March 12, 2021

Dear all:

Attached please find my paper for this week’s Kadish Center workshop. The paper, entitled *Structural Biases in Structural Constitutional Law*, explores the ways in which seemingly neutral features of constitutional design may stack the deck in favor of some policy outcomes, parties, or factions over others. It documents these sorts of biases in the U.S. constitutional system and explores how they should shape our thinking about constitutional theory, design, and politics.

I apologize for the length of the article, which is an unfortunate feature of the law review genre. To cut down on reading time, please feel free to skim the typology in Part III (pp.24-46). I think it will be helpful to read a few of the examples in that part to get a feel for what sorts of biases the paper is focused on, but it is certainly not necessary to read all of them closely. I anticipate the conceptual framework at the start of the paper and the discussion of implications at the end will be enough for a rich discussion.

Many thanks in advance for reading!

Warm regards,

Jonathan Gould
STRUCTURAL BIASES IN STRUCTURAL CONSTITUTIONAL LAW

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Structural constitutional law regulates the workings of government and supplies the rules of the political game. Whether by design or by accident, these rules sometimes tilt the playing field for or against certain political factions—not just episodically, based on who holds power at a given moment, but systematically over time—in terms of electoral outcomes or policy objectives. In these instances, structural constitutional law is itself structurally biased.

This Article identifies and begins to develop the concept of such structural biases, with a focus on biases affecting the major political parties. Recent years have witnessed a revival of political conflict over the basic terms of the U.S. constitutional order. We suggest that this phenomenon, and a large part of structural constitutional conflict in general, is best explained by the interaction between partisan polarization and structural bias, each of which can intensify the other. The Article also offers a typology of structural biases, keyed to the contemporary United States but potentially applicable to any system. To date, legal scholars have lagged social scientists in investigating the efficiency, distributional, and political effects of governance arrangements. The concept of structural bias, we aim to show, can help bridge this disciplinary gap and thereby advance the study of constitutional design and constitutional politics.

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INTRODUCTION

Perhaps the most basic task of a constitution is to supply the rules of “the political game.” Constitutions establish frameworks within which public power is allocated, government decisions are made, and partisan competition is waged, as well as institutions with the authority to refine the rules over time. Yet while no one disputes that structural constitutional choices can influence political behavior and policy outcomes, the precise nature of that influence is often difficult to predict and may change as circumstances change. Constitutional structure matters, but how?

In the United States today, questions about the desirability and design of structural constitutional arrangements are typically approached in one of two ways. The first focuses on the political affiliations of current officeholders. Whichever political bloc controls a given institution in a given period will tend to benefit from that institution and from any increase in its authority. A more powerful presidency benefits whichever party holds the presidency, a more powerful Supreme Court benefits those who are ideologically aligned with a majority of the Justices, and so on. Knowing this, partisans may try to strengthen the institutions they lead or to weaken those they do not. Many of these efforts can be expected to wash out sooner or later, on such accounts, as the parties trade control over the organs of government—as has been happening with increasing frequency in the political branches.

A second approach to structural constitutional analysis focuses not on transient political alignments but rather on timeless principles endorsed by all sides, at least at the level of generality at which they are invoked. In an optimistic key, for example, federalism and the separation of powers are often hailed as safeguards of liberty. In a critical register, the two-senators-per-state rule is often condemned as inconsistent with political equality. Across the globe, students of constitutional design similarly ask about the relationship between structural choices and widely shared goals such as avoidance of tyranny or preservation of effective state functioning.

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2 “Even after decades of [comparative constitutional] scholarship on political institutions,’’ one leading scholar observes, “our knowledge of the interaction of particular practices with environmental factors is quite limited, and predictions of how institutions will operate are, at best, probabilistic guesses.” Tom Ginsburg, Introduction, in COMPARATIVE CONSTITUTIONAL DESIGN 1, 1 (Tom Ginsburg ed., 2012).
4 See infra notes 148–150 and accompanying text.
Both of these approaches, one that emphasizes cycles of political control and the other that abstracts away from distributions of power altogether, offer valuable insights into structural constitutional law. But they miss something important about constitutional politics. Throughout U.S. history, various constitutional arrangements have been associated with values and agendas that are fiercely contested along partisan lines regardless of who holds office at any particular moment. In these instances, political actors may contend that structural constitutional law is itself structurally biased—that the rules of the political game systematically tilt the playing field, whether by design or by accident, for or against the policy objectives or electoral fortunes of one faction or another. And they may be right.

This Article introduces and develops the idea of structural biases in structural constitutional law. It is especially important, one often hears, that a society’s rules for organizing government not be formulated or applied in a politically partisan manner. But structural biases are bound to exist in any constitutional system with well-defined political blocs, including our own. In such a system, there can be no truly “neutral principles” of constitutional governance, whether for formulating policy, administering laws, or facilitating electoral competition. Even technical-seeming arrangements will tend to favor certain outcomes favored by certain parties. Any set of rules to structure the lawmaking process, for instance, implicitly encodes contestable judgments about how easy or hard it should be to devise or expand regulatory and social welfare regimes. Any set of electoral rules reflects a choice among alternative modes of constructing political representation and accountability. In these domains and others, prevailing practices may be much more aligned with one side’s medium- and long-term interests than a plausible alternative arrangement would be.

A few structural constitutional biases have been the subject of heated debate in recent years. Most prominently, Democrats have complained that the rules governing the apportionment of senators and the allocation of Electoral College votes are biased in favor of the Republican Party, given the spatial distribution of partisans. These complaints are just the tip of the iceberg, however. As we will show, ideological, geographic, and demographic polarization have worked in tandem to generate or exacerbate structural biases—as well as partisan strife regarding these biases—across nearly every area of structural constitutional law. Because Democrats now have consistently more ambitious legislative agendas than do Republicans, for instance, the many veto points in the federal lawmaking process have a disparate negative impact on Democratic agendas. Conversely, the left-leaning tilt of the civil service means that legal limits on presidential control of the bureaucracy disproportionately disadvantage Republican chief executives.

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8 See, e.g., Zachary S. Price, Symmetric Constitutionalism: An Essay on Masterpiece Cakeshop and the Post-Kennedy Supreme Court, 70 HASTINGS L.J. 1273, 1306–07 (2019) (“A theory of executive power or federalism or any other structural principle that is acceptable only if exercised by one’s co-partisans is not a legal theory but an act of force.”).
10 See infra section III.A.6.
11 See infra sections II.B, III.A.
12 See infra section III.A.1.
13 See infra section III.A.4.
The politicization of constitutional structure marks both a dramatic new development in contemporary constitutionalism and a reversion to historical precedent. Although conflict over structural biases was relatively quiet in the late twentieth century, such conflict has riven American politics since the Founding.\textsuperscript{14} For centuries, partisans have fought to entrench structural biases that benefit their agendas and to dismantle those that stand in their way. As straightforward as this observation might seem—and certain structural biases, at certain points in time, \textit{are} straightforward, even if many others are subtler—legal scholarship has not taken any sort of systematic account of this phenomenon.\textsuperscript{15} Current disputes over institutions like the Electoral College and the “deep state” cannot be well understood without being placed in this larger context.

The Article proceeds as follows. Part I defines key terms, outlines the scope of our study, and situates it in the existing literature. Part II briefly reviews earlier cycles of conflict over structural biases before turning to the present period. It explains that contemporary political conditions lend themselves to contestation over the basic terms of our constitutional order much more so than the conditions that prevailed a generation ago. Part III provides a typology of structural biases, potentially applicable to any system but elaborated with reference to the United States today. This typology helps us understand current constitutional flashpoints and may help predict futures ones. Finally, Part IV explores possible lessons from our descriptive and analytical account—for the coming phase of U.S. constitutionalism, for constitutional designers and reformers, and for scholars seeking to understand how legal institutions shape electoral and policy disputes. The concept of structural bias, we aim to show throughout, deserves a central place in the study of constitutional politics.

\section*{I. Framing the Inquiry}

\subsection*{A. Definitions and Caveats}

Both terms in this Article’s title deserve some explanation. By “structural constitutional law,” we refer broadly to the authoritative legal norms that guide the workings of government and the distribution of government power.\textsuperscript{16} These norms may be grounded in the text of the canonical document, of course. But they may also be part of what is often called the “small-c” constitution, or the larger “web of documents, practices, institutions, norms, and traditions that structure American government.”\textsuperscript{17} Structural constitutional law, on this understanding, encompasses many legal sources not taught in traditional constitutional law classes. Framework statutes such as the Administrative Procedure Act and the Congressional Budget Act of 1974,\textsuperscript{18} cameral rules in each house of Congress,\textsuperscript{19} rules considered binding within the executive branch,\textsuperscript{20} and election laws

\textsuperscript{14} \textit{See infra} section II.A.
\textsuperscript{15} \textit{See infra} section I.B.
\textsuperscript{16} \textit{Cf.} Daryl J. Levinson, \textit{The Supreme Court, 2015 Term—Foreword: Looking for Power in Public Law}, 130 HARV. L. REV. 31, 33 (2016) (observing that “the focus of structural constitutional law . . . has been on how power is distributed between and among”—and we would add within—“government institutions”).
enacted by Congress and the states\textsuperscript{21} may all qualify—just so long as they authoritatively determine the roles, powers, or procedures of government institutions. Expansive as it may seem, this approach to structural constitutional law is consistent with the small-c literature.\textsuperscript{22} The Article’s field of inquiry could also be thought of as structural public law, although we prefer “constitutional” to “public” for the way it highlights how this body of law constitutes as well as constrains the state.

By “structural biases,” we refer to situations in which constitutional arrangements disadvantage a political or ideological faction and its policy agenda over multiple election cycles, even when the arrangements are ostensibly neutral with respect to party, ideology, and policy. Structural constitutional law is sometimes described as setting out “the rules of the game by which politicians gain and use power.”\textsuperscript{23} The concept of structural bias prompts us to ask who is helped or harmed by these rules, and under what circumstances.\textsuperscript{24} More formally: an institutional arrangement is structurally biased against a political faction when, for the foreseeable future, it asymmetrically harms that faction in its overall effects, relative to a normatively and practically plausible alternative arrangement. If an electoral institution is biased against party A and in favor of party B, A’s candidates will be apt to lose races to B’s candidates even when the former enjoy equal or greater popular support. If a policymaking process is biased against A and in favor of B, A’s officeholders will face greater challenges than B’s officeholders in effectuating their agenda, even when A’s agenda enjoys equal or greater popular support.

As scholarship on bias in other domains has pointed out, bias can exist only relative to a baseline.\textsuperscript{25} For many controversial features of structural constitutional law, a baseline is named or implied by critics. The Senate filibuster is typically contrasted with simple-majority voting,\textsuperscript{26} \textit{Chevron} deference with de novo judicial review of agency action,\textsuperscript{27} single-member legislative

\textsuperscript{21} Under the Constitution’s Elections Clause, U.S. CONST. art. I, § 4, cl. 1, state legislatures share with Congress the authority to regulate federal congressional elections.

\textsuperscript{22} See, e.g., David E. Pozen, \textit{Self-Help and the Separation of Powers}, 124 YALE L.J. 2, 33 (2014) (“While small-c theories come in many different stripes, they share a commitment to assimilating into constitutional analysis ‘all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state’ . . . .” (quoting A.V. Dicey, \textit{Introduction to the Study of the Law of the Constitution} 22 (8th ed. 1915))); Primus, \textit{supra} note 17, at 1082 (“[S]mall-c theorists often hold that rules not appearing in the text are nevertheless constitutional because they are important to the structure of government . . . .”).


\textsuperscript{24} Whether any structural biases that exist are ultimately justified or unjustified is a separate question, the answer to which requires both a positive grasp of their effects and a normative theory of constitutional politics and constitutional design.

\textsuperscript{25} See, e.g., Ward Farnsworth, \textit{The Legal Regulation of Self-Serving Bias}, 37 U.C. DAVIS L. REV. 567, 571 (2003) (“Before a bias can be condemned or even identified, one must identify a baseline: a goal that the bias is frustrating; a judgment that it may contaminate but should not.”).

\textsuperscript{26} See, e.g., Josh Chafetz, \textit{The Unconstitutionality of the Filibuster}, 43 CONN. L. REV. 1003, 1011–16 (2011).

\textsuperscript{27} See, e.g., Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).
districts with proportional representation, \(^{28}\) and so on. \(^{29}\) In these instances, there is an intuitive and well-established (though still contestable) reference point for current arrangements. For other features of structural constitutional law, however, an appropriate baseline for comparison is harder to identify. One may believe that existing law gives the president too much power or too little power, but there is no obvious quantum of presidential power against which the status quo can be assessed. Every constitutional rule in every system might be seen as “biased” relative to some imaginable alternative that would better serve some end. While we cannot entirely escape the ubiquitous problem of “baseline hell” in analyzing contested legal arrangements, \(^{30}\) we focus on arrangements that create identifiable political winners and losers—those that systematically advance the electoral or policy interests of one bloc over another—relative to an identifiable substitute used in other contexts or jurisdictions.

The number and character of veto points in the legislative process provides an illustration. For any set of rules that govern the making of legislation, one could add or subtract, or strengthen or weaken, veto points. Every possible legislative process could thus be said to be simultaneously “biased” both in favor of action (relative to more veto-laden alternatives) and in favor of inaction (relative to less veto-laden alternatives). But this fact only becomes politically meaningful—and only gives rise to a structural bias in our sense—when veto points bear on a discrepancy among rival factions. If political party \(A\) has an ambitious legislative agenda whereas political party \(B\) prefers statutory inertia, then a proliferation of veto points does not just hinder lawmaking in the abstract. It takes on new meaning as anti-\(A\) and pro-\(B\).

Other constitutional arrangements, by contrast, may not intersect neatly with such political cleavages. The U.S. lawmaking process might be seen as tilted toward international trade, for example, on account of special procedures that make it easier to pass trade agreements than ordinary laws. \(^{31}\) But if the parties are either generally aligned or internally divided on trade policy, then this tilt would not amount to a structural bias in favor of one party or another.

As these examples suggest, the same constitutional arrangement can be structurally biased in one period but not in a later period, or vice versa, if external developments change its practical or factional implications across the periods. The political significance of the Senate’s “overrepresentation” of small states, for example, depends on the geographic distribution of partisans across the nation, which may fluctuate even if the Senate’s apportionment rules remain constant. Against the backdrop of a rarely updated constitutional text, identifying the ebb and flow of structural biases is a way to mark the passage of constitutional time.


\(^{29}\) When incumbent officeholders enact a reform intended to entrench their side’s policies or power against future change, see generally Daryl Levinson & Benjamin I. Sachs, \textit{Political Entrenchment and Public Law}, 125 YALE L.J. 400 (2015) (providing numerous examples of this phenomenon, both in the constitutional realm and beyond), the natural baseline for charges of structural bias is the prereform status quo ante.


The examples also point toward the central role of political parties in determining the salience and significance of structural biases. Because parties are the key institutions that organize political contestation in the United States, these biases will be most likely to generate political conflict when they benefit one of the two major parties to the detriment of the other. Constitutional arrangements can be tilted for or against any number of political, ideological, or demographic groups. But many such groups are now firmly ensconced in either the Democratic or Republican coalition, while many other political identities are subsumed into party identities. Any structural bias against contemporary Democrats, for instance, would also amount to a bias against the policy preferences of left-liberals, African-Americans and other communities of color that make up the party’s base, and a variety of interest groups ranging from labor unions to reproductive-rights advocates to environmentalists. Both for these reasons and to keep the scope of the project manageable, this Article homes in on biases that affect the major parties. Complicating matters, the parties not only seek to alter or exploit certain constitutional arrangements at certain junctures but also have themselves been shaped by such arrangements—meaning that fights over structural biases take place within a politics that is partially constructed by those biases. We return to this endogeneity issue in Part IV.

In introducing and beginning to theorize the idea of structural biases, this Article does not offer anything remotely like a comprehensive historical or comparative analysis. Nor does it delve into the details of any single institutional arrangement. Our focus, instead, is on a high-level overview of the past fifty years or so in U.S. constitutional politics, mostly (though not entirely) at the federal level. The logic of our account, however, generalizes broadly. The endemic character of structural biases means that they will exist to a greater or lesser extent in any politically heterogeneous society—which is to say, almost everywhere. In addition to clarifying the current phase of American constitutionalism, we hope to provide tools for thinking about the role of these biases across constitutional systems.

B. Prior Legal Literature and the Promise of a Structural(-Bias) Turn

Our investigation of structural bias has some affinities with two strains in the U.S. constitutional law literature: one that focuses on the rotation of power between the parties and another that focuses on the consistency of constitutional arrangements with democratic values. We do not disagree with the leading works in either strain, each of which provides valuable insights into structural constitutional law. But the concept of structural bias captures important dynamics missed by these accounts.

