods and procedures of science."[303] It must be more than simply "subjective belief or unsupported speculation."[304] Rather, it must be "derived from the scientific method."[305] To be reasonable, an assessment must be a "reasonable accommodation of manifestly competing interests."[306] In effect, the government must be making an honest and evidence-based effort to understand a complex problem. It cannot simply be producing a biased assessment to support a predetermined outcome.[307] When the government undertakes a reasonable and scientific assessment, then courts should defer to that assessment. If the government's assessment does not meet these criteria, then the court is free to ignore it when determining whether the law or rule complies with this Amendment.

Of course, deference to the government's determinations is not intended to be unlimited. Even if the government's assessment is entitled to deference, the

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299 *De novo* review means the court would consider the effect of the legislation or rulemaking on inequality anew, as if no governmental assessment had been done. *Cf.* Freeman v. DirecTV, Inc., 457 F.3d 1001, 1004 (9th Cir. 2006).

300 *See supra* notes 280–282 (describing some recent attempts by the federal government to produce flawed assessments designed to justify a particular policy).

301 *Cf.* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993) (discussing the requirement that expert testimony be scientific in nature to be admissible).

302 Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (holding that the courts must defer to an agency's administrative actions if they are reasonable).

303 *Daubert*, 509 U.S. at 590.

304 *Id.*

305 *Id.*

306 *Chevron*, 467 U.S. at 845 (quoting United States v. Shimer, 367 U.S. 374, 383 (1961)).

307 *See supra* notes 280–282 (describing some recent attempts by the federal government to produce flawed assessments designed to justify a particular policy).

courts may still ignore it if it is clearly erroneous.[308] An assessment will be clearly erroneous, and thus not subject to deference, if the court is "left with the definite and firm conviction that a mistake has been committed."[309]

F. "A law or rule may not increase wealth inequality unless that law or rule is narrowly tailored to achieve an important governmental purpose, and the expected benefit of achieving that purpose exceeds the cost of increasing wealth inequality."

This represents the heart of the Amendment. First, if a law or rule does not result in a net increase in wealth inequality, then the law or rule may be adopted. There is no requirement that laws must reduce inequality.[310]

However, if a law or rule would result in a net increase in wealth inequality, then there are additional requirements that must be met before it can be adopted. The Amendment does not prohibit all laws or rules that increase inequality. Rather, it subjects them to heightened scrutiny. First, the rule must be narrowly tailored to achieve an important governmental purpose. This language is similar in nature to the existing "intermediate scrutiny" standard in constitutional law.[311] It requires that the purpose of the law must be an "important" one rather than simply a legitimate goal of government.[312] In addition, the law must be substantially related to achieving that important governmental purpose, rather than simply a reasonable way of doing so.[313] As a result, the way in which the law or rule operates must be narrowly tailored to achieve an important governmental goal.[314]

In addition to satisfying the intermediate scrutiny standard, the expected benefit of the law must exceed the cost of the net increase in wealth inequality.

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308 *Cf.* FED. R. CIV. P. 52(a)(6) (noting that judicial determinations of fact should not be set aside on appeal unless they are "clearly erroneous").

309 Easley v. Cromartie, 532 U.S. 234, 235 (2001) (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)).

310 Having said that, there is an expectation that severely limiting the government's ability to pass laws that increase inequality will result in inequality gradually decreasing. *See supra* text accompanying notes 229–235.

311 CHEMERINSKY, *supra* note 1, at 540.

312 *Id.*; *see also* Craig v. Boren, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge, previous cases established that classifications by gender must serve important governmental objectives . . . .").

313 CHEMERINSKY, *supra* note 1, at 540; *see also Craig*, 429 U.S. at 197 ("To withstand constitutional challenge, previous cases established that classifications by gender . . . must be substantially related to achievement of those objectives.").

314 CHEMERINSKY, *supra* note 1, at 541; *see also* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 556 (2001) (refusing to apply the "least restrictive means" test to restrictions on commercial speech but holding that they must be "narrowly tailored" to achieve the desired outcome (citations omitted)).