32 See Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 HARV. L. REV. 2311, 2385 (2006) (“From nearly the start of the American republic, . . . [t]he enduring institutional form of democratic political competition has turned out to be not branches but political parties.”); see also MARK TUSHNET, WHY THE CONSTITUTION MATTERS 13 (2010) (“In short, the Constitution matters because political parties matter, and the Constitution has some influence on the way parties operate.”).
33 See infra notes 342–355 and accompanying text (expanding on this point and noting possible extensions of this project that would focus on political and social blocs outside the party system).
35 See MATT GROSSMANN & DAVID A. HOPKINS, ASYMMETRIC POLITICS: IDEOLOGICAL REPUBLICANS AND GROUP INTEREST DEMOCRATS 100–01 (2016) (discussing the Democratic coalition since the mid-1970s).
36 See infra section IV.C.
The first, descriptive body of work looks at how views on issues of structural constitutional law vary depending on which party holds office. The central finding is that views seem to vary quite a lot. When a party gains control over a government institution, it tends to endorse expansive understandings of that institution’s authority; losing control over an institution tends to have the opposite effect. Legal scholars have explored this dynamic in particular depth for theories of judicial review. A similar sort of cycling, or “flip-flopping,” has characterized the parties’ positions on federalism, the separation of powers, the Senate filibuster, and more.

Institutional flip-flopping plainly occurs to some significant extent, which suggests that political opportunism and motivated reasoning play a significant role in shaping debates over structural constitutional law. But just as plainly, some people’s views on structural questions do not hinge exclusively, if at all, on the short-term distribution of partisan power. Nor does this distribution fully determine the political or practical effects of any given structural arrangement.

Consider, for example, what Richard Briffault calls the “new preemption”: the “emergence and rapid spread of . . . sweeping state laws that clearly, intentionally, extensively, and at times punitively bar local efforts to address a host of local problems.” An account based on rotation of power would predict that views about this sort of preemption will flip-flop depending on whether relevant state and local governments happen to be controlled by Democrats or Republicans at a given moment. But there is a deeper, longer-term dynamic at play. The political geography of the contemporary United States has resulted in many large, Democratic-controlled cities in states with Republican-controlled state governments. The result, as Briffault documents, is that “the preponderance of new preemption actions and proposals have been advanced by Republican-dominated state governments, embrace conservative economic and social causes, and respond to—and are designed to block—relatively progressive local regulations.” Rotation-of-power accounts have little to say about cases like Alabama’s reliably Republican state government preempting a minimum wage ordinance in the equally reliably Democratic city of Birmingham. A focus on structural bias better explains the politics of the new preemption by highlighting how, under prevailing political conditions, state preemption of local law favors conservative Republican agendas not cyclically or episodically but systematically.

The second, normative strain of literature that partially overlaps with our analysis examines the relationship between structural constitutional arrangements and enduring democratic values. In a book titled How Democratic Is the American Constitution?, Robert Dahl famously enumerated

38 See Posner & Sunstein, supra note 3, at 486–504.
41 Id. at 1997–98.
42 See id. at 2009.
a number of undemocratic aspects of the original constitutional design. 43 More recently, Sanford Levinson has emerged as the academy’s most forceful critic of the Constitution’s democratic shortcomings. 44 For Levinson, “many structural provisions of the Constitution . . . place almost insurmountable barriers in the way of any acceptable notion of democracy.” 45 He shows how all three branches have significant democratic deficits. The legislative process impedes majority rule, mainly on account of the Senate; the president is selected through the Electoral College, rather than a nationwide vote, and a president who loses popular support cannot be replaced mid-term on that basis; and federal judges are given life tenure. 46

As vital as it is to identify such democratic deficits, they need not go hand in hand with structural biases. 47 Either can exist without the other. Levinson’s critique of the president’s fixed term in office, for example, arguably shines light on a democratic flaw in the U.S. constitutional framework: the people’s representatives cannot end a failed presidency through a “no-confidence” vote or similar mechanism. 48 But this flaw is not a structural bias, at least not in any obvious sense, as making it easier to remove the president would not clearly help or hurt any political faction over an extended period of time. 49 Whether or not a system with an easier-to-remove president would be desirable as a matter of democratic theory, it is hard to conclude that the existing removal rules are systematically skewed for or against either party.

Conversely, structural biases can exist without democratic deficits. Consider the line-item veto, which allows a chief executive to veto a portion of a bill without vetoing the entire bill. A line-item veto exists in a majority of U.S. states, 50 and it briefly existed at the federal level before being struck down as unconstitutional. 51 The line-item veto alters the relationship between the political branches. Its introduction transfers legal authority from the legislature to the executive;

45 Id. at 6.
46 Id. at 25–78 (Congress); id. at 79–122 (presidency); id. at 123–40 (courts). For another prominent call for structural constitutional reform keyed to democratic values, see AM. ACAD. ARTS & SCI., OUR COMMON PURPOSE: REINVENTING AMERICAN DEMOCRACY FOR THE 21ST CENTURY (2020), https://amacad.org/sites/default/files/publication/downloads/2020-Democratic-Citizenship_Our-Common-Purpose_0.pdf.
47 Though they certainly can: the malapportionment of the Senate and the Electoral College provide the most glaring examples of institutions that are both democratically suspect and structurally biased. See infra section III.A.6.
48 See LEVINSON, supra note 44, at 119–21.
49 In the seven decades that Gallup has been measuring presidential approval ratings, the five presidents whose approval ratings dipped below thirty percent—and thus would have been ripe for removal if the Constitution contained a no-confidence procedure—including two Democrats and three Republicans. See Presidential Approval Ratings—Gallup Historical Statistics and Trends, GALLUP, https://news.gallup.com/poll/116677/Presidential-Approval-Ratings-Gallup-Historical-Statistics-Trends.aspx (last visited Jan. 5, 2021).
its elimination transfers authority in the opposite direction.\textsuperscript{52} Yet because neither branch is clearly more or less democratic than the other,\textsuperscript{53} any attempt to evaluate the line-item veto in democratic terms would require a complex and contestable judgment.

Analysis of the line-item veto is easier from the standpoint of structural bias. Whatever it means for democracy, the line-item veto gives chief executives “a specific tool for counteracting improvident funding.”\textsuperscript{54} The tool is a one-way ratchet: while an executive wielding a line-item veto can block appropriations that the legislature has authorized, she cannot force appropriations beyond ceilings set by the legislature. If line-item veto provisions work as their proponents intend, they lead to less government spending.\textsuperscript{55} This policy bias aligns with a contemporary partisan bias, given the two parties’ different attitudes toward public spending.\textsuperscript{56} It is no surprise, then, that when members of Congress reintroduced a version of the line-item veto in the 2000s, a large majority of Republicans supported the effort and a large majority of Democrats opposed it.\textsuperscript{57} The line-item veto shows how a structural bias can exist without raising the democratic concerns that animate much of the normative scholarship on structural constitutional arrangements.

More generally, appeals to abstract, apolitical ideals such as democracy can shed only so much light on questions of institutional design. There are many different ways of organizing government that are plausibly compatible with democracy, not to mention many different ways of conceptualizing democracy itself.\textsuperscript{58} Often, the strongest argument against a contentious


\textsuperscript{53} Compare, e.g., Elena Kagan, Presidential Administration, 114 HARV. L. REV. 2245, 2335–36 (2001) (arguing that the president is more likely than members of Congress to consider “the preferences of the general public” and to represent the “national interest”), with Jide Nzelibe, The Fable of the Nationalist President and the Parochial Congress, 53 UCLA L. REV. 1217, 1222 (2006) (arguing that “[a]s a collective institution, Congress is subject to a wider range of pluralist voices and interest groups than any other political actor (including the president)”).

\textsuperscript{54} Lisa Schultz Bressman, Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State, 78 N.Y.U. L. REV. 461, 526 (2003); see also id. (describing the federal line-item veto as “affording the President a mechanism to control federal spending”); U.S. Chamber Supports Presidential Line Item Veto, U.S. CHAMBER OF COMMERCE (Mar. 22, 2000, 7:00 PM) (expressing support for the line-item veto as an “important means of fiscal restraint” (internal quotation marks omitted)).

\textsuperscript{55} Interestingly, there is limited evidence for such an effect. See Shanna Rose, Institutions and Fiscal Sustainability, 63 NAT’L TAX J. 807, 817–19 (2010) (summarizing empirical research).


\textsuperscript{58} Cf. David E. Pozen, The Shrinking Constitution of Settlement, 68 DRAKE L. REV. 335, 349 (2020) (“[A]ppeals to ‘democracy’ . . . will not tell us which elements in our constitutional system deserve to be celebrated and which deserve to be overhauled without an account of democracy’s purposes, preconditions, and normative priority. Different conceptions of democracy may point toward different problems and solutions.”

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constitutional arrangement will not be that it is undemocratic in some sense all could agree on, but rather that the arrangement makes it harder to achieve certain policy goals. This charge can be devastating when the disfavored goals are extremely valuable. It is not, however, a charge that can purport to be neutral among policy programs or ideological worldviews. A focus on structural bias provides resources for evaluating many constitutional arrangements—from separation-of-powers disputes to the federal budget process to preemption doctrine—about which democratic theory does not yield a clear verdict.

C. Prior Nonlegal Literature

Outside of law, our inquiry is most consonant with scholarship in the fields of comparative political science and political economy exploring the impacts of various governance arrangements. This literature, which focuses largely on institutional determinants of public spending and economic redistribution, has identified a number of persistent policy biases. “Majoritarian elections,” for instance, “are associated with a smaller overall size of government, smaller welfare spending, and larger budget surpluses . . . than proportional and mixed systems.”\(^{59}\) Nations that employ proportional representation (PR), on the other hand, “have developed larger public sectors, more generous social expenditure, [and] higher levels of redistribution.”\(^{60}\) Presidential systems are associated with less government spending\(^{61}\) and more economic inequality\(^{62}\) as compared to parliamentary systems. So, too, “[t]he vast literature on fiscal federalism points to decentralization as a force that reduces the size of government and the provision of public goods.”\(^{63}\) Parallel dynamics exist at the local level: some types of municipal governments are more conducive to

(citation omitted). On competing theories of democracy, see generally ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); DAVID HELD, MODELS OF DEMOCRACY (3d ed. 2006). In an important recent article, Nicholas Bagley makes a similar argument about the limited utility of analyzing administrative law “with reference to broadly shared commitments” rather than “contested ideological visions.” Nicholas Bagley, The Procedure Fetish, 118 Mich. L. Rev. 345, 360 (2019).


\(^{60}\) JONATHAN A. RODDEN, WHY CITIES LOSE: THE DEEP ROOTS OF THE URBAN-RURAL POLITICAL DIVIDE 228 (2019); see also JOHN CAREY & SIMON HIX, POLICY CONSEQUENCES OF ELECTORAL RULES, IN POLITICAL SCIENCE, ELECTORAL RULES, AND DEMOCRATIC GOVERNANCE 46, 53 (Mala Hut & G. Bingham Powell, Jr. eds., 2013) (discussing evidence that single-member-district systems “tend to produce lower government spending, lower public deficits, and less government rent-seeking than PR systems”).


\(^{63}\) ALESINA & GLAESER, supra note 59, at 87–88.
public spending than others. And beyond public spending, the structure of government has been found to be related to legislative outcomes in areas such as trade and environmental policy.

The effects of institutional arrangements are not limited to policy; structural choices are also closely linked to electoral outcomes. Cross-nationally, “[r]ight-wing governments are more likely to form under majoritarian rules, whereas left-wing governments are more frequent with proportional representation.” Within the United States, votes for Republican legislative candidates translate into legislative seats more readily than do votes for Democrats. This is most apparent in the Senate, given the political geography of rural America, but it also holds in the House of Representatives and in state legislatures that are required to draw districts in accordance with the one-person-one-vote principle. Similarly, the Electoral College is now widely understood to be tilted against Democrats. Consistent with recent electoral outcomes, empirical evidence suggests that national-popular-vote losers who win the Electoral College are far more likely to be Republicans.

This Article seeks to bring into constitutional scholarship the core insight of these literatures: institutions matter to policy and electoral outcomes. Work in this vein by social scientists has focused on macro-level questions of government design, such as presidential-versus-parliamentary systems or proportional-versus-majoritarian modes of electing legislatures. This macro-level focus may be necessary to enable rigorous econometric comparisons across countries. But constitutional orders also have more discrete, idiosyncratic features that do not lend themselves to cross-national quantitative analysis—and yet nonetheless may be structurally biased with respect to policy outcomes, electoral outcomes, or both. Such features exist in spades in the United States, and their biases appear to have become more acute in recent years. We turn now to this possibility.

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64 See, e.g., Stephen Coate & Brian Knight, Government Form and Public Spending: Theory and Evidence from US Municipalities, 3 AM. ECON. J.: ECON. POL’Y 82 (2011) (showing that public spending is lower under mayor-council as compared to council-manager forms of government in U.S. cities).


66 See, e.g., RODDEN, supra note 60, at 228 (explaining that PR systems are associated with “more stringent efforts at environmental protection”); Nathan J. Madden, Green Means Stop: Veto Players and Their Impact on Climate-Change Policy Outputs, 23 ENVIRONMENTAL POL. 570 (2014) (finding that higher numbers of “political institutions” in a state are associated with lower rates of climate-policy adoption).

67 Holger Döring & Philip Manow, Is Proportional Representation More Favourable to the Left? Electoral Rules and Their Impact on Elections, Parliaments and the Formation of Cabinets, 47 BRIT. J. POL. SCI. 149, 149 (2017); see also id. at 149–54 (discussing possible explanations for this finding); Torben Iversen & David Soskice, Electoral Institutions and the Politics of Coalitions: Why Some Democracies Redistribute More than Others, 100 AM. POL. SCI. REV. 165, 166 (2006) (showing theoretically and empirically “that in a two-party majoritarian system the center-right party is more likely to win government power, and redistribute less, than in a multiparty PR system”).

68 See infra notes 118, 281–283 and accompanying text.

69 See RODDEN, supra note 60, at 165–96.

70 See infra note 285 and accompanying text.
II. POLARIZATION AND STRUCTURAL CONSTITUTIONAL CONFLICT

Today’s most significant constitutional fights, as one of us has described elsewhere, increasingly concern not the substance of judicially enforced constitutional rights but rather the structure of constitutional governance. Seemingly settled practices of organizing politics are becoming unsettled. After first sketching earlier episodes of structural constitutional conflict, this Part investigates its recent revival and argues that this trend is best explained by the iterated interaction between structural biases and multiple forms of partisan polarization.

A. A Return to Structural Struggle

The story of American constitutional politics could be told, in significant part, as a story of struggle over structural bias. From the Founding to the present, constitutional designers and reformers have fought to create structural biases that benefit their agendas while preventing their opponents from doing the same. Large congressional districts, to take just one example, were preferred by the framers not only to dilute the influence of “factions” and promote civic-minded representatives, but also to secure the dominance of large property holders whose resources and connections would put them in the best position to win geographically dispersed elections. Critics then and ever since have charged that this design feature, among many others, stacked the deck in favor of private property rights and against economic redistribution. Critics have further charged that the original constitutional framework bolstered chattel slavery through interlocking structural protections for slaveowners, slave states, and the foreign slave trade.

The intensity of such criticism has waxed and waned over time, but concerns about structural biases have never gone away. Concerns involving race are one particularly persistent throughline. Ever since the Founding, issues of race have explicitly motivated or lurked just beneath the surface.

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71 See David E. Pozen, Hardball and/or Anti-Hardball, 21 N.Y.U. J. LEGIS. & PUB. POL’Y 949 (2019); Pozen, supra note 58.
74 The “Beardian” (or “neo-Beardian”) literature advancing such arguments is vast. Leading works include CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION (1913); KLARMAN, supra note 73; JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY (1990).
75 See AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 255–59 (2005) (discussing pro-slavery implications of, inter alia, the Three-Fifths Clause, the Fugitive Slave Clause, Article V’s limitations on constitutional amendment, and the slave-importation provisions of Article I, Section 9); GEORGE WILLIAM VAN CLEVE, A SLAVEHOLDERS’ UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC 9 (2010) (arguing that the original Constitution distributed political power between North and South in ways that “materially advanced the creation of a slaveholders’ union” and “laid the groundwork for expansion of the slave state economies and of slavery itself”). Vigorous debates continue to this day over whether and to what extent the original constitutional design was “pro-slavery.” See, e.g., Nicholas Guyatt, How Proslavery Was the Constitution?, N.Y. REV. BOOKS (June 6, 2019), https://nybooks.com/articles/2019/06/06/how-proslavery-was-the-constitution (reviewing SEAN WILENTZ, NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION’S FOUNDING (2018)).
of foundational fights over structural arrangements, from antebellum debates about nullification and admission of new states,\textsuperscript{76} to Reconstruction Era debates about voting rights and the scope of federal power;\textsuperscript{77} to Civil Rights Era debates about, once again, voting rights and the scope of federal power;\textsuperscript{78} to contemporary debates about, once again, voting rights and admission of new states,\textsuperscript{79} to recurrent debates about the Electoral College.\textsuperscript{80} Reflecting on this pattern, a noted scholar asserted in 1964 that “if in the United States one disapproves of racism, one should disapprove of federalism.”\textsuperscript{81} The fact that the term “states’ rights” still functions as a racial dog whistle shows the lasting power of structural biases to shape constitutional politics.\textsuperscript{82}

In light of this history, late twentieth-century debates over structural bias seem tame. The few serious legislative attempts at structural reform were unsuccessful, as with the line-item veto\textsuperscript{83} and right-wing pushes in the 1990s for a balanced budget amendment and term limits for members of Congress.\textsuperscript{84} The Rehnquist Court issued several high-profile decisions appearing to rein in

\textsuperscript{76} The nullification crisis was formally about whether a state may ignore a federal law that the state legislature deems contrary to the U.S. Constitution, but it was closely linked to fights over slavery as well as tariff policy. See \textsc{Edward McPherson}, \textit{The Political History of the United States of America, During the Great Rebellion} 409 (4th ed. 1882) (quoting a letter by Andrew Jackson stating that “the tariff was only a pretext, and disunion and southern confederacy the real object”); David P. Currie, \textit{The Constitution in Congress: The Public Lands}, 1829–1861, 70 U. Chi. L. Rev. 783, 785 (2003) (noting that John Calhoun “maintained that the great Nullification crisis of 1832–33 was really about slavery”). See generally \textsc{Richard E. Ellis}, \textit{The Union at Risk: Jacksonian Democracy, States’ Rights, and the Nullification Crisis} (1987). As the nation expanded westward, every possible admission of a new state risked upsetting the balance of free and slave states, leading states to be admitted in pairs—one slave and one free—for much of the antebellum period. \textit{But cf.} Paul Finkelman, \textit{The Cost of Compromise and the Covenant with Death}, 38 Pepp. L. Rev. 845, 863–67 (2011) (discussing complications with this narrative).

\textsuperscript{77} See generally \textsc{Eric Foner}, \textit{The Second Founding: How the Civil War and Reconstruction Remade the Constitution} (2019) (analyzing the Reconstruction Amendments as a “second founding”).

\textsuperscript{78} See generally \textsc{Bruce Ackerman}, \textit{We the People: The Civil Rights Revolution} (2014) (arguing that the civil rights revolution of the 1960s effected a fundamental transformation of the constitutional order)


\textsuperscript{80} See generally \textsc{Alexander Keyssar}, \textit{Why Do We Still Have the Electoral College?} (2020) (tracing the history of the Electoral College and attributing its persistence, in part, to successful efforts by Southern states to block reforms as a means of preserving white supremacy).


\textsuperscript{83} \textit{See supra} notes 50–57 and accompanying text.

congressional power but failed, in the view of most, to transform the federal-state balance. The Article V amendment process fell into disuse. Constitution worship prevailed in public discourse, along with a corresponding quietism about constitutional institutions. By the early 2000s, scholars who had detected the possible emergence of a new constitutional order following the presidential election of Ronald Reagan came to emphasize the era’s “chastened” constitutional ambitions and how little change occurred in any of the branches. The rules of the political game remained relatively stable.

Recent years, however, have witnessed a resurgence of conflict over structural constitutional arrangements. This is true even if one brackets President Trump’s behaviors during his four years in the White House as anomalous in their degree of disregard for constitutional norms. On the political right, for instance, opposition to the authority and independence of the administrative state persisted during President Trump’s term of office and continues to mount, while opposition to undocumented immigration led to repeated efforts to change the census. On the political left, a growing chorus of voices has called for eliminating the filibuster for legislation, transferring authority to draw legislative districts from state legislatures to independent commissions, reforming the Supreme Court, reconfiguring or circumventing the Electoral College, and admitting new states into the union. In Congress, the White House, and state capitols, Democratic and Republican officeholders have been engaging in new forms of constitutional hardball. Across

86 See, e.g., Heather K. Gerken, Federalism and Nationalism: Time for a Détente?, 59 ST. LOUIS U. L.J. 997, 1006 (2015) (“[T]he Rehnquist Court’s federalism revolution has been a failure. Despite many skirmishes and some genuine defeats . . . the traditional nationalists are winning the war over constraints on federal power.”); see also David Fontana, The Current Generation of Constitutional Law, 93 GEO. L.J. 1061, 1068 n.55 (2005) (book review) (collecting sources taking this view).
87 The only formal constitutional amendment since 1971, on congressional compensation, is widely seen as “fluky” and having “no significant effect.” David A. Strauss, The Irrelevance of Constitutional Amendments, 114 HARV. L. REV. 1457, 1486–87 (2001).
89 Sandy Levinson has documented and lamented such quietism in numerous works, perhaps most poignantly in Sanford Levinson, How I Lost My Constitutional Faith, 71 MD. L. REV. 956 (2012).
94 See Pozen, supra note 58, at 338–45 (cataloging these and other examples of “ways in which the Constitution of Settlement is becoming unsettled”).
95 See generally Fishkin & Pozen, supra note 56 (exploring possible drivers of escalating constitutional hardball, especially but not only on the Republican side, since the mid-1990s).
area after area, “previously taken-for-granted constitutional institutions and distributions are increasingly subject to revision” either formally or informally,\textsuperscript{96} not for the most part through bargaining and compromise so much as through the unilateral initiative of one side.

Why?

\textbf{B. Ideological, Geographic, and Demographic Polarization}

The answer, in a word, is polarization. More specifically, several overlapping forms of polarization have worked together to make more and more features of structural constitutional law more and more biased against one or the other major political party. Recognizing that these features systematically tilt the playing field against their electoral prospects or policy goals, those who are harmed by structural biases are fighting back. Moreover, at the same time that polarization is exacerbating structural biases, the inverse seems to be happening as well.

It will surprise no one that partisan polarization has something to do with constitutional conflict. Yet the connections between the two still have not been fully mapped and, in particular, the key role of structural biases in motivating and predicting constitutional conflict has not been explored.\textsuperscript{97} Our account of the dialectical interaction between partisan polarization and structural bias does not capture all relevant variables of course,\textsuperscript{98} but it supplies a parsimonious, unified framework for understanding the renewed interest in constitutional governance.

First, Democrats’ and Republicans’ ideological polarization increases the expected frequency and intensity of partisan conflict over structural arrangements. It is by now familiar that the Democratic Party has moved significantly to the left and the Republican Party significantly to the right over the past half-century.\textsuperscript{99} This pattern is generally understood to be asymmetric, with Republicans having tacked further rightward than Democrats have leftward.\textsuperscript{100} Earlier in the twentieth century, the parties’ platforms overlapped to a greater degree, so much so that a 1950 report by a task force of the American Political Science Association described the central problem

\textsuperscript{96} Pozen, \textit{supra} note 58, at 350.
\textsuperscript{97} Many different works have discussed the arguable electoral or policy biases (not necessarily by that label) of individual constitutional arrangements, with reference to recent conflicts over them. But we are not aware of any prior work that explores the relationship between such biases and such conflicts at a wholesale rather than a retail level.
\textsuperscript{98} \textit{Cf. infra} notes 345–355 and accompanying text (discussing cultural and material variables that our account largely brackets).
\textsuperscript{100} See Nolan McCarty, \textit{What We Know and Don’t Know About Our Polarized Politics, in POLITICAL POLARIZATION IN AMERICAN POLITICS, supra} note 99, at 1, 3 (noting a “major partisan asymmetry in polarization,” with “movement of the Republican Party to the right account[ing] for most of the divergence between the two parties”).

Electronic copy available at: https://ssrn.com/abstract=3797051
of our party system as one of insufficient polarization.\textsuperscript{101} Political scientists debate the sources of the growing divide between the parties since the 1970s. Some emphasize ways in which mass public opinion has polarized,\textsuperscript{102} while others stress the extent to which liberals have sorted into the Democratic camp and conservatives into the Republican camp.\textsuperscript{103} Whatever its ultimate causes, ideological polarization is an unmistakable feature of contemporary U.S. politics. “The parties’ increasing internal cohesion makes them more disciplined and oppositional, and the forces of ideological zeal and partisan team spirit now reinforce each other.”\textsuperscript{104}

I ideological polarization shapes politics on many levels, one of which is that it makes structural biases both more likely to emerge and more potent when they exist. The basic reason is simple: ideological polarization means that whenever a structural constitutional arrangement systematically favors one sort of policy outcome over another, it will be more likely to favor one political party over the other for that very reason. As the parties have developed increasingly differentiated policy programs, the space for “neutral” institutional design has narrowed. Rising levels of intraparty cohesion and unity, meanwhile, make it easier for partisans to organize against arrangements that thwart their goals.\textsuperscript{105}

As we detail in the next Part, contemporary Democratic officeholders are more likely than their Republican counterparts to seek to enact policy changes through non-tax legislation and regulation.\textsuperscript{106} Structural barriers to enacting and administering ambitious new laws have, in consequence, assumed an increasingly “anti-Democratic” valence. Prominent voices in the Democratic coalition have called for weakening some of these barriers, as by eliminating the

\textsuperscript{101} See COMM. ON POLITICAL PARTIES, AM. POLITICAL SCI. ASS’N, TOWARD A MORE RESPONSIBLE TWO-PARTY SYSTEM 3–4 (1950) (“Alternatives between the parties are defined so badly that it is often difficult to determine what the election has decided even in broadest terms.”). Similar dynamics held in certain earlier periods. In the decades leading up to the Civil War, for instance, the major parties were not neatly polarized even on issues as fundamental as slavery. See DESMOND KING & ROGERS M. SMITH, STILL A HOUSE DIVIDED: RACE AND POLITICS IN OBAMA’S AMERICA 38–42 (2013) (describing cross-party coalitions in support of and in opposition to slavery during the antebellum period).


\textsuperscript{103} See, e.g., MORRIS P. FIORINA, UNSTABLE MAJORITIES: POLARIZATION, PARTY SORTING, AND POLITICAL STALEMATE, at xv (2017).

\textsuperscript{104} ROSENFELD, supra note 99, at 3; see also id. (“[M]uch of what Americans bemoan about their polarized politics . . . are largely secondary consequences of one key development: the parties are now chiefly distinguished from each other by their contrasting agendas and worldviews.”).

\textsuperscript{105} The party coalitions are not now, nor have they ever been, perfectly ideologically homogenous. See generally RUTH BLOCH RUBIN, BUILDING THE BLOC: INTRAPARTY ORGANIZATION IN THE U.S. CONGRESS (2017) (discussing intraparty organization and the role of party dissidents in Congress over the past century).

But as long as agreement about distinct policy goals exists within each coalition at some (perhaps high) level of generality, partisans will generally be able to identify and unify in support of structural arrangements that advance their goals and against arrangements that stand in the way.

\textsuperscript{106} See infra sections III.A.1–.2.
Senate filibuster\textsuperscript{107} or curtailing judicial review.\textsuperscript{108} On the flip side, Republicans who recognize that Democrats need powerful agencies to pursue ambitious regulatory agendas with aging statutes have turned against agency power, as reflected in efforts to revitalize the nondelegation doctrine\textsuperscript{109} and to limit or repudiate \textit{Chevron} deference.\textsuperscript{110}

These conflicts over structural constitutional law not only follow from but also help fuel polarization. The growing perception that a certain constitutional arrangement is systematically biased against the side generates new forms of argument and activism by that side’s supporters, which in turn generates countermoves by opponents, in a manner that can exacerbate confirmation bias and deepen preexisting divides. Skepticism toward the administrative state and the constitutional norms that protect its independence, for example, has become a constitutive commitment for many Republican legal elites—one that helps define their social identity in contradistinction to the proreregulatory posture of Democratic elites.\textsuperscript{111} Among Democrats, calls for “structural change” have become shibboleths that help distinguish the party’s left from its center.\textsuperscript{112} To some unmeasurable but potentially significant extent, structural biases and ideological polarization reinforce each other through the grievances and cleavages they engender.

Biased features of the constitutional order may contribute to ideological polarization in more discrete ways as well. Some political scientists have argued, for instance, that economic inequality and polarization are mutually reinforcing.\textsuperscript{113} As the next Part explains, a raft of veto points in the federal lawmaking process can be seen as tilting that process against redistributive agendas.\textsuperscript{114} Insofar as economic inequality tends to foster social and political division and hard-wired features of the constitutional system tend to insulate such inequality from policy response, those features


\textsuperscript{109} See Julian Davis Mortenson & Nicholas Bagley, \textit{Delegation at the Founding}, 121 COLUM. L. REV. (forthcoming 2021) (manuscript at 4), https://ssrn.com/abstract=3512154 (explaining that “[f]or the first time in history, a working majority on the Supreme Court”—composed entirely of Republican appointees—“may be poised to give the nondelegation doctrine real teeth”).

\textsuperscript{110} See Gregory A. Elinson & Jonathan S. Gould, The Politics of Deference (July 2020) (unpublished manuscript) (on file with authors) (tracing the evolution of the politics of \textit{Chevron} deference over the past four decades).


\textsuperscript{113} See, e.g., MCCARTY ET AL., supra note 99, at 3–4.

\textsuperscript{114} See infra sections III.A.1–.3.
serve to perpetuate polarization. A structurally biased lawmakers process, economic inequality, and ideological polarization, on this account, feed one another in a vicious circle.

Second, geographic polarization can similarly generate and exacerbate structural biases. As with ideological polarization, it is familiar that Democrats and Republicans are now geographically polarized. “While the two major parties once fiercely battled each other for popular supremacy across wide swaths of the continent, Republicans and Democrats today both maintain sizable regional bastions” of support.¹¹⁵ Geographic polarization is evidenced across states, many of which are reliably “red” or “blue” in presidential elections. Within states, Democrats are electorally dominant in urban cores and competitive in inner-ring suburbs, while Republicans win in exurban and rural areas.¹¹⁶ This sort of geographic polarization was not the norm for much of the twentieth century,¹¹⁷ but its existence in contemporary politics is undeniable.

Geographic polarization of the electorate gives rise to structural biases throughout the constitutional order. The most obvious examples are institutions such as the Senate and the Electoral College that inflate the power of less populated states relative to a population-based apportionment scheme. These institutions currently manifest a significant pro-Republican bias, in virtue of Republican electoral dominance in such states.¹¹⁸ Because of the president’s and Senate’s role in selecting and confirming Supreme Court Justices and other officials, this bias ramifications throughout the federal government. Justice Brett Kavanaugh, for instance, was confirmed on a nearly party-line vote of senators representing only 44% of the U.S. population—a historic low.¹¹⁹

Less obviously, single-member, plurality-winner congressional districts also hurt contemporary Democrats. Such districts are not required by the text of the Constitution, but they have been mandated by statute at the federal level since 1842.¹²⁰ The overwhelming majority of

¹¹⁷ See, e.g., Rodden, supra note 60, at 4 (noting no correlation between a county’s population density and Democratic Party vote share in the 1916 presidential election, some correlation in the 1960 presidential election, and an “astounding” correlation in the 2016 presidential election).
¹¹⁸ See, e.g., Adam Jentleson, Kill Switch: The Rise of the Modern Senate and the Crippling of American Democracy 10 (2021) (noting that “Senate Democrats have represented a majority of the American population at every moment in the twenty-first century so far, regardless of whether they controlled the majority of the seats in the Senate”).
¹¹⁹ Joshua Tauberer, With Kavanaugh Vote, the Senate Reaches a Historic Low in Democratic Metric, GovTrack.us (Oct. 7, 2018), https://govtrackinsider.com/with-kavanaugh-vote-the-senate-reaches-a-historic-low-in-democratic-metric-dfb0f5fa7fa; see also Joshua P. Zoffer & David Singh Grewal, The Counter-Majoritarian Difficulty of a Minoritarian Judiciary, 11 Calif. L. Rev. Online 437 (2020) (documenting the dramatic rise in “minoritarian judges” appointed by Republicans presidents who failed to win the national popular vote, confirmed by Republican Senate majorities representing less than half of the national population, or both).
state legislators are likewise elected in single-member districts. Jonathan Rodden has documented the ways in which this districting arrangement has come to favor Republicans over Democrats, given the latter’s concentration in urban areas. He provides a wealth of empirical evidence that “when winner-take-all districts are drawn on top of this geography, Democrats end up with a distribution of support across districts that is highly inefficient. That is, they win by excessive margins in the districts they win and fall short by relatively narrow margins in the districts they lose.”

The result, Rodden concludes, is that “in the early twenty-first century, the Democratic Party has a political geography problem.” This geography problem is itself a function of a political institutions problem: the geographic distribution of partisans matters not for any a priori reason, but because of its intersection with the design of electoral institutions. Recent political science research suggests that the current geographic distribution of partisans may, in addition, create asymmetric opportunities for Republicans to use “anti-democratic tactics” in the areas of gerrymandering and voter suppression.