Implicitly, this means that if the government's assessment finds that the law or rule will increase inequality and the government wishes to pass the law anyway, it must also quantify the expected benefit of the law and show that the expected benefit exceeds the cost of the net increase in wealth inequality. The achievement of the expected benefit identified in the assessment must also be an important governmental purpose.

The effect of this is to limit the government's ability to pass laws or rules that increase wealth inequality without a very good reason. It is not a blanket ban on laws or rules that increase economic inequality. There may be some important governmental purpose that can only be achieved by increasing inequality. If that is the case, then this Amendment does permit laws that will increase inequality. But it has the effect of requiring the government to assess the impact on wealth inequality before passing new laws or rules and it forces the government to justify any laws or rules that will increase inequality. Given this restriction, it is expected that the government will only rarely be able to justify increasing inequality.

Professor Andrias has previously considered whether heightened judicial scrutiny of legislation that benefits the wealthy is a good idea.[315] She ultimately concluded that heightened judicial review would not be the best course.[316] The Amendment proposed in this Article, however, avoids many of her criticisms. Her first criticism is that courts are not well placed to evaluate the impact of legislation on inequality.[317] This concern is mitigated by the fact that the court will not be conducting its own assessment of the effect of the challenged legislation or rule, rather it will be evaluating the government's assessment of that effect. This transfers the initial burden of assessing the impact of legislation to the government, which has the expertise and resources to undertake it. Moreover, the plaintiffs in these actions are likely to have the expertise and resources to produce their own models of the effect of legislation on inequality.[318] Thus, courts will not have to produce their own estimates of the effects of legislation, but rather evaluate the models produced by the parties. Trial judges are not scientists, but they do engage in something similar to this

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315 *See* Andrias, *supra* note 7, at 488–89 (suggesting that one possible response to the influence of the wealthy is for courts to impose "greater scrutiny" when "governmental action serves to further concentrate power among the wealthy").

316 *See id*. at 491–92 (arguing that "there are reasons to be wary of relying on the judiciary to reduce" the influence of the wealthy on government).

317 *Id.* at 491.

318 *See supra* text accompanying notes 265–266 (noting that several organizations already operate sophisticated economic models that can produce real time predictions of the effects of major legislation); *see also infra* Section VI.G (requiring that plaintiffs be able to adequately represent the public interest, including having the requisite experience and resources to litigate the matter).

quite regularly—evaluating the admissibility of expert testimony.[319] Thus, it seems reasonable to assume they can undertake the evaluation required by this Amendment.[320]

Next, Professor Andrias argues that individuals and organizations with concerns about the future implications of legislation will not be able to participate because they won't have standing.[321] That is a valid concern under the current standing doctrine, which the proposed Amendment resolves by creating a special standing provision for suits brought under this Amendment.[322] This will permit individuals and organizations to sue if they can demonstrate that they will adequately represent the public interest in opposing excessive wealth inequality.[323]

She also raises concerns about whether those who are not wealthy will be able to compete with wealthy interest groups who can engage in repeated and well-financed litigation.[324] This is obviously a concern,[325] but not one that should prevent the adoption of the Amendment. The wealthy will always be at an advantage in influencing all of the branches of government by virtue of their greater resources.[326] If we were to accept that argument as a reason not to try to address inequality, then we would never be able to do anything about it. The better question is not whether the wealthy influence the courts but rather whether the wealthy are significantly better at influencing the courts than they are at influencing the other branches. In the absence of such evidence,[327] it seems appropriate to assign the task of ensuring the constitutionality of the laws to the judiciary. That is, after all, one of their traditional functions.[328]

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319 *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589 (1993) (observing that a trial judge faced with a proffer of expert scientific testimony must make an initial determination of whether that testimony is both scientific in nature and will assist the trier of fact (citing FED. R. EVID. 702)).