Beyond the electoral sphere, various legal tools and policy choices have partisan valences that they would not have had in a less geographically polarized environment. For instance, as noted above, a new wave of state preemption laws that “would virtually end local initiative over a wide range of subjects” is closely linked to “polarization between red states and their blue cities.” The widespread practice of “prison gerrymandering”—counting incarcerated individuals at their places of confinement instead of their home addresses for purposes of the census—advantages Republicans by inflating representation of the rural conservative areas where prisons tend to be located. The widespread practice of electing district attorneys at the

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122 RODDEN, supra note 60, at 133; see also Jowei Chen & Jonathan Rodden, Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures, 8 Q.J. POL. SCI. 239, 239 (2013) (“We show that in many states, Democrats are inefficiently concentrated in large cities and smaller industrial agglomerations such that they can expect to win fewer than 50% of the seats when they win 50% of the votes.”).
123 RODDEN, supra note 60, at 188.
124 Cf. id. at 230 (“In highly proportional systems with large districts, like those in Northern Europe, the geographic of a party’s support is largely irrelevant for the transformation of votes into seats.”).
126 See supra notes 40–42 and accompanying text.
127 Briffault, supra note 40, at 1995; see also Joshua S. Sellers & Erin A. Scharff, Preempting Politics: State Power and Local Democracy, 72 STAN. L. REV. 1361 (2020) (explaining that Republican-led “structural preemption,” whereby states displace not just local governments’ specific policies but their “structural authority” to design institutions, has also been on the rise).
129 See Ho, supra note 128, at 360 (“[T]he distortion of the redistricting process [by prison gerrymandering] ... has specific and identifiable effects, transferring political power from certain types of communities—namely, urban districts and communities of color—to others—generally rural and predominantly white areas.”).
level of counties, rather than cities, gives whiter and more conservative suburbanites a larger say in criminal justice policies that primarily affect the lives of racial minorities in urban locales.\textsuperscript{130}

Third, \textit{demographic polarization} can support structural bias as well. Throughout U.S. history, contestation over the right to vote and legal regulation of voting has been closely tied to the parties’ quests for electoral supremacy.\textsuperscript{131} If voters’ ascriptive characteristics make it increasingly easy to predict which party they will support, the parties will find it increasingly easy to draw ostensibly nonpartisan districts or to fashion ostensibly nonpartisan ballot-access rules in ways that afford a partisan edge. Once in place, moreover, such arrangements may strengthen partisan identities and solidarities through the voting patterns and grievances they generate—as suggested, for example, by Republican politicians’ complaints about voter fraud\textsuperscript{132} and Democratic politicians’ calls to combat voter suppression.\textsuperscript{133} Structural biases, in other words, can have not only first-order effects on electoral outcomes but also second-order effects on partisan mobilization.

The demographic divides between the parties today are stark along the lines of race, age, gender, and education. The most notable divide is racial. Simply put, white voters favor Republicans decisively, and non-white voters favor Democrats even more decisively. In presidential elections since 2008, Republican candidates have won white voters by margins of 12\% to 20\%, while Democratic candidates have won Black voters by margins of 81\% to 91\%, Hispanic voters by margins of 36\% to 44\%, and Asian-American voters by margins of 27\% to 47\%.\textsuperscript{134} In recent decades, a parallel gap has opened up between increasingly Democratic-leaning younger voters and Republican-leaning senior citizens\textsuperscript{135} and between increasingly Democratic-leaning women and Republican-leaning men.\textsuperscript{136} The contemporary partisan gap with respect to education is especially striking—highly educated voters now tend to support Democrats and less educated voters Republicans.

\textsuperscript{130} See \textsc{William J. Stuntz}, \textsc{The Collapse Of American Criminal Justice} 7, 35–36, 191–95 (2011).

\textsuperscript{131} See generally \textsc{Alexander Keyssar}, \textsc{The Right to Vote: The Contested History of Democracy in the United States} (2009) (emphasizing this link with examples from the nineteenth and twentieth centuries).


\textsuperscript{133} See, e.g., \textsc{Nicholas A. Valentino & Fabian G. Neuner}, \textsc{Why the Sky Didn’t Fall: Mobilizing Anger in Reaction to Voter ID Laws}, 38 Pol. Psych. 331 (2017) (providing observational and empirical evidence that “strong emotional reactions to the public debate about [voter suppression] laws may mobilize Democrats,” thereby partially offsetting the suppressive effects of these laws).

\textsuperscript{134} See \textsc{William H. Frey}, \textsc{Diversity Explosion: How New Racial Demographics Are Remaking America} 222 fig.11-3 (rev. & updated ed. 2018).

\textsuperscript{135} See generally \textsc{Ashley D Ross & Stella M. Rouse}, \textsc{The Politics of Millennials: Political Beliefs and Policy Preferences of America’s Most Diverse Generation} (2018); \textsc{Patrick Fisher}, \textsc{The Age Gap in the 2008 Presidential Election}, 47 Soc’y 295 (2010).

\textsuperscript{136} See, e.g., \textsc{Elizabeth U. Cascio & Na’ama Shenhav}, \textsc{A Century of the American Woman Voter: Sex Gaps in Political Participation, Preferences, and Partisanship Since Women’s Enfranchisement}, J. Econ. PERSP., Spring 2020, at 24, 35 (“Following the 2016 election, women were almost 12 percentage points more likely than men to consider themselves Democrats, compared to a sex gap hovering around zero in the late 1940s and 1950s.”).
voters to support Republicans—in that it represents an inversion of dynamics that prevailed as recently as the early 2000s.\textsuperscript{137}

These demographic divides set the stage for much of what Richard Hasen has described as the “voting wars” of the early twenty-first century.\textsuperscript{138} The key point, again, is that when many demographic groups predictably favor one party by wide margins, the parties can seek to change many electoral rules to their advantage. Of greatest consequence, Republican-controlled state governments have enacted a host of restrictions on ballot access that limit the vote of core Democratic constituencies, most notably people of color.\textsuperscript{139} The mirror image of these efforts are Democratic efforts to reenfranchise felons\textsuperscript{140} and provide for automatic voter registration.\textsuperscript{141} “When party and race coincide,” as Hasen notes, “it is much harder to separate racial and partisan intent and effect” in evaluating electoral arrangements.\textsuperscript{142}

Predictable differences in how various demographic groups vote also help explain otherwise curious features of voter-identification laws, such as a Republican-sponsored measure in Texas that did not recognize university-issued ID cards.\textsuperscript{143} While turnout-reducing tactics are manifestly more common and intensive among Republicans,\textsuperscript{144} Democrats have sometimes used limited versions. State Democratic parties, for example, benefit from off-cycle school board elections that preserve the influence of teachers’ unions over those elections.\textsuperscript{145}

In addition, greater overlap between demography and partisanship creates greater potential for political bias in methods for conducting the census. Democrats have long advocated for use of statistical sampling in the census to remedy the undercount of poorer and minority voters, which

\textsuperscript{142} Richard L. Hasen, Race or Party? How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere, 127 Harv. L. Rev. F. 58, 61 (2014). By the same token, longstanding electoral arrangements designed to protect against racial discrimination may assume a new partisan valence. See, e.g., id. (“The Voting Rights Act, when passed, was not seen as a law that helped the Democratic Party—quite the opposite. But today, many Republicans view the Voting Rights Act as a law that favors Democrats . . . .”).
\textsuperscript{143} See Veasey v. Perry, 71 F. Supp. 3d 627 (S.D. Tex. 2014) (describing, and enjoining, this measure).
would inflate Democratic representation, while Republicans have pushed back.146 More recently, Republicans sought to add a question on citizenship to the census, an effort that would have depressed Hispanic response rates147 and thereby advantaged the Republican Party. Partisan contestation over the design and administration of the census makes sense when demographics and partisanship are tightly aligned.

C. Close Competition

On top of all these trends, the close competition between today’s parties fuels constitutional conflict. Sharply contested presidential elections have replaced the landslides of prior generations, while the contemporary House and Senate have changed hands with greater frequency than at any point since the late nineteenth century.148 As Frances Lee has detailed, this electoral instability affects the behavior of officeholders on numerous levels. “Members of insecure parties worry more about partisan advantage and work harder to win it” than members of more dominant or more hopeless parties.149 Under closely divided electoral conditions, officeholders feel a greater need to “define and dramatize party differences in order to energize their supporters and to persuade undecided voters to prefer their party to the opposition,” a dynamic that “stands in tension with successful legislating” for the general good.150

This dynamic extends to structural constitutional arrangements. Intense competition between the parties encourages the seeking of any possible advantage, including the use of structural biases for purposes of entrenching one’s own reforms or disrupting the other side’s agenda. Recent Republican calls to revive the nondelegation doctrine151 make more strategic sense in light of the knowledge that Democrats may well control the White House with considerable frequency in the coming decades. Recent Democratic calls to eliminate the legislative filibuster152 stem from the recognition of rare and brief windows of unified control in a period of insecure majorities. Biases in the electoral or lawmaking process matter little, in practice, if one party can comfortably win elections and garner large governing coalitions regardless. But these same biases may matter enormously when the parties compete roughly at parity.

146 See, e.g., Thomas L. Brunell, Using Statistical Sampling to Estimate the U.S. Population: The Methodological and Political Debate over Census 2000, PS: POL. SCI & POL. 775, 776 (2000) (“A principal concern of the Republicans is that Democrats will gain seats if statistical methods are used to adjust the census counts to include more minorities, urban residents, and poor people and justify the creation of more electoral districts with a majority of likely Democratic voters.”).

147 See Matthew A. Baum, Bryce J. Dietrich, Rebecca Goldstein & Maya Sen, Estimating the Effect of Asking About Citizenship on the U.S. Census: Results from a Randomized Controlled Trial, SHORENSTEIN CTR. ON MEDIA, POL. & PUB. POL’Y (Apr. 2019), https://shorensteincenter.org/wp-content/uploads/2019/03/Census-Citizenship-March-2019.pdf (reporting results of a survey experiment finding that inclusion of the citizenship question would have reduced the number of Hispanics reported in the 2020 census by over 12% of the Hispanic population).

148 See Fiorina, supra note 103, at 10 (noting that from 1992 to 2014, “twelve elections . . . produced six different patterns of majority control of our three national elective institutions”—the highest level of “majoritarian instability” since the nineteenth century); Frances E. Lee, INSECURE MAJORIES 1–2 (2016) (describing greater stability in past periods of U.S. history).

149 Lee, supra note 148, at 4.

150 See id. at 69–70.

151 See supra note 109 and accompanying text.

152 See supra note 107 and accompanying text.
Certain structural biases also become more countermajoritarian in closely divided partisan environments. The small-state bias of the Electoral College and the Senate, for instance, will continue to exist and to favor Republicans as long as the political geography of the United States looks as it does now. If one party were dominant, however, this bias would be less likely to yield presidents and Justices who lack majority popular support (as measured, in the Justices’ case, by the proportion of the U.S. population represented by senators voting to confirm).\(^{153}\)

In sum, the combination of polarization and closely divided parties is a recipe for structural constitutional conflict. Ideological, geographic, and demographic polarization bolster the presence and power of numerous structural biases, while some structural biases may exacerbate polarization. Ideological polarization alone explains only part of contemporary constitutional conflict. The interaction of ideological and geographical polarization drives the new preemption, for example, while the interaction of ideological and demographic polarization drives voter-suppression efforts. And the instability of partisan control over institutions makes it more rational for politicians from both parties to exploit structural biases when feasible.

### III. Mapping Structural Biases

Having shown how partisan polarization leads a growing number of structural constitutional arrangements to cut against one political party or the other in their electoral or policy effects, we are now in a position to build a fuller catalog of such biases. The previous Parts discussed numerous examples in passing. This Part gives more examples of structural biases, along with an analytic framework for understanding them.

We organize our typology around the constitutional order’s relationship to the contemporary Democratic and Republican parties. Many different controversies in many different areas of public law, the typology helps show, share a common normative architecture. Often, when Democrats denounce an institution such as the Electoral College or Republicans denounce an institution such as the “deep state,” the gravamen of the argument is that certain modes of organizing government systematically favor one political side over another, relative to an alternative arrangement that is at least as democratically defensible. Treating structural bias as a category provides a conceptual vocabulary for describing and evaluating these sorts of arguments. Disaggregating the category provides a map to some of the recurring ways in which constitutional institutions produce political winners and losers and, therefore, political conflicts.

Despite our contemporary and domestic focus, the typology has wide potential applicability. Most of the institutions discussed in this Part exist in various forms across the democratic world. The details vary greatly across time and space; the basic insights about which sorts of arrangements will be biased against which sorts of actors do not. Our analysis therefore provides a model for similar inquiry in any constitutional system with meaningful political competition.

#### A. A Typology

1. Ex Ante Impediments to Lawmaking (Legislative Branch)

\(^{153}\) See supra note 119 and accompanying text.
All constitutional designers make choices that affect how easy or hard it will be to enact and amend statutes. These choices will not necessarily have clear partisan implications. If in a given period all political parties share similar general orientations toward statutory policymaking, then the rules governing the legislative process may not manifest any structural bias. Yet as discussed in Part I, if one party wishes to enact significantly more legislation than the other does across multiple policy domains and election cycles, then procedural barriers to lawmaking can have disparate consequences as between the two.\footnote{See text following supra note 28.}

Such a partisan divide has opened up in the United States, and structural bias has followed. “No other advanced industrialized country has so many institutional veto points” as does the United States.\footnote{David Karol, American Political Parties: Exceptional No More, in SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA 208, 212 (Nathaniel Persily ed., 2015); see also William N. Eskridge, Jr., Vetogates and American Public Law, 31 J.L. ECON. & ORG. 756, 757–60 (2012) (describing nine “vetogates” in the U.S. legislative process); Alfred Stepan & Juan J. Linz, Comparative Perspectives on Inequality and the Quality of Democracy in the United States, 9 PERSP. ON POL. 841, 844 (2011) (reporting that among longstanding democracies with advanced economies, only the United States has more than three “electorally generated veto players . . . who potentially can block social change, by blocking key bills or amendments”).} This longstanding feature of our constitutional order now impedes Democratic policy goals more than Republican policy goals because Democrats now have more ambitious legislative agendas. In the late twentieth and early twenty-first centuries, Congresses controlled by Democrats considered more bills, held more committee meetings, and passed more bills than Congresses controlled by Republicans,\footnote{GROSSMANN & HOPKINS, supra note 35, at 264–65 (data from 1961 to 2012).} while Democratic presidents tendered significantly more policy proposals than their Republican counterparts.\footnote{Id. at 267 (reporting that since 1965, “Democratic presidents made 39 percent more proposals than Republicans overall and 62 percent more domestic policy proposals”); see also id. at 260 (reporting that from 1945 to 2004, “policy changes” were more than three times as likely to be liberal than conservative across the federal government).}

The first Congresses of recent presidencies illustrate this asymmetry. During the two years in which Democrats held unified control of the political branches under President Obama, Congress passed major economic, health care, financial regulatory, and civil rights legislation on party-line or near-party-line votes.\footnote{E.g., Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515; Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); Patient Protection and Affordable Care Act; Pub. L. No. 111-148, 124 Stat. 119 (2010); American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115; Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.} Democrats also mounted significant but ultimately unsuccessful legislative efforts to address climate change and immigration.\footnote{For critical overviews of these efforts, see Sarah R. Coleman, A Promise Unfulfilled, an Imperfect Legacy: Obama and Immigration Policy, in THE PRESIDENCY OF BARACK OBAMA: A FIRST HISTORICAL ASSESSMENT 179 (Julian Zelizer ed., 2018); Meg Jacobs, Obama’s Fight Against Global Warming, in id. at 62.} The Biden Administration, buoyed by a Democratic Congress, has begun by proposing a similarly aggressive legislative
agenda on topics including immigration,\textsuperscript{160} racial justice,\textsuperscript{161} voting rights,\textsuperscript{162} and COVID-19 relief.\textsuperscript{163}

The Trump Administration also enjoyed unified control on both sides of Pennsylvania Avenue during its first two years. Yet its “sole significant legislative accomplishment” during this period was a tax bill,\textsuperscript{164} and its only other high-profile legislative undertaking was its attempt to repeal the Affordable Care Act.\textsuperscript{165} Even in areas that were policy priorities for the Trump Administration, such as restricting immigration and relaxing regulation of business, it generally pursued its goals through executive action rather than legislation.\textsuperscript{166}

Multiple factors likely contribute to this asymmetry in legislative ambition. Some political scientists emphasize the parties’ different attitudes toward the role of government. “Elected Democrats tend to treat policymaking as an attempt to address a catalog of social problems,” Matt Grossmann and David Hopkins argue, “whereas Republicans view policy disputes as battlegrounds in a broader philosophical conflict.”\textsuperscript{167} Closely related, the Democratic Party has become a coalition of “social groups making specific programmatic demands on government,”


\textsuperscript{161} See, e.g., Commission to Study and Develop Reparation Proposals for African-Americans Act, H.R. 40, 117th Cong. (2021); \textit{see also} Jacob M. Schlesinger, Biden Offers Big Government Plan to Address Racial Inequality, WALL ST. J. (July 13, 2020, 10:00 AM), https://wsj.com/articles/biden-offers-big-government-plan-to-address-racial-inequality-11594648806 (contrasting Democratic support for “new spending and initiatives” with Republicans’ “market-oriented approach” to addressing racial inequality).

\textsuperscript{162} See, e.g., For the People Act of 2021, H.R. 1, 117th Cong.


\textsuperscript{166} See Toluse Olorunnipe & Ashley Parker, Trump’s Familiar Routine After Failing to Cut Deals with Congress: Signing Legally Dubious Executive Actions, WASH. POST (Aug. 9, 2020, 3:00 PM), https://washingtonpost.com/politics/trump-dealmaker-congress-coronavirus/2020/08/09/8a5b13c0-da52-11ea-809e-b8be57ba616e_story.html (“It’s pretty striking that other than the December 2017 tax law, basically all of the major moves by the Trump administration have been via executive action, even though he had control of Congress [for two years] . . .” (quoting Daniel Hemel)).

\textsuperscript{167} GROSSMANN & HOPKINS, \textit{supra} note 35, at 252; \textit{see also id.} (“Democrats propose major legislation more often and are more amenable to practical compromises . . . Republicans, in contrast, prefer a confrontational approach that relies more on procedural brinkmanship in pursuit of total victory—which is often defined as the successful blockade of Democratic initiatives.”).
whereas the Republican Party is largely “an ideological movement united by conservative values and skeptical of the assumption that government action can ameliorate social problems.” 168 Others contend that Democrats have been able to entrench key twentieth-century social welfare policies, such that it would be politically difficult for Republicans to pursue revisionist legislation even if they might wish to do so in principle. 169 In addition, as the next subsection explains, Republicans looking to cut back on economic regulation have a wider range of nonstatutory tools at their disposal than do Democrats looking to expand regulation.

Whatever its causes, this asymmetry means that the rules governing the legislative process cannot be neutral as between the parties’ policy agendas, for today’s Democratic Party has significantly more to lose from veto points that increase the difficulty of enacting legislation. And as already mentioned, the U.S. constitutional order is awash in such veto points. 170 The written Constitution, of course, requires that to become law a bill must pass each house of Congress and be signed by the president, 171 unless supermajorities in both chambers override a presidential veto. 172 Cameral rules in the House and Senate establish numerous additional procedural hurdles beyond bicameralism and presentment—including a bevy of congressional committees that most bills must clear and from which many never emerge. 173 Some of these hurdles, in particular the Senate’s sixty-vote cloture requirement, 174 are especially onerous in an age when neither party enjoys political dominance. 175

None of these features of the U.S. constitutional order is intrinsic to any lawmaking process. Alternative procedures are widely used both within the United States and abroad. Congress itself has deviated from its standard operating procedures for defined subject-matter areas, most notably by easing the rules for passage of budget legislation and trade agreements. 176 State legislative procedures differ from congressional procedures in ways that make it both easier and harder to

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168 Id. at 255–56.
169 See, e.g., Andrea Louise Campbell, How Policies Make Citizens: Senior Political Activism and the American Welfare State 2 (2011) (explaining that Social Security and Medicare have created a powerful constituency of senior citizens who “actively defend their programs” against legislative “tamper[ing]”).
170 See supra note 155 and accompanying text.
171 U.S. CONST. art. I, § 7, cl. 2.
173 The standard process in both chambers requires that a bill clear one or more subcommittees and one or more committees, each with jurisdiction defined by subject matter. See Walter J. Oleszek, Mark J. Oleszek, Elizabeth Rybicki & Bill Heniff Jr., Congressional Procedures and the Policy Process 99–143 (10th ed. 2016). In the House, the Rules Committee serves as an additional gatekeeper. See id. at 159–61. If different versions of a bill pass in the House and Senate, a conference committee typically crafts a final bill, which is then sent back to each chamber for a final vote. See id. at 330–75.
175 See Jentleson, supra note 118, at 9 (arguing that the filibuster has made the Senate “a kill switch that cuts off broad-based solutions and shuts down our democratic process”); id. at 5 (explaining that “the filibuster has mainly served to empower a predominately white conservatives”).
176 See generally Molly E. Reynolds, Exceptions to the Rule: The Politics of Filibuster Limitations in the U.S. Senate (2017) (detailing “majoritarian exceptions” to the filibuster employed by the Senate in certain policy areas since the late 1960s).
enact legislation. Most state legislatures do not have general supermajority requirements comparable to the Senate cloture rule,\textsuperscript{177} although many erect other hurdles to legislation such as requiring that each bill concern only a single subject\textsuperscript{178} or allowing governors to exercise a line-item veto.\textsuperscript{179} Meanwhile, every municipal legislature in the country is unicameral,\textsuperscript{180} as is one state legislature.\textsuperscript{181} Many constitutional systems around the world employ bicameralism, but without giving each chamber a “death lock over any legislation passed by the other” like the U.S. version does.\textsuperscript{182}

A number of other procedural rules also manifest bias by making lawmaking more difficult, either as a general matter or on particular topics with an ideological valence. Consider special procedural rules governing tax legislation. Because the parties are polarized on tax policy, rules that make it harder to raise taxes or easier to cut them favor Republican agendas, while rules with the opposite effects favor Democrats. Many state governments impose special supermajority requirements on proposed tax increases.\textsuperscript{183} At the federal level, the Origination Clause likewise creates a special hurdle to imposing taxes,\textsuperscript{184} although in practice it is easily circumvented.\textsuperscript{185} The budget reconciliation process once incorporated a bias in the opposite direction (allowing tax increases but not tax cuts to circumvent Senate cloture rules), but Congress has treated reconciliation as neutral as between tax cuts and tax increases since the 1990s.\textsuperscript{186} More generally, even relatively obscure rules that do not put a thumb on the scale in favor of a specific outcome, such as rules restricting earmarks and mandating public access to deliberations, have created conditions in Congress increasingly inhospitable to legislative dealmaking.\textsuperscript{187}


\textsuperscript{179} See supra notes 50–57 and accompanying text.

\textsuperscript{180} See Noah M. Kazis, American Unicameralism: The Structure of Local Legislatures, 69 HASTINGS L.J. 1147, 1149 (2018) (“There are more than 90,000 local governments in the United States. Each and every one has a single legislative chamber.” (footnote omitted)).

\textsuperscript{181} See generally CHARLYNE BERENS, ONE HOUSE: THE UNICAMERAL’S PROGRESSIVE VISION FOR NEBRASKA (2d. ed. 2013). For making treaties, the federal Constitution requires Senate supermajorities rather than bicameralism. U.S. CONST. art. II, § 2, cl. 2.

\textsuperscript{182} LEVINSON, supra note 6, at 47. In most of these other systems, the “lower” house is given the power to break deadlocks. Id. at 134.

\textsuperscript{183} See Supermajority Vote Requirements to Pass the Budget, NAT’L CONF. STATE LEG. (Nov. 9, 2018), https://ncls.org/research/fiscal-policy/supermajority-vote-requirements-to-pass-the-budget635542510.aspx.

\textsuperscript{184} U.S. CONST. art. I, § 7, cl. 1 (“All Bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”).


\textsuperscript{186} See Gould, supra note 19, at 996–97.

\textsuperscript{187} On earmarks, see DIANA EVANS, GREASING THE WHEELS: USING PORK BARREL PROJECTS TO BUILD MAJORITY COALITIONS 223 (2004) (arguing that “vote buying with pork barrel projects is useful, even essential, for passing general interest legislation” in a body like the U.S. Congress whose majority leaders have limited ability to enforce party discipline); John Hudak, Congress in 2019: Why the First Branch Should Bring Back Earmarks, BROOKINGS (Dec. 27, 2018), https://brookings.edu/blog/fixedgov/2018/12/27/congress-in-2019-why-
In sum, taking account of the parties’ mismatched legislative ambitions casts congressional procedure in a new light. The many institutional features that make legislating difficult at the federal level have come to impede the policy aspirations of Democrats more than those of Republicans—again, not just cyclically or episodically but systematically. When similar features exist in state or foreign legislative bodies, those features can be understood as structurally biased against legislatively ambitious parties in much the same way. Biases in the legislative process are critically important on their own terms, but they also put pressure on other sorts of institutions. Rules that hamstring Congress will tend to channel policymaking elsewhere, including the administrative state, the courts, and subnational governments. We turn next to structural biases in these other venues.

2. Ex Post Checks on Implementing or Enforcing Law (Executive Branch)

Structural constitutional arrangements shape the implementation and enforcement as well as the creation of statutory law. In a system that makes legislating difficult, the rules governing executive branch decisionmaking become all the more important. These rules, too, may be structurally biased in situations where the political parties have sharply divergent policy agendas.

Biases arising from veto points in the regulatory process parallel those arising from veto points in the legislative process. The two parties have different general orientations toward implementing and enforcing federal law. Crudely put, executive branch agencies that administer programs and regulate industries are often viewed by Democrats as critical to promoting the public interest, while many Republicans would prefer to constrain or outright abolish these agencies. In recent years, Republican elected officials and opinion leaders have called for eliminating the Environmental Protection Agency (EPA), the Internal Revenue Service, and the Departments of Agriculture, Commerce, Education, Energy, Housing and Urban Development, the Interior, and Transportation, as well as a host of smaller boards and programs.\footnote{See, e.g., Ted Cruz, \textit{Five for Freedom}, NAT’L REV. (Nov. 11, 2015, 1:30 AM), https://nationalreview.com/2015/11/ted-cruz-five-freedom; Jason Plautz, \textit{How to Eliminate Almost Every Federal Agency}, The ATLANTIC (Aug. 13, 2014), https://theatlantic.com/politics/archive/2014/08/how-to-eliminate-almost-every-federal-agency/452961; Brett Samuels, \textit{The 22 Agencies and Programs Trump’s Budget Would Eliminate}, THE HILL (Feb. 12, 2018, 1:28 PM), https://thehill.com/homenews/administration/373441-the-federal-programs-trump-proposes-cutting-in-2019-budget.} Even if some of these calls are more rhetorical than substantive, they demonstrate the extent of Republican hostility to the regulatory state. The political dynamics are reversed for a small number of agencies, with Republicans rather than Democrats favoring greater agency authority.\footnote{See, e.g., Rachel Levinson-Waldman & Haley Hinkle, \textit{The Abolish ICE Movement Explained}, BRENNA CTR. FOR JUST. (July 30, 2018), https://brennancenter.org/our-work/analysis-opinion/abolish-ice-movement-explained.} But the overall asymmetry is plain: Democrats for the most part want more active and empowered agencies, and Republicans want the opposite.

debate is one where Congress and the president often have opposite goals. The first branch wants to put more power into the hands of citizens—otherwise known as “the people.” The executive branch wants to put less power into the hands of the people. The two branches are trying to push in opposite directions, and the president has a veto, so the executive branch is in a worse position.\footnote{See, e.g., Rachel Levinson-Waldman & Haley Hinkle, \textit{The Abolish ICE Movement Explained}, BRENNA CTR. FOR JUST. (July 30, 2018), https://brennancenter.org/our-work/analysis-opinion/abolish-ice-movement-explained.}
This asymmetry means that structural arrangements that make it harder for agencies to take initiative, relative to alternative arrangements employed in prior periods or endorsed by reformers, may be biased against the contemporary Democratic Party. Nicholas Bagley has documented how the “proceduralism” of administrative law—the proliferation since the 1960s of procedural hurdles that agencies must clear before acting—has had just this effect. Agencies seeking to regulate in new or intensified ways face constraints of limited policy windows and overstretched senior personnel, along with well-resourced and mobilized opponents in the private sector. More procedural requirements make it more likely that any of these forces will thwart agency action. Using the notice-and-comment process to issue a rule, as critics of administrative-law “ossification” have emphasized, takes “a long time and an extensive commitment of agency resources.” A growing set of transparency requirements, meanwhile, impose relatively modest obligations on the national security agencies preferred by Republicans “while hobbling relatively visible efforts to regulate health, safety, the economy, the environment, and civil rights.” The current structure of administrative procedure, Bagley concludes, favors “inaction over action, deregulation over regulation, and nonenforcement over enforcement.”

Executive branch regulatory review embodies a similar deregulatory bias. Since the 1980s, the Office of Information and Regulatory Review (OIRA), which sits within the Office of Management and Budget (OMB), has reviewed proposed regulations prior to their taking effect. In theory, such an arrangement need not be biased for or against regulation. But in practice, it nearly always serves to impede or dilute rather than to generate or strengthen regulatory initiatives. As Bagley and Richard Revesz have noted, “many of the features of OMB review create a profound institutional bias against regulation—a bias which is inexplicable except with reference to the implicit Reagan-era belief that agencies will systematically overregulate.” This holds true

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190 See Bagley, supra note 58, at 358–69.
193 David E. Pozen, Freedom of Information Beyond the Freedom of Information Act, 165 U. PA. L. REV. 1097, 1111 (2017); see also Pozen, supra note 187, at 156 (explaining that U.S. transparency laws have evolved since the 1960s in ways that make them “harder to square with the progressive commitment to energetic, egalitarian government than with a libertarian vision of a minimalist state authorized primarily to protect citizens against violent threats”).
194 Bagley, supra note 58, at 368–69.
even in “pro-regulatory presidential administrations.”\textsuperscript{197} Despite a fleeting experiment with “prompt letters” as a tool to encourage agencies to act,\textsuperscript{198} OMB review has consistently favored the Republican Party’s deregulatory agenda.

Beyond veto points, more specific rules governing executive branch policymaking can be structurally biased as well. For instance, a fierce controversy from a prior generation suggests at least one respect in which today’s budget rules are structurally biased in favor of higher spending and thus the contemporary Democratic Party. For nearly two centuries, presidents held the power of impoundment, which allowed them to decline to spend funds appropriated by Congress.\textsuperscript{199} Impoundment was used by presidents of both parties.\textsuperscript{200} But like the line-item veto, impoundment is a one-way ratchet, in that it allows a president unilaterally to reduce federal spending but not to increase it. The different attitudes of the two parties toward federal spending\textsuperscript{201} came to lend that feature a partisan cast. A Republican president could use impoundment authority to target various social welfare programs, especially less popular programs benefiting the poor, while a Democratic president with this authority would find fewer politically plausible uses for it. A prohibition on impoundment is accordingly biased toward Democrats, relative to rules that allow the practice. Consistent with this analysis, when Congress ultimately banned impoundment in 1974, the ban was passed by Democratic congressional majorities reacting to aggressive use of impoundment authority by a Republican chief executive.\textsuperscript{202}

3. Ex Post Checks on Implementing or Enforcing Law (Judicial Branch)

Turning from the second branch to the third, the organization of judicial power can also be structurally biased in multiple respects. Here, we consider possible biases arising from the two central ways in which federal courts interact with Congress and the executive: strong-form constitutional review of laws and regulations, and judicial review of agency decisionmaking.\textsuperscript{203}

\textsuperscript{197} Barron, supra note 196, at 1114 (“OIRA review has a consistent deregulatory influence even in pro-regulatory presidential administrations.”).

\textsuperscript{198} See Curtis W. Copeland, The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking, 33 FORDHAM URB. L.J. 1257, 1289–90 (2006) (noting a small number of prompt letters during President George W. Bush’s first term); Michael A. Livermore & Richard L. Revesz, Regulatory Review, Capture, and Agency Inaction, 101 GEO. L.J. 1337, 1381 (2013) (observing that “the practice of prompt letters was always ad hoc” and was not “continued by the Obama Administration”).


\textsuperscript{200} See Gerald A. Figurski, Presidential Impoundment of Funds, 7 AKRON L. REV. 107, 111 (1973) (describing how “Presidents from FDR on impounded various programs and irritated Congress in the process”).

\textsuperscript{201} See supra note 56 and accompanying text.

\textsuperscript{202} Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297; see CHAFETZ, supra note 19, at 64–66 (discussing this episode).

\textsuperscript{203} Many other ostensibly neutral features of judicial practice might be considered part of structural constitutional law, at least on some accounts, and give rise to structural bias—from substantive rules governing judicial review of actions taken by state and local officials, to procedural rules governing access to court, to remedial rules governing plaintiffs’ ability to obtain monetary or injunctive relief from different sorts of defendants. Investigation of possible structural biases caused by these features is an important and complex task.
The U.S. federal judiciary exercises a paradigmatic version of “strong-form” judicial review, in which “the courts have general authority to determine what the Constitution means” and “the courts’ constitutional interpretations are authoritative and binding on the other branches,” including Congress.\(^{204}\) While the legal literature on judicial review often focuses on its complex relationship to democracy,\(^{205}\) judicial review can also be understood more simply as an additional veto point in the legislative process.\(^{206}\) Even if a statute manages to satisfy bicameralism and presentment, courts can still prevent it from taking effect by deeming it incompatible with the Constitution. A veto-point perspective becomes all the more resonant at a time when the federal courts are increasingly polarized along the same left-right axis as the rest of government.\(^{207}\)

Understanding constitutional judicial review as a veto point raises the possibility that, like other veto points, it might be structurally biased. Given the asymmetry in the legislative agendas of the two parties, contemporary Democrats have more to lose from strong-form judicial review of federal statutes than do contemporary Republicans, just as they have more to lose from analogous veto points in Congress and the executive branch. It is easy to imagine a conservative Supreme Court overturning future progressive legislation on constitutional grounds.\(^{208}\) By contrast, if a liberal Supreme Court were to exist during a future period of Republican control of the political branches, those branches may not produce as much ambitious domestic legislation that could be challenged in court.\(^{209}\)

A cursory glance at U.S. history provides support for the proposition that judicial review of federal statutes tends to be biased against left-leaning political programs—a proposition that early

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that we reserve for future work. Restrictive standing rules, for instance, could cut in a liberal direction insofar as they insulate social welfare and regulatory policies from industry challenges, while at the same time cutting in a conservative direction insofar as they stymie challenges to race discrimination, environmental misconduct, or the like. Which effect dominates, and with what consequences for the policy goals of the two major political parties, is an empirical question not well illuminated by the formal content of the rules themselves.