320 The Supreme Court said of the evaluation of expert testimony that "[w]e are confident that federal judges possess the capacity to undertake this review." *Id.* at 593.

321 *See* Andrias, *supra* note 7, at 491.

322 *See infra* Section VI.G.

323 *Id.*

324 *See* Andrias, *supra* note 7, at 492.

325 *See supra* text accompanying note 237 (arguing that one reason to frame this as an Amendment to the Constitution rather than a statute is to try to insulate if from the efforts of wealthy interest groups to undermine it).

326 *See supra* Section III.B.

327 Professor Andrias's own work suggests that the wealthy are in fact quite adept at influencing all of the branches of the government, especially Congress and the President. *See* Andrias, *supra* note 7, at 444–52.

328 *See* Marbury v. Madison, 5 U.S. 137 (1803) (establishing that U.S. courts can review laws and find them unconstitutional).

Finally, Professor Andrias expresses concern that judges may not be well-placed to adjudicate disputes about economic inequality because they are themselves largely elites.[329] This is true,[330] but so too are most members of Congress and the President.[331] So, it is not clear that trusting this task to the judiciary necessarily involves worse concerns than would trusting it to other branches. Moreover, as Professor Andrias acknowledges, Article III judges are not subject to capture in quite the same way as the other branches.[332] Ultimately, the Amendment tries to blunt this impact by expressly embedding in the Constitution the idea that excessive wealth inequality is harmful.[333] For these reasons, the Amendment includes heightened scrutiny of statutes and rules that impact wealth inequality despite Professor Andrias's misgivings.

G. *"Individuals or organizations have standing to challenge that law or rule if they will fairly and adequately represent the public interest in opposing excessive wealth inequality."*

The constitutionality of new laws or rules can be challenged under this amendment. This is evident from the provision on judicial review.[334] But in recent decades, the federal courts have erected a number of potential barriers to the enforcement of this Amendment. Lack of subject matter jurisdiction would not be a problem as federal courts would have jurisdiction over claims made under this Amendment.[335] But there are other potential problems. For example, the Supreme Court has been hostile to private actions to enforce federal law.[336] The Amendment makes it clear that both individuals and organizations have a

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329 *See* Andrias, *supra* note 7, at 492.

330 *See* Richard Wolf, *Nearly All Supreme Court Justices Are Millionaires*, USA TODAY (June 20, 2014), https://www.usatoday.com/story/news/politics/2014/06/20/supreme-court-justices-financial-disclosure/11105985/ (finding that eight of the nine Supreme Court justices in 2014 were millionaires, with Justices Breyer and Ginsburg being worth between $5 and $20 million each).

331 *See* David Hawkings, *Wealth of Congress: Richer Than Ever, But Mostly at the Very Top*, ROLL CALL (Feb. 27, 2018), https://www.rollcall.com/news/hawkings/congress-richer-ever-mostly-top (finding that the wealth of the median member of Congress was more than five times higher than the wealth of the median American).

332 *See* Andrias, *supra* note 7, at 492.

333 *See supra* Section VI.A.

334 *See supra* Section VI.D.

335 Federal district courts would have subject matter jurisdiction to hear challenges to the Amendment under the federal question doctrine since the claim would "aris[e] under" the Constitution. 28 U.S.C.A. § 1331 (West 2019) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

336 *See* Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113 (2010) (describing how the Supreme Court has been reluctant to permit private plaintiffs to bring suits to enforce federal laws unless the statute clearly creates a private right of action).

right to challenge laws or rules that are alleged to violate this Amendment. In effect, it creates an explicit private right of action to enforce the Amendment. This ought to overcome any doubts about whether a private action is permitted.[337]

But, a bigger problem is the Supreme Court's standing jurisprudence. Current standing rules would likely pose an obstacle to enforcement of this Amendment.[338] So this provision creates a new standing rule for those who wish to challenge a law that they believe does not comply with this Amendment.