\(^{207}\) See, e.g., Christopher Sundby & Suzanna Sherry, *Term Limits and Turmoil*: Roe v. Wade’s Whiplash, 98 TEX. L. REV. 121, 133–34 & nn.55–60 (2019) (summarizing evidence that “the Court increasingly votes along ideological lines that are predictable and closely aligned with the views and preferences of political parties”).

\(^{208}\) See Doerfler & Moyn, *supra* note 108 (manuscript at 16) (noting that “the single most important driver of Supreme Court reform debate” in recent years has been Democrats’ fear that the judiciary will become “a stronghold of resistance against progressive legislative ambition”); see also Robin West, *The Aspirational Constitution*, 88 NW. U. L. REV. 241, 251 (1993) (arguing that judicial review has a conservative slant because “progressive gains require a degree of legislative experimentalism that judicially imposed constitutional constraints inhibit”).

\(^{209}\) See *supra* notes 158–169 and accompanying text.
The argument that strong-form judicial review is biased toward small-government conservatism might lose much of its force in a system where the constitutional courts were inclined and able to spur the legislature into taking action to promote social rights or social welfare. This is not our system. Unlike most written constitutions in effect today, the U.S. Constitution is generally viewed as “a charter of negative rather than positive liberties.” 219


211 E.g., Civil Rights Cases, 109 U.S. 3 (1883); United States v. Reese, 92 U.S. 214 (1876).

212 E.g., Hammer v. Dagenhart, 247 U.S. 251 (1918); United States v. E.C. Knight, 156 U.S. 1 (1895).


219 Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.); see also, e.g., DeShaney v. Winnebago Cty. Dep’t of Soc. Servs, 489 U.S. 189, 195 (1989); Harris v. McRae, 448 U.S. 297, 317–18 (1980); Lindsey v. Normet, 405 U.S. 56, 74 (1972); David S. Law & Mila Versteeg, The Declining Influence of the United States Constitution, 87 N.Y.U. L. Rev. 762, 806–07 (2012) (describing the U.S. Constitution as “rooted in a libertarian constitutional tradition that is inherently antithetical to the notion of positive rights” and demonstrating that it is increasingly a global outlier in not expressly providing for such rights). Within the United States, judicial enforcement of positive constitutional rights is far more prevalent at the state level. See generally EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS (2013).
courts recognize doctrines such as “legislative omission” that they can employ to force legislatures to regulate in the service of social and economic entitlements.\textsuperscript{220} In the United States, no such doctrine exists, and “even at the high tide of their political ascendancy, liberals couldn’t get the Supreme Court to commit to distributive entitlements of any kind.”\textsuperscript{221} While the libertarian tilt of constitutional judicial review may be especially acute in this country, given our negative-rights-oriented text and tradition, there is some evidence that it generalizes broadly. One leading comparative study, for instance, provides a political and cultural account of why judicial enforcement of constitutional rights has been less effective at fostering egalitarianism than at “shielding the economic sphere from attempts to reduce socioeconomic disparity through regulatory and redistributive means.”\textsuperscript{222}

Judicial review of agency action can be structurally biased in much the same way as strong-form constitutional judicial review of statutes. A critical threshold issue is which sorts of agency behaviors will be subject to judicial scrutiny in the first instance. Whereas U.S. agencies seeking to adopt regulations or initiate enforcement proceedings must be prepared to defend their actions in court, under \textit{Heckler v. Chaney}\textsuperscript{223} and associated cases no such burden attends most decisions to decline to regulate or enforce. “Agencies can thus gut existing rules by enforcing them less vigorously—without observing any procedural niceties at all.”\textsuperscript{224} Whichever party does not hold the presidency is apt to decry nonenforcement decisions,\textsuperscript{225} but this sort of flip-flopping should not obscure the deeper dynamic. The result of subjecting agency action to regular judicial review,


\textsuperscript{222} \textsc{Ran Hirsch}, \textit{Towards Juristocracy: The Origins and Consequences of the New Constitutionalism} 218 (2004); \textit{see also} \textsc{Judicial Power and the Left: Notes on a Skeptical Tradition} (Richard Ekins & Graham Gee eds., 2017) (collecting essays from European and American authors emphasizing the longstanding tension between judicial review and progressive politics). Specifying the conditions under which constitutional judicial review of statutes will not have a rightward tilt is well beyond the scope of this Article; the claim here is that the traditional U.S. model has such a tilt.

\textsuperscript{223} 470 U.S. 821 (1985) (holding that executive nonenforcement decisions are presumptively unreviewable).

\textsuperscript{224} Bagley, \textit{supra} note 58, at 365; \textit{see also id}. at 366 (“On occasion, the courts will rebuke agencies for adopting categorical nonenforcement policies, but agencies face virtually no litigation risk if they don’t publicly codify those policies (and little risk even if they do).” (footnotes omitted)). While \textit{Heckler} sets out the contemporary administrative law framework, nonenforcement has long been a means for opponents of a federal statute’s goals to blunt its impact without judicial remedy. \textit{See, e.g., Pamela Brandwein, Rethinking the Judicial Settlement of Reconstruction} 28 (2011)” (“[A] pattern materialized in the aftermath of the [civil rights] acts of 1866 and 1867: the local and systematic refusal to punish Klan violence and intimidation aimed at blacks, white Republicans, and Freedmen’s Bureau agents.”).

while sparing agency inaction, is a structural bias toward nonenforcement of regulatory statutes and toward parties that have a consistently stronger interest in such nonenforcement.\textsuperscript{226}

Limits on more searching judicial review can serve as a partial counterweight to this bias. Consider the practice of courts deferring to reasonable agency interpretations of ambiguous or silent statutes under \textit{Chevron}, rather than reviewing those interpretations de novo.\textsuperscript{227} Whichever party controls the White House can benefit from \textit{Chevron} deference, but again there is an asymmetric effect that transcends the rotation of power. Recent Democratic administrations have relied heavily on agency rulemakings in implementing new statutes\textsuperscript{228} and in seeking to adapt old statutes to new policy challenges in the face of congressional gridlock, perhaps most notably in the environmental context.\textsuperscript{229} \textit{Chevron} plays a crucial role in safeguarding these efforts from industry attack.\textsuperscript{230} While Republican administrations sometimes rely on \textit{Chevron} in pursuit of deregulatory aims, they have many other deregulatory tools at their disposal: they can decline to enforce regulatory statutes, grant waivers to regulated entities, refuse to appoint or confirm regulators, or seek to limit agencies’ resources.\textsuperscript{231} Once the full panoply of pro- and anti-regulatory tools available to the parties is accounted for, it becomes apparent that \textit{Chevron} deference is more valuable to contemporary Democrats than to contemporary Republicans.\textsuperscript{232}

4. Executive Branch Organization and Personnel

\textsuperscript{226} While a number of Trump Administration deregulatory actions were enjoined by the courts, see \textit{Roundup: Trump-Era Agency Policy in the Courts}, INST. FOR POL’LY INTEGRITY (Jan. 20, 2021), https://policyintegrity.org/trump-court-roundup (collecting cases), most of those decisions rested on agency failures to follow the procedural requirements of the Administrative Procedure Act or to provide a reasoned explanation for policy changes—leaving intact the underlying asymmetry created by \textit{Heckler}. But cf. Benjamin Eidelson, \textit{Reasoned Explanation and Political Accountability in the Roberts Court}, 130 YALE L.J. (forthcoming 2021) (manuscript at 42–47), https://scholar.harvard.edu/files/beidelson/files/reasoned-explanation.pdf (speculating that a nascent “accountability-forcing” approach to rationality review could lead to expanded judicial review of nonenforcement policies in the future).


\textsuperscript{230} Cf. Freeman & Spence, \textit{supra} note 229, at 69 n.299 (noting that judicial review of every agency decision discussed in their article would “invoke the \textit{Chevron} doctrine”).

\textsuperscript{231} See Elinson & Gould, \textit{supra} note 110 (manuscript at 4).

\textsuperscript{232} See \textit{id.} at 46–52 (explicating this bias and the various reasons for it); see also \textsc{Mark Tushnet}, \textsc{Taking Back the Constitution: Activist Judges and the Next Age of American Law} 162 (2020) (arguing that \textit{Chevron} is “a major benefit” to agencies seeking to regulate (or “re-regulate”) under conditions of congressional gridlock and only “a small benefit” to agencies seeking to deregulate, such that abandoning the doctrine would on balance serve the cause of “deconstruct[ing] the administrative state”).
We have focused thus far on the policymaking process, where a plethora of veto points in all three branches broadly favor those who would prefer to see government do less. Conservatives, however, have recently argued that a different set of structural biases prevent them from accomplishing their policy goals, arising from the composition of the federal bureaucracy and from legal limits on the president’s control of it.

These arguments have some force, but the overall story of structural bias in this area is mixed. The U.S. federal bureaucracy is staffed predominantly by civil servants, who are protected by law from politically motivated coercion\(^\text{233}\) and retaliation for whistleblowing.\(^\text{234}\) These sorts of protections can have a partisan or ideological bias, relative to at-will employment or other less politically insulated arrangements, if bureaucrats tend to hold either left- or right-of-center views.\(^\text{235}\) Federal employees in the aggregate lean Democratic,\(^\text{236}\) although their politics vary considerably across agencies. One prominent study found strong liberal leanings among employees at some agencies (most notably the EPA, Federal Trade Commission, and National Labor Relations Board) and strong conservative leanings among employees at others (most notably the Department of Defense and Department of Homeland Security).\(^\text{237}\) Republicans are therefore correct that rules insulating the bureaucracy from political control or otherwise empowering civil servants may be biased toward Democrats in the case of regulatory and social welfare agencies. The upshot has been Republican efforts at the federal and state levels to limit civil service


\(^{234}\) See Jon O. Shimabukuro, L. Paige Whitaker & Emily E. Roberts, Cong. Rsch. Serv., R43045, Survey of Federal Whistleblower and Anti-Retaliati on Laws (2013); see also Shawn Marie Boyne, Whistleblowing, 62 Am. J. Comp. L. 425, 428 (2014) (“Outside the national security employment sector, the breadth and depth of whistleblower protections in the United States has grown exponentially since the Watergate era.”).


protections.\textsuperscript{238} In the national security and law enforcement contexts, the bias appears to be reversed.

Given the civil service’s ideological profile, legal arrangements that allow for “independent agencies” can likewise give rise to structural bias. Such arrangements have a long constitutional pedigree\textsuperscript{239} and are typically justified as necessary to shield “expert decisionmakers from the shifting winds of politics.”\textsuperscript{240} The past several decades, however, have witnessed the rise of a “unitary executive” theory that would give the president exclusive authority to “direct, control, and supervise inferior officers or agencies.”\textsuperscript{241} Consistent with the view that there is a liberal bias to the status quo of agency independence,\textsuperscript{242} these ideas have been developed and promoted almost entirely by conservative judges and scholars.\textsuperscript{243} While there is no clear empirical evidence that bureaucratic insulation has enabled Democratic civil servants to subvert Republican policy programs,\textsuperscript{244} there is also no evidence about the counterfactual: who would benefit from greater presidential control over the administrative state? Republican proponents of unitary executive theories may well be correct that they would benefit from such a change.

A structural bias in the other direction may exist in rules governing appointments of agency leaders. Federal law requires presidential nomination and Senate confirmation for over a thousand executive branch officials.\textsuperscript{245} The rules are formally neutral as between the parties, but they have disparate impacts on the two. When Republicans control the White House, they can drag their feet


\textsuperscript{239} See, e.g., Humphrey’s Executor v. United States, 295 U.S. 602, 629 (1935) (“The authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted.”); see also 44 U.S.C. § 3502(5) (listing independent agencies).

\textsuperscript{240} Emily Hammond Meazell, Presidential Control, Expertise, and the Deference Dilemma, 61 DUKE L.J. 1763, 1778 (2012); see also id. (“Other reasons for creating independent agencies involve maintaining stability, providing insulation from interest-group capture, and protecting against bureaucratic drift.”).


\textsuperscript{242} See, e.g., Mark Seidenfeld, A Big Picture Approach to Presidential Influence on Agency Policy-Making, 80 IOWA L. REV. 1, 25 n.37 (1994) (citing sources on such views during the Nixon and Reagan Administrations); see also JASON CHAFFETZ, THE DEEP STATE: HOW AN ARMY OF BUREaucrats PROTECTED BARACK OBAMA AND IS WORKING TO DESTROY THE TRUMP AGENDA (2018) (making similar arguments about bureaucrats during the Trump Administration).


\textsuperscript{244} See Bagley & Revesz, supra note 196, at 1300.

on making appointments that would enable disfavored agencies to carry out their missions. “[I]n many cases,” as President Trump acknowledged in 2017, “we don’t want to fill [executive branch] jobs . . . because they’re unnecessary to have.”

The dynamic is different when Democrats control the White House. During the Obama Administration, Senate Republicans attempted (often successfully) to block appointments as a means of undermining various agencies. Perhaps the most pointed example involved the Consumer Financial Protection Bureau (CFPB). After failing to prevent the creation of the CFPB in 2010, Republicans refused to hold an up-or-down vote on President Obama’s nominee to run the bureau in order to leverage changes in the bureau’s structure and disable it from bringing enforcement actions that required a confirmed director. Agencies that lack Senate-confirmed leadership have been found to be less productive and to have lower employee morale. And the confirmation process itself consumes valuable Senate floor time that could otherwise be devoted to legislative efforts. Democrats are more dependent on confirmed nominees for their policy agendas, and they incur greater opportunity costs for time spent on the confirmation process. The rules governing appointments of agency leaders can therefore be seen as biased toward Republicans relative to alternative arrangements, including those employed in virtually all other democracies, that subject fewer executive branch positions to any sort of legislative vote.

5. Federalism

The organization of the U.S. government into multiple layers—federal, state, and local—can also give rise to structural biases. This overarching organization has complex and cross-cutting effects, and many people’s views on federalism vary depending on which parties currently hold power at the state and national levels. But certain features of U.S. federalism seem to have more

250 See Anne Joseph O’Connell, Vacant Offices: Delays in Staffing Top Agency Positions, 82 S. CAL. L. REV. 913, 935 & n.117 (2009) (explaining that there are “far more political jobs in the American administrative state than in other developed countries” and collecting comparative examples). Congress has taken modest steps in recent years to lower the number of appointees requiring Senate confirmation. See Presidential Appointment Efficiency and Streamlining Act of 2011, Pub. L. No. 112-166, 126 Stat. 1283 (2012). Separate from these steps, any pro-Republican structural bias arising from the difficulty of the confirmation process is smaller today than it was a decade ago, on account of the elimination in 2013 of the filibuster for executive branch nominees. See William G. Dauster, The Senate in Transition or How I Learned to Stop Worrying and Love the Nuclear Option, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 631, 645–48 (2016). Prior to that rule change, nominees could be blocked by the minority party in the Senate even when the other party controlled both the White House and the Senate.
251 See Bulman-Pozen, supra note 34, at 1082–122 (arguing that partisanship shapes Americans’ identification with states and state challenges to federal policy); Posner & Sunstein, supra note 3, at 488, 501,
As is well known, federalism can at times lead to a “race to the bottom,” wherein state officials compete against each other to attract business by lowering taxes, limiting liability, or reducing regulation. In Justice Louis Brandeis’s words, interstate regulatory competition can be “one not of diligence but of laxity.”\textsuperscript{252} South Dakota, for example, became a center of the national credit card industry in the early 1980s by eliminating its usury cap.\textsuperscript{253} Year in and year out, state and local governments offer businesses tens of billions of dollars in special tax incentives to relocate to or remain within their jurisdiction.\textsuperscript{254}

Beyond the race-to-the-bottom risks that are endemic to federalist systems, specific doctrines associated with U.S. federalism can create more specific forms of deregulatory bias. Consider the Supreme Court’s decision in \textit{National Federation of Independent Businesses v. Sebelius}\textsuperscript{255} (NFIB), which struck down as impermissibly coercive the Affordable Care Act’s use of funding conditions to induce states to expand Medicaid.\textsuperscript{256} Roughly half of the states declined to expand Medicaid in the aftermath of the Court’s ruling, denying health insurance to millions of Americans,\textsuperscript{257} and at this writing a dozen states still have not expanded Medicaid.\textsuperscript{258} The Court’s anti-coercion logic could in theory apply to a Republican-sponsored law just as to a Democratic-sponsored law. But the absence of any plausible real-world examples of the former points toward a structural bias: because Democrats are more reliant on cooperative federalism programs in carrying out their policy agendas and strengthening social welfare regimes, judge-made limits on how the federal government may spur states to partner in administering such regimes have a conservative slant.

Judicial doctrine on federal preemption of state law manifests a similar bias.\textsuperscript{259} The basic principle of preemption seems politically neutral: “any state law, however clearly within a state’s acknowledged power, which interferes with or is contrary to federal law, must yield.”\textsuperscript{260} As a

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507 (discussing federalism flip-flops, in which people alternately “promote or deride federalism based on their views of the substantive political outcomes at stake”); Louis Michael Seidman, \textit{Substitute Arguments in Constitutional Law}, 31 J.L. & Pol. 237, 285 (2016) (“Even a casual observer of American constitutional culture knows that federalism provides fertile turf for hypocritical [arguments].”),

\textsuperscript{252} Louis K. Liggett Co. v. Lee, 288 U.S. 517, 559 (1933) (Brandeis, J., dissenting in part).


\textsuperscript{254} \textit{See}, e.g., Evan Mast, \textit{Race to the Bottom? Local Tax Break Competition and Business Location}, 12 AM. ECON. J.: APPLIED ECON. 288, 288 (2020) (“State and local governments in the United States spend approximately $45 billion each year on tax incentives that aim to attract businesses or encourage the growth of existing businesses.”).

\textsuperscript{255} 567 U.S. 519 (2012).

\textsuperscript{256} \textit{Id.} at 575–88. For an illuminating analysis of this portion of the Court’s ruling, see Samuel Bagenstos, \textit{The Anti-Leveraging Principle and the Spending Clause after NFIB}, 101 GEO. L.J. 861 (2013).


\textsuperscript{259} We focus here on federal-state preemption, but state preemption of municipal law can also be structurally biased in favor of conservative outcomes. \textit{See supra} notes 40–42 and accompanying text.

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practical matter, however, most preemption cases involve “claims by business entities that rigorous regulation at the state level must give way to comparatively less rigorous regulation at the national level . . . , ranging from oil tanker safety rules in Washington and air pollution standards in California, to tort standards in Tennessee and restrictions on tobacco ads in Massachusetts.”

The reason for this is an asymmetry between regulation and deregulation. If federal regulations are more demanding than state regulations on the same topic, regulated parties will have to comply with the stricter federal rules; preemption does not enter the conversation. But if federal regulations are less demanding, preemption can serve to sweep aside stricter state alternatives. The especially “expansive” approach to preemption taken by the Rehnquist and Roberts Courts, accordingly, has had a deregulatory effect.

More familiar is federalism’s troubled relationship with issues of race and civil rights. As discussed in Part II, American progressives have long been “deeply skeptical of federalism” on account of its historical use by defenders of slavery and, later, Jim Crow to promote white supremacy in the name of constitutional structure. The racialized character of constitutional federalism doctrine persists to some extent into the present. The Roberts Court in *Shelby County v. Holder* struck down the Voting Rights Act’s coverage formula as inconsistent with “the fundamental principle of equal sovereignty” among states. This ruling “nullified the most important provision ever passed to combat racial vote denial (and racial vote dilution)” and

261 Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 133–34 (2004) (citations omitted); see also Ernest A. Young, “The Ordinary Diet of the Law”: The Presumption Against Preemption in the Roberts Court, 2011 SUP. CT. REV. 253, 342 (“Federal preemption is generally deregulatory—that is, preemption cases typically arise only where a state government has regulated more strictly than has the national government.”).

262 Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2127–28 (2019) (citing empirical research on the Rehnquist Court’s embrace of preemption and noting that “[t]he Roberts Court has cheerfully continued this trend with expansive preemption rulings and even attempts to neuter abstention doctrines developed in the 1970s”).

263 See supra notes 76–82 and accompanying text.


265 See, e.g., supra note 76 (discussing the nullification crisis); Pamela Brandwein, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 36 (1999) (noting that an antebellum “consensus recognized that ‘state sovereignty’ protected Southern slavery from federal reach”).


268 *Id.* at 544; cf Ilya Somin, Federalism and the Roberts Court, 46 PUBLIUS 441, 447 (2016) (observing that “NFIB and *Shelby County* were easily the most consequential Supreme Court federalism decisions of the post-New Deal era”).

predictably led to new restrictions on the franchise and reduced minority political participation in many of the same jurisdictions that once invoked states’ rights to defend American apartheid.270

These examples do not imply that federalism always leads to deregulatory spirals or diminishment of civil rights. On the contrary, large progressive states may set preregulatory baselines that end up being followed by smaller states271 or federal regulators272 when Congress and the courts permit. Even when no such race to the top occurs, stringent state laws can have spillover effects across jurisdictional lines.273 So, too, can federalism doctrines that allocate valuable entitlements to the states have progressive distributional consequences under certain conditions.274 And many state and local governments provide protections for civil rights well above the floors established by the federal Constitution and federal statutes.275

Yet even if “progressive federalism” is not an oxymoron and indeed was particularly vibrant during the Trump Administration, it remains fair to conclude that U.S. federalism is biased on net against the contemporary Democratic agenda, especially in the areas of economic regulation and social welfare policy. Interjurisdictional competition and a host of structural constitutional law doctrines—exemplified by preemption, anti-coercion, and equal sovereignty—have all significantly set back this agenda. Political scientists have explained, more broadly, how “federalism’s” many venues generally disadvantage groups with comprehensive, progressive policy aims.276 And a large body of work by political economists, referenced above, demonstrates that


272 In perhaps the most famous modern example of this dynamic, federal law specifically permits California to set stricter motor-vehicle emissions standards, and both other states and the EPA have at times followed its lead. See Vogel, supra note 271, at 259; Jessica Bulman-Pozen & Heather K. Gerken, Uncooperative Federalism, 118 YALE L.J. 1256, 1277 (2009).

273 These spillovers interact with dormant commerce clause doctrine, under which, in the absence of congressional consent, any state “statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority and is invalid.” Healy v. Beer Inst., 491 U.S. 324, 336 (1989). The ability of states to regulate in ways that may have spillover effects thus turns in part on if, when, and how courts deploy this extraterritoriality doctrine.


275 See, e.g., Gerken, Progressive Federalism, supra note 264 (outlining ways in which federalism can promote racial equality and minority rights). Liberals have long recognized the rights-protecting potential of state constitutional law. See, e.g., William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489 (1977).

greater decentralization tends to lead to smaller welfare states and lower public spending.277 Because federalism can sometimes facilitate progressive electoral gains and policy outcomes, understanding the structural biases associated with it requires close examination of the details of particular arrangements.278 But it is equally important not to miss the forest for the trees. Relative to more centralized systems, the constitutional design of U.S. federalism has helped conservatives and harmed progressives in ways that modern developments have only partly unraveled.

6. Geography, Demography, and the Electoral System

The intersection of constitutional design and political geography can give rise to numerous structural biases. The prevailing political geography of the United States—in which Democrats predominate in urban areas and inner-ring suburbs while Republicans predominate in exurban and rural areas—tilts a host of longstanding structural arrangements in Republicans’ favor.279 We will be especially brief in reviewing examples here, both because Part II already discussed this intersection at length and because the examples are especially familiar.280

Most obviously, constitutional rules that treat all states on equal terms regardless of population will be biased toward parties that are strongest in small states, relative to rules that comply with some version of the one-person-one-vote principle. Today, the most sparsely populated states have Republican majorities, and Republicans are far more likely than Democrats to be in the majority of more than half the states even if they are in the minority nationwide.281 The structure of the Senate rewards this geographic distribution by allocating to each state two senators and to each senator one vote.282 Because of the concentration of Democrats in large and medium-sized states, Republicans can control the Senate even when Democrats win a majority of all Senate votes cast

277 See supra note 63 and accompanying text.
278 See, e.g., Scott L. Greer, Introduction: Comparative Federalism, Public Policy, and Money, in FEDERALISM AND SOCIAL POLICY: PATTERNS OF REDISTRIBUTION IN 11 DEMOCRACIES 1, 1 (Scott L. Greer & Heather Elliott eds., 2019) (arguing that the “relationship between social democracy and federalism is all in the rules”).
279 See supra notes 115–147 and accompanying text.
280 Our examples of biases in election law are illustrative rather than exhaustive. One significant swath that we bracket for present purposes is campaign finance law, which, “like other electoral laws, can obviously be a vehicle for . . . partisan advantage-seeking.” Richard H. Pildes, The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics, 118 HARV. L. REV. 28, 130 (2004). We assume that certain rules governing campaign finance are biased toward one party or the other, and some empirical literature suggests as much. See, e.g., Nour Abdul-Razzak, Carlo Prato & Stephane Wolton, After Citizens United: How Outside Spending Shapes American Democracy, 67 ELECTORAL STUD. 1, 7 (2020) (finding, based on an analysis of state legislative races, that “Citizens United yielded an increase of approximately 11.5% in Republican seat shares”); Andrew B. Hall, Systemic Effects of Campaign Spending: Evidence from Corporate Contribution Bans in US State Legislatures, 4 POL. SCI. RSCH. & METHODS 343 (2016) (showing a correlation between corporate campaign contribution bans and Democratic state legislative seats). But more generally, the empirical evidence on the relationship between campaign fundraising and electoral outcomes is mixed, see Yasmin Dawood, Campaign Finance and American Democracy, 18 ANN. REV. POL. SCI. 329, 340–42 (2015); and as far as we are aware, scholars have not demonstrated systematic partisan bias in the contemporary U.S. campaign finance regime relative to plausible alternative modes of financing campaigns in a two-party context.
281 See supra notes 115–119 and accompanying text.
in a given cycle.\textsuperscript{283} The Electoral College is not as biased as the Senate, given that it also takes into account the size of each state’s House delegation, which is apportioned based on population.\textsuperscript{284} But by including each state’s two senators in its calculation of electors, the Electoral College puts a thumb on the scale in favor of small states—which, again, in the contemporary United States are disproportionately conservative.\textsuperscript{285}

While the Electoral College and the Senate are perennially relevant, more obscure features of our constitutional order are biased in related ways. Ratifying a constitutional amendment proposed by Congress requires the support of three-fourths of the states.\textsuperscript{286} The Twelfth Amendment provides that if no candidate wins an Electoral College majority, the election is settled in the House, with each state’s House delegation casting one vote.\textsuperscript{287} Both of these provisions treat large states and small states on equal terms and, as a result, generate a conceptually similar (if less politically consequential) bias against contemporary Democrats.

The process for electing House members is also biased against contemporary Democrats, to a lesser degree. As explained in Part II, the combination of single-member districts and the concentration of Democratic voters in urban areas means that Republicans consistently win an outsized percentage of House seats relative to the percentage of votes received.\textsuperscript{288} So long as House elections use single-member districts and partisans are geographically distributed as they are, these elections will continue to be biased toward the Republican Party relative to a system of proportional representation.

The intersection of demographic voting patterns and ballot access rules also gives rise to structural bias. As explained in Part II, Democrats today dominate among young and Black voters, while older and white voters are core to the Republican base.\textsuperscript{289} These electoral features tee up attempts to grow or shrink the electorate along demographic lines for partisan gain. Thus,


\textsuperscript{284} See U.S. CONST. art. II, § 1, cl. 2 (allocating to each state “a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress”).

\textsuperscript{285} See, e.g., Michael Geruso, Dean Spears & Ishaana Talesara, Inversions in US Presidential Elections: 1836–2016, at 3 (Nat’l Bureau of Econ. Rsch., Working Paper No. 26247, 2019) (showing that the probability of an “inversion,” or an Electoral College victory for a national-popular-vote loser, has been highly asymmetric across the parties in the past thirty years: “conditional on an inversion occurring, the ex ante probability that it would have been won by a Republican ranges from 62% to 93% across models we analyze (in contrast to the ex post realization of 100%)”); see also Ian Millhiser, The Astounding Advantage the Electoral College Gives to Republicans, in One Chart, VOX (Sept. 17, 2019, 7:50 AM), https://vox.com/policy-and-politics/2019/9/17/20868790/republicans-lose-popular-vote-win-electoral-college.

\textsuperscript{286} U.S. CONST. art. V.

\textsuperscript{287} Id. amend. XII, cl. 3.

\textsuperscript{288} See supra notes 120–125 and accompanying text.

\textsuperscript{289} See supra notes 131–137 and accompanying text.
Democrats rightly criticize voter ID laws as being anti-Democratic as well as anti-democratic, while Republicans plausibly fear that, for the foreseeable future, felon reenfranchisement and automatic voter registration could harm their electoral prospects relative to current voting rules.  

Finally, recent debates over ranked-choice voting (RCV) show how structural biases can manifest differently depending on contingent facts on the ground. Under prevailing election rules in nearly every U.S. jurisdiction, voters select one candidate and the winner is the candidate who receives the most votes. Under RCV, voters rank candidates from favorite to least favorite, the least popular candidates are sequentially eliminated, and votes for candidates who have been eliminated are reallocated based on voters’ preference ordering. RCV proponents argue that, among other benefits, it prevents “spoilage,” in which “a minor party candidate splits the vote with a major-party candidate who might have prevailed were it not for the minor-party candidate being in the race.”

RCV could help Democrats in some races, by preventing spoiling by Green Party or other left-wing candidates. In other races, where the would-be spoiler is instead a Libertarian or other right-wing candidate, RCV could help Republicans. It is not clear that either sort of race predominates today. But in the pre-New-Deal era, spoilers were significantly more common on the political left, which meant that the prevailing first-past-the-post voting rules were structurally biased against Democrats relative to RCV. Partly because of this very phenomenon, the Democratic Party moved left to co-opt support for such spoilers—an excellent example of how structural biases can not only help or harm parties in specific periods but also dynamically reshape party platforms and coalitions over time.

7. Constitutional Amendment Rules

The U.S. Constitution is “unusually, and probably excessively, difficult to amend.” The rarity of amendment makes it hard to directly observe any bias associated with this feature: neither party has made formal constitutional change central to its agenda in recent decades, and partisan-identified amendment proposals have been largely symbolic in nature. But at a minimum, even if the parties are not divided in their general approach to revising the constitutional text, the

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290 Cf. Pozen, supra note 71, at 953 (noting that “at this moment in political time most proposals to make it easier to vote would advance not only ‘small-d’ democratic values but also ‘big-D’ Democratic interests”).


292 Id. (manuscript at 8); see also Rob Richie, Ranked Choice Voting May Affect Partisan Outcomes, but It Always Helps Voters, FAIRVOTE (Nov. 9, 2018), https://fairvote.org/ranked_choice_voting_may_affect_partisan_outcomes_but_it_always_helps_voters (providing examples of spoilers in U.S. Senate races from 1998 to 2016).


294 See id. at 7–12. “The New Deal Democrats not only co-opted the progressive agenda,” Hirano and Snyder relate, but also the Socialist Party’s agenda as well. Id. at 7 n.33.

295 Donald S. Lutz, Toward a Theory of Constitutional Amendment, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 237, 265 (Sanford Levinson ed., 1995); see also id. at 261 (finding that the U.S. Constitution has in Article V the world’s second most difficult amendment process, behind only the now-defunct Yugoslav Constitution).

extraordinary difficulty of amending the U.S. Constitution serves to reinforce those structural biases that are created by the Constitution and that could be remedied only through amendment. To the extent that such biases favor one political party overall, Article V’s double-supermajoritarian process favors that party by functionally entrenching them. Given the advantages afforded to contemporary Republicans by the Senate, the Electoral College, and bicameralism, among other hard-wired features of the Constitution, the analysis here suggests that Article V can consequently be seen as biased toward Republicans as well.

B. Unbiased Arrangements

It may be tempting to conclude from the breadth of this Part’s discussion that structural biases pervade every aspect of the constitutional order. Under certain circumstances and in certain eras, however, structural arrangements may not yield any discernible bias with regard to the parties. Partisan structural biases generally do not exist or do not become politically salient when any of several conditions holds.

First, a structural arrangement will not be structurally biased for or against one of the parties when it concerns an issue on which the parties are each internally riven or otherwise not straightforwardly polarized on ideological, geographic, or demographic grounds. Part I offered, in stylized form, the example of the special legislative rules governing trade agreements.297 Consider also the September 2001 Authorization for the Use of Military Force (AUMF).298 Over nearly two decades, presidents have broadly read this AUMF to justify use of military force in the Middle East and North Africa, including against groups that did not exist when the AUMF was passed.299 Relative to a more conflict-specific authorization model, such an expansive and unchecked arrangement is biased in favor of presidential power and military interventionism. But it is not biased for or against either Democrats or Republicans, given that each camp contains substantial hawkish and dovish elements. Just as presidents from both parties have invoked the AUMF, skepticism of the AUMF has been bipartisan as well, with legislators from both parties supporting efforts to repeal300 or replace301 it. The 2001 AUMF shows how when an issue cross-cuts existing party coalitions, structural arrangements bearing on the issue will be unlikely to generate persistent partisan biases even if the arrangements do generate discernible policy biases.

297 See supra note 31 and accompanying text.
298 Pub. L. No. 107–40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note) (authorizing the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons”).
299 MATTHEW WEED, CONG. RSCH. SERV., PRESIDENTIAL REFERENCES TO THE 2001 AUTHORIZATION FOR USE OF MILITARY FORCE IN PUBLICLY AVAILABLE EXECUTIVE ACTIONS AND REPORTS TO CONGRESS (2018).
Second, institutional arrangements typically will not generate structural biases when the arrangements do not directly concern policymaking or elections. As discussed in Part I, the U.S. Constitution’s lack of a no-confidence mechanism may create short-term winners and losers, but it does not seem to have a more persistent partisan valence. Issues of executive privilege vis-à-vis Congress provide another example. The executive branch’s ability to withhold information from Congress can benefit either party in particular conflicts, depending on who controls which institutions. Presidents of both parties want to conceal some matters, and their political opponents want to expose damaging details. It is hard to see, however, why the degree of constitutional protection for such executive branch secret-keeping would have a systematic skew toward either liberal or conservative policy outcomes or toward either Democratic or Republican electoral victories.