"Standing is the determination of whether a specific person is the proper party to bring a matter to court for adjudication."[339] Under current standing rules, a person has standing to challenge a statute only if they "have been or will imminently be" injured by that statute.[340] Thus, a person may not challenge a law or rule simply because they are opposed to it.[341] The Supreme Court has also stated that the standing inquiry is "especially rigorous" when the case involves a question of whether an act by another branch of the federal government is constitutional.[342] The Court's standing doctrine, however, has been widely criticized as incoherent and flawed.[343]

The current approach to standing, with its focus on a showing of concrete harm to a particular plaintiff, presents a problem when dealing with "public" issues such as wealth inequality.[344] Who will have standing to challenge a law

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337 *See, e.g.*, Gonzaga Univ. v. Doe, 536 U.S. 273, 279–80 (2002) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 27–28 (1981)) (noting that a private right of action will exist when the text of the statute unambiguously confers the right to sue on individuals).

338 *See infra* text accompanying notes 344–348.

339 CHEMERINSKY, *supra* note 1, at 60.

340 *Id.* at 53; *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (explaining that standing doctrine requires that the plaintiff suffer an "injury in fact" that is "actual or imminent" (citations omitted)).

341 *Lujan*, 504 U.S. at 562–65 (finding that the plaintiff's intention to visit a site that might be adversely affected by an agency decision at some indeterminate point in the future failed to satisfy the requirement of an actual or imminent injury).

342 Raines v. Byrd, 521 U.S. 811, 819–20 (1997).

343 *See e.g.*, Elise C. Boddie, *The Sins of Innocence in Standing Doctrine*, 68 VAND. L. REV. 297, 300 (2015) ("Scholars have long criticized the incoherence of standing doctrine . . . ."); Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 STAN. L. REV. 591, 591 (2010) (observing that "standing doctrine is one of the most widely . . . criticized doctrines in U.S. law"); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 309 (2002) ("Injury determinations have been marked by a breathtaking inconsistency."). Professor Nichol's article contains a particularly exhaustive list of the literature that is critical of the standing doctrine. Nichol, Jr., *supra*, at 302 n.4.

344 *See* Andrias, *supra* note 7, at 491 (arguing that implementing heightened judicial scrutiny of laws that increase the concentration of wealth would be difficult, in part because "[i]ndividuals or organizations interested in the future implications of a case, but not in the judgment itself, generally lack standing and receive inadequate consideration"); *see also* Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 279–80 (1990) (arguing that the Supreme Court's focus on the

that increases inequality? Take, for instance, a law that eliminated the estate tax. The elimination of the estate tax would harm society generally by permitting greater intergenerational accumulation of wealth and increasing wealth inequality.[345] But, it would be hard to identify a particular person who has suffered a concrete injury as a direct result of the statute. Most of the people directly affected by the law would have benefited from it because they would not have had to pay the estate tax on their inheritance. The people who would be harmed by it would be distant and suffer harms not directly from the elimination of the estate tax but from the increase in wealth inequality and the various public health and societal harms that eventually causes. A plaintiff alleging that they would eventually be harmed (along with millions of others) by higher levels of violent crime and reduced life expectancies caused by an increase in wealth inequality resulting from the elimination of the estate tax would have a hard time establishing the concrete harm necessary to sue under the current rules.[346] Such a plaintiff might also have difficulty with the Court's "general grievance" cases.[347]

This does not mean that no plaintiffs would have standing under the present rules. For example, a statute that increased taxes on the poor and middle class to pay for tax cuts for the wealthy, would likely provide standing for poor and middle-class plaintiffs to sue. They would be able to show both that wealth

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"pecuniary and property rights of individuals" has resulted in a standing doctrine that devalues "widely shared constitutional or other collective injuries"); Richard H. Fallon, Jr., *Of Justiciability, Remedies and Public Law Litigation: Notes on the Jurisprudence of* Lyons, 59 N.Y.U. L. REV. 1, 3–7 (1984) (noting how the Supreme Court's standing doctrine makes it difficult for plaintiffs who seek to "represent shared interests in enforcing lawful conduct" by the government); Patti A. Meeks, *Justice Scalia and the Demise of Environmental Law Standing*, 8 J. LAND USE & ENVTL. L. 343, 362–64 (1993) (arguing that the Supreme Court's focus on individual rights and individualized harm makes it difficult for plaintiffs who wish to vindicate a public interest in lawful government action); Kellis E. Parker & Robin Stone, *Standing and Public Law Remedies*, 78 COLUM. L. REV. 771, 771 (1978) (discussing the difficulties of using traditional standing rules in cases that involve "public interests in public actions"); Tokaji, *supra* note 336, at 114 (criticizing the Supreme Court's "myopic focus" on individual harm in election law cases because "federal election statutes are not solely aimed at protecting the individual right to vote . . . , [but] also aim to serve systemic interests in a fair election process").

[345] *See supra* Part III (describing the enormous adverse consequences of high levels of wealth inequality).

[346] *See supra* text accompanying notes 339–341 (noting that current standing rules require an actual or imminent injury in fact); *see also* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408–14 (2013) (holding that plaintiffs did not have standing to enjoin government surveillance because it was not certain that they would be harmed in the future by that surveillance).

[347] *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 573–74 (1992) ("We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.").

inequality increased as a result of the statute and that they had suffered a direct and concrete harm (higher taxes and lower after-tax income) as a result.

This hypothetical tax law might be a somewhat unusual statute, however. The 2017 Tax Act, even though it directs most of its benefits to the wealthy, actually decreases taxes for almost everyone. According to the Tax Policy Center's analysis, the Tax Act resulted in after-tax income increases for every quintile, even though the largest gains went to those in the 95th to 99th percentile.[348] So, even for a statute, like the 2017 Tax Act, that clearly increased inequality, it might be hard to find anyone who had suffered a sufficient "harm" under the present standing rules. This is a significant problem as it would be much harder to achieve the goal of the Amendment if statutes that increased inequality could not be challenged because nobody had standing.

Thus, this Article proposes a new standing approach that takes into account the public nature of the problem of wealth inequality.[349] The key to standing under this Amendment should not be whether a particular plaintiff can identify a concrete and imminent harm to themselves, but rather whether they would adequately represent the interests of the public in preventing excessive levels of wealth inequality.[350] Because of the complexity and cost of this type of public litigation, in many cases, it will be institutions or organizations that are best placed to represent the public interest, rather than individuals.[351]

Thus, the Amendment permits individuals or organizations to challenge the constitutionality of a statute or rule if they can show that they would fairly and adequately represent the interests of the public in opposing excessive wealth inequality.[352] The concept of "fair and adequate representation" is borrowed from

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348 *See Analysis of the Tax Cuts and Jobs Act*, *supra* note 266.

349 Actually, this approach is not entirely novel; it has just never been adopted by the Supreme Court. Something similar was proposed in the 1970s as a way to reduce standing rules as an obstacle to public interest litigation. *See, e.g.*, Parker & Stone, *supra* note 344.

350 *See id.* at 775 (arguing that the key to standing in public litigation should be the ability of the plaintiff to adequately represent the interests of the public); *see also id.* at 771 ("While the interest of the plaintiff is essential to the prosecution of private actions, the public nature of public action minimizes the importance of the role played by traditional plaintiffs . . . ."); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 700 (1977) (arguing that the proper role of the standing doctrine should be to ensure that the plaintiff is able to adequately present the case).

351 *See* Parker & Stone, *supra* note 344, at 772 (noting that "institutional litigators," such as the NAACP Legal Defense Fund, were instrumental in prosecuting key civil-rights actions).

352 *Cf.* Associated Indus. of N.Y. State, Inc. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943), *vacated as moot*, 320 U.S. 707 (1943) (concluding that Congress could confer on "any non-official person or a designated group of non-official persons" the authority to bring a suit on behalf of some public interest). In *Ickes*, Judge Frank said that "[s]uch persons, so authorized, are, so to speak, private Attorneys General." *Id.*

Rule 23 of the Federal Rules of Civil Procedure, which governs class actions.[353] In many ways, the class representatives in a class action fulfill a similar function to the plaintiffs in an action brought under this Amendment—they represent the interests of a large number of people who do not have the incentive or the resources to litigate the matter on their own but who have an interest in the outcome of the litigation.[354] Thus, it makes sense to subject the representative of the public interest under this Amendment to the same standards as the class representative in class action litigation.

Borrowing from jurisprudence about Rule 23, it follows that to be an adequate representative, the plaintiff must be willing to vigorously prosecute the public interest in opposing excessive wealth inequality.[355] Moreover, the plaintiff must be represented by qualified counsel and have the resources to litigate a complex matter against the government.[356] If those criteria are met, then the plaintiff has standing to challenge the law or rule in question under this Amendment. To the extent that they conflict with this or impose additional requirements, the Supreme Court's current standing rules[357] are not applicable to suits under this Amendment. A body of law that has been used in, in practice, to "systematically favor[] the powerful over the powerless"[358] should not constrain an amendment specifically designed to break the stranglehold of the wealthy over the government.

VII. CONCLUSION

This Article's conclusions are dramatic. The level of economic inequality the U.S. is currently experiencing represents an existential threat to our society and democracy. The U.S. performs significantly worse than most of the countries that most Americans think of as being our peers. By most measures, the U.S. is now a worse place to live than almost all of Europe. We have more crime, lower life expectancies, and lower life satisfaction. In fact, the countries

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353 *See* FED. R. CIV. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all members only if . . . the representative parties will fairly and adequately protect the interests of the class.").

354 *Cf.* Parker & Stone, *supra* note 344, at 772 (proposing that public law litigation be viewed more like class action litigation).

355 *See, e.g.*, Int'l Union, United Auto., Aerospace, & Agr. Implement Workers of Am. v. Gen. Motors Corp., 497 F.3d 615, 626 (6th Cir. 2007).

356 *Id.*; *see also* FED. R. CIV. P. 23(g)(1) (requiring the court to consider whether the class counsel has knowledge of the substantive law, experience handling complex litigation, and the resources to represent the interests of the class).

357 *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992).

358 *See* Nichol, Jr., *supra* note 343, at 304 ("[T]he standing rulings of the past three decades demonstrate that the injury standard is not only unstable and inconsistent, but it also systematically favors the powerful over the powerless. The malleable, value-laden injury determination has operated to give greater credence to interests of privilege than to outsider claims of disadvantage.").

that look most like the U.S. today are highly unequal countries like Chile and Russia.

These outcomes are a predictable consequence of our high levels of inequality. In study after study, high levels of economic inequality are linked to various ills, including higher crime rates, higher drug use rates, higher infant mortality rates, lower rates of economic growth, lower life expectancies, and lower social cohesion. The U.S. is not just unlucky or different. The society we have now is exactly what one would expect given that we have the highest levels of inequality of any advanced democracy.

Moreover, the wealthy have essentially captured the government and ensured that it acts to protect and enhance their wealth. The majority of Americans have been largely unable to alter government policies favoring lower taxes on the wealthy over the last several decades despite the fact that only a tiny percentage of Americans have benefitted from those policies. According to many political scientists, there is something decidedly broken about our democracy.

Taken together, these conclusions justify amending the Constitution. This Article proposes embedding in the Constitution an obligation on the federal government to estimate the impact on wealth inequality of all future laws and rules. The Amendment would prevent the government from passing a law or adopting a rule that increases wealth inequality unless the government can show that it is narrowly tailored to achieve an important governmental purpose. This would largely prevent the government from further increasing wealth inequality in the U.S. In fact, in the long run, it would almost certainly result in a gradual decrease in inequality. And if we can significantly reduce wealth inequality there is a good chance that hundreds of millions of Americans will live longer, healthier, and more satisfied lives. We could, through this change, make our society a measurably better place to live for virtually everyone.