Third, lack of sufficient information can cloud whether a bias exists and in which direction it points. Consider the controversial practice of federal district court judges issuing nationwide injunctions. Nationwide injunctions can stymie policy objectives of both Democratic and Republican presidents, as is evident from high-profile injunctions issued during the Obama and Trump Administrations. A self-described bipartisan pair of legal scholars has characterized nationwide injunctions as “equal opportunity” threats to the parties. This seems to be the case at present. But one could imagine more durable partisan patterns emerging in the years ahead if the recent trend toward greater use of this tool continues or accelerates. This would be especially true if judicial doctrine were to limit nationwide injunctions to certain types of plaintiffs or cases that themselves have a partisan cast. Even in the absence of such a doctrinal development, a partisan split might emerge simply as a result of growing experience with the practice and better evidence of its effects on Democratic and Republican policy agendas. At least for now, though, nationwide injunctions seem more or less neutral as between the two parties, and the parties’ positions on them can be expected to alternate based on who controls the political branches.

IV. STRUCTURAL BIASES AND CONSTITUTIONAL ANALYSIS

A fundamental force shaping American constitutional politics today, we have argued, is the proliferation and intensification of structural biases against one party or the other throughout all

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302 See supra notes 47–49 and accompanying text.
303 See Mark J. Rozell, Executive Privilege Revived? Secrecy and Conflict During the Bush Presidency, 52 DUKE L.J. 403, 404 (2002) (noting that “every president since George Washington has exercised some form of what is today called executive privilege”); Kimberly Breedon & A. Christopher Bryant, Executive Privilege in A Hyper-Partisan Era, 64 WAYNE L. REV. 63, 64 (2018) (recounting instances from 1974 to 2016 in which presidents have invoked executive privilege to justify withholding information from Congress).
304 See generally Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction Article, 131 HARV. L. REV. 417 (2017); Mila Sohoni, The Lost History of the “Universal” Injunction, 133 HARV. L. REV. 920 (2020).
306 Bagley & Bray, supra note 305.
307 During the Trump Administration, proposed bills to prevent district courts from issuing nationwide injunctions were sponsored exclusively by Republicans. See Injunctive Authority Clarification Act, H.R. 77, 116th Cong. (2019); Injunctive Authority Clarification Act, H.R. 6730, 115th Cong. (2018).
three branches of government. Many seemingly disparate debates in public law come into clearer view—and reveal themselves to be variations on the same debate—once one grasps this point. In this final Part, we pan out to consider some broader implications of our analysis for constitutional conflict, constitutional reform, and constitutional scholarship, both here and abroad.

A. Aggregate Structural Bias and Pathways for Debiasing

Our focus thus far has been on specific constitutional arrangements and their partisan dimensions. But the typology in Part III also enables a more comprehensive assessment. If one political party is disadvantaged by significantly more structural biases or by significantly stronger biases than its rival in a given period, we might say that the latter party occupies a preferred constitutional position. Is the U.S. constitutional order structurally biased at this macro level?

The conclusion is debatable, but we read the evidence we have assembled to suggest that the Republican Party currently enjoys such an aggregate edge. As Parts II and III explained, Democrats are at a structural disadvantage in winning control of the White House (owing to the Electoral College), the Senate (owing to its apportionment formula), and the House (owing to single-member districts, among other factors). When they do manage to control these institutions, Democrats face an extraordinary number of veto points across the legislative, executive, and judicial branches—more than exist in any other industrialized democracy—along with a suite of anti-secrecy and anti-earmark rules that inhibit dealmaking and impede their relatively ambitious policy agendas. A powerful underlying logic, then, helps explain why influential voices within the Democratic coalition have increasingly turned against longstanding features of the constitutional order and begun to emphasize the need for “structural” reform. If there is anything surprising in this turn, it is that it took so long to come about.

A party disadvantaged by a particular structural bias or set of biases has two basic options. The party can seek either (1) to undo the bias through legal revision, reinterpretation, or both; or (2) to adapt to the bias by altering its agenda, its coalition, or both. The exceptional procedural difficulty of amending the U.S. Constitution through Article V, together with cultural factors that make many Americans hesitant to pursue revisions to the constitutional text, means that option (1) will not be a realistic near-term possibility for certain arrangements specified in the text, such as the Senate’s apportionment formula. For all but the most rigidly entrenched arrangements, however, Democratic Party leaders have already started to explore reforms that would reduce

308 See supra notes 68–70, 118–122 and accompanying text; supra section III.A.6.
309 See supra sections III.A.1–3.
310 See supra notes 94–96, 112 and accompanying text.
311 Although many of the specific critiques and reform proposals are different, this Democratic turn marks a return to the Progressive Era in its willingness to rethink constitutional structures that limit state capacity and popular self-rule. See generally William E. Forbath, The Will of the People? Pollsters, Elites, and Other Difficulties, 78 GEO. WASH. L. REV. 1191, 1197 & n.32 (2010) (collecting sources on how “Progressives set out to remake the constitutional order, root and branch”).
312 See supra section III.A.7.
existing bias, as by eliminating the legislative filibuster or establishing an interstate compact that would award the presidency to the candidate who receives the most votes nationwide.\footnote{See Pozen, supra note 58, at 338–45.}

We have no special insight into whether Democrats will succeed in these institutional reform efforts. Yet even if they do not succeed, or succeed only in part, option (2) remains available. Structural biases for or against the political parties, as we have shown, are contingent on what the parties look like, both in terms of their policy programs and their constituencies. And parties are not constants. The history of parties in the United States has been one of periodic realignments, in which various social groups decisively switch allegiance from one party to the other.\footnote{See generally James L. Sundquist, Dynamics of the Party System: Alignment and Realignment of Political Parties in the United States (2011).}

When today’s party dynamics change, the salience and severity of today’s structural biases may recede, and new biases may emerge, even if institutional structures remain constant. Changes along any of the axes of polarization that we discuss could mitigate or even reverse existing biases. If, for instance, Democrats were to develop a significant base of rural support,\footnote{For one of numerous emerging plans to do so, see Jane Kleeb, Harvest the Vote: How Democrats Can Win Again in Rural America (2020).} the Senate and Electoral College would become less tilted in Republicans’ favor. The Electoral College’s current bias is especially unstable: the “bluing” of Texas alone has the potential to negate it.\footnote{Cf. Jonathan Bernstein, Republicans Can’t Count on Electoral College Edge in 2024, BLOOMBERG (Nov. 22, 2020, 8:00 AM), https://www.bloomberg.com/opinion/articles/2020-11-22/republican-electoral-college-edge-isn-t-built-in-to-the-u-s-voting-system (outlining multiple scenarios that could yield “an electoral college with smaller biases that fluctuate between (slightly) helping Democrats and Republicans” as soon as 2024).} Likewise, if Republicans were to make headway with voters of color, rules making it easier or harder to cast a ballot would have less of a partisan valence. If the Republican Party platform were to call for more active government intervention in economic affairs, a trend that some commentators believe is already underway,\footnote{See, e.g., Stephanie Slade, Republicans Are Ripping Out “The Very Heart and Soul” of Their Party, N.Y. Times (Aug. 25, 2020), https://nytimes.com/2020/08/25/opinion/republicans-libertarians-economics.html (contending that the “Republican Party seems to become more comfortable with top-down economic interventionism by the day”).} the myriad veto points in the policy process would no longer differentially disadvantage Democratic agendas to the same degree.

As these examples suggest, the dismantling of structural bias can be the product of top-down reform and highly coordinated mobilization. But it can also arise from unplanned and highly diffuse developments, such as migratory movements across regions, evolving political views within demographic groups, or generational shifts in ideological orientation. Broad changes in the character of the parties or their constituencies would not change evaluations of structural arrangements from the standpoint of values like equality or democracy. They could, however, go a long way toward minimizing the disparate partisan impacts that institutional arrangements presently produce and the constitutional conflict that can follow.

In short, because structural biases are co-produced by institutions and politics, changes to either could unsettle the biases. Most critical commentary in this area has focused on the institutional side of the ledger, and the ways in which certain constitutional features distribute power unevenly.
among various social blocs. But a more dialectical understanding of structural bias casts these maldistributions in a somewhat different light. Descriptively speaking, if any given feature becomes biased against a political party, the reason lies as much with the party—and its ideological, geographic, and demographic composition—as with the Constitution.

B. Constitutional Polarization and Contestation

The previous Parts provided an account of how multiple overlapping forms of polarization have created or exacerbated structural biases throughout the U.S. constitutional order, which in turn has reinforced polarization and created or exacerbated conflict over a growing list of institutions. The details of this account are specific to this period in U.S. constitutional history. But we can also draw some more general lessons.

First, the account suggests a key mechanism by which partisan polarization translates into polarization over constitutional matters. Even though partisan polarization is a well-known and much-studied phenomenon, its constitutional analog remains a relatively obscure subject. The constitutional theory literature furnishes contradictory hypotheses as to whether constitutional polarization ought to be more extreme, less extreme, or essentially coterminous with partisan polarization. 319 The empirical literature on this relationship is thin. 320 Our account explains why it is rational for highly polarized, closely divided parties to develop divergent views on a growing list of constitutional arrangements: because under such conditions, more and more of these arrangements will have become more and more tilted against one party and in favor of the other. The concept of structural bias supplies the link between “low” partisan politicking and “high” constitutional contestation. 321 If Americans increasingly have come to see the Constitution less “as a symbol of unity and common purpose” than as a source of “partisan strife,” 322 this is in no small part because the Constitution increasingly invites partisan strife through institutions that systematically undermine the electoral and policy goals of one or the other major party.

Second, and relatedly, our account suggests that partisan critiques of a constitutional order are likely to be lagging rather than leading indicators of polarization. Among other functions, structural constitutional arrangements serve as “focal point[s]” for social coordination.”

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320 See id. at 12 (noting that “the nature, degree, and determinants of constitutional polarization [and] the relationship of constitutional polarization to nonconstitutional polarization” remain “untested in mainstream constitutional law scholarship” (punctuation omitted)).
Political insiders will typically have strong incentives to leave such coordination devices intact. Only once a party has been persistently thwarted in achieving its goals will it be likely to turn against a structural arrangement in any concerted fashion. Consistent with this claim, the contemporary Democratic turn against the filibuster followed directly from the obstructionism of Senate Republicans during the Obama Administration, while contemporary Republican antipathy to *Chevron* grew out of the ways in which the Obama Administration used agency initiatives to accomplish progressive policy ends. Growing polarization about policy has been a feature of U.S. politics for decades, but it takes time for that polarization to catalyze structural constitutional conflict.

Third, if it is correct that structural constitutional biases motivate disadvantaged political actors to challenge the relevant arrangements, then cataloging the structural biases in any given system—as Part III does for the United States—may not only illuminate its current constitutional politics but also help forecast future constitutional conflicts. Some of the arrangements we have discussed are already the subject of legal and political contestation. But other structurally biased arrangements, from bicameralism to single-member legislative districting to various veto points in the administrative process, have not yet elicited any significant political opposition. These arrangements may continue to go unchallenged because disadvantaged actors conclude that the benefits from reform are not worth the cost of its pursuit, adjusted for the probability of success, or because prevailing legal ideologies make it difficult for these actors to appreciate the extent of the bias. The more biased a constitutional arrangement becomes, however, the more rational it becomes for negatively affected parties to fight back. Part III’s conceptual map of contemporary biases, accordingly, might also be seen as a kind of heatmap—both to existing sites of structural struggle and to possible constitutional conflicts in waiting.

Fourth, our account suggests that conflict over structural bias holds promise as well as peril for a mature democracy. The downside risks are straightforward and significant. Political fights over structural constitutional arrangements open the door to escalating forms of constitutional hardball, countermajoritarian practices, and institutional instability that together make effective governance increasingly difficult if not impossible. When structural biases become so severe that they cause party leaders from one side or the other to despair of advancing their agenda through ordinary legal and political channels—when these elites no longer “believe they are better off within the current constitutional bargain than in taking a chance on, and expending resources in, negotiating a new


325 *See* Elinson & Gould, *supra* note 110 (manuscript at 45–52).

326 *Cf.* Bagley, *supra* note 58, at 369–400 (suggesting that tropes of legitimacy and accountability have prevented the political left from turning against administrative procedure, despite its systematically anti-progressive effects).

327 On the risks posed by such fights themselves, separate from the issues being fought over, see, for example, STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 215–17 (2018); Fishkin & Pozen, *supra* note 56, at 964–65.
one”328—they can undermine the functioning of a constitutional order writ large. In extremis, perceptions of structural bias can lead to political revolt and constitutional breakdown.

Yet at the same time, mounting conflict over structural bias of the sort that the United States has been experiencing is by no means a clear sign of constitutional retrogression or democratic decay. Such fights represent a maturation of our politics insofar as both parties have gained—or regained329—recognition of their fundamental interests in constitutional design and are arguing for change or stasis accordingly. Such fights also represent a revolt against dead-hand control insofar as participants seek to revise outworn terms of the constitutional order rather than maneuver within them. And any number of specific structural reforms, including removal of the Senate filibuster, may well create stable new equilibria in our political institutions rather than escalating cycles of partisan retribution.330

Constitutional changes motivated by structural bias could also have salutary effects from the standpoint of more general values. A tension between the value of democratic equality and, say, the constitutional status of the District of Columbia or the design of the Electoral College has existed since the Founding. But this tension alone has not been sufficient to prompt political reform.331 Now that the partisan tilt of these institutions has become clear, reform proposals have gained momentum.332 In this way, structural bias can lead partisans to identify and invest in structural constitutional reforms that are normatively desirable on principled grounds, independent of which party would benefit for the foreseeable future. The norms of constitutional argument, moreover, require advocates to defend most proposals in nonpartisan terms,333 thus ensuring that

328 ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS 7 (2009) (identifying such a belief as the basic condition of constitutional endurance).

329 See supra section II.A (discussing cycles of conflict over structural constitutional biases throughout U.S. history).

330 The Senate has been on a gradual slide toward majority rule since the 1970s: it has lowered the cloture threshold, created and then expanded exceptions to the cloture requirement (most notably the budget reconciliation process), and eliminated the filibuster for judicial and executive branch nominations. See GREGORY J. WAWRO & ERIC SCHICKLER, FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE 89 (2013) (discussing the move to a three-fifths cloture requirement); Dauster, supra note 250, at 645–56 (discussing nominations); supra note 186 and accompanying text (discussing reconciliation). Fully eliminating the legislative filibuster would result in the Senate operating as a majority-rule body, like most other U.S. legislative chambers, without creating obvious opportunities for additional strategic manipulation of voting rules. Cf. Doerfler & Moyn, supra note 108 (manuscript at 67–71) (comparing “spiralizing” risks posed by Court-packing schemes with “the non-spiraling virtue” of other structural reforms).

331 But cf. JESSE WEGMAN, LET THE PEOPLE PICK THE PRESIDENT: THE CASE FOR ABOLISHING THE ELECTORAL COLLEGE 126–62 (2020) (explaining that Supreme Court decisions ratifying the ideal of “one person, one vote” helped catalyze the last major push to overhaul the Electoral College, in the late 1960s).


333 See Reva B. Siegel, Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA, 94 CALIF. L. REV. 1323, 1350 (2006) (“American constitutional culture supplies practices of argument that channel the expression of disagreement into claims about the meaning of a shared tradition, teaching advocates to express claims of partisan conviction in the language of public value.”); see also
considerations of political morality animate the reform conversation regardless of what brings participants into it.

C. Broader Lessons for Constitutional Designers, Empiricists, and Theorists

Other potential lessons are still broader. While we have focused on U.S. constitutionalism, the concept of structural bias is itself a tool for constitutional analysis in any time or place. For politicians and practitioners, attention to structural bias can inform constitutional drafting and reform efforts. For scholars, including both constitutional lawyers and social scientists, attention to structural bias can inform a variety of positive and normative projects.

Constitutional designers are not benevolent social planners but political actors seeking to promote substantive ends. By making some electoral or policy outcomes more likely than others, the strategic creation of structural biases may serve these ends—all the more so if the strategy is made less salient by being embedded in a “relatively dry” structural arrangement rather than a rights guarantee. Constitutional designers might, for example, intentionally create institutions that over- or under-represent certain groups in the political process, relative to their numbers. As discussed briefly above, the framers of the U.S. Constitution were highly attentive to which sorts of Americans would be empowered and disempowered by various institutional arrangements, sometimes in subtle ways. Other nations’ constitutions have more explicitly augmented the voting rights of specified subpopulations—sometimes as a means of entrenching the clout of currently privileged groups, sometimes as a means of empowering women or racial, ethnic, or religious minorities. Constitutional designers may also make certain sorts of policy change easier or harder to achieve, as by calibrating rules regarding voting thresholds or agenda-setting procedures. In other instances, constitutional designers may seek more directly to aid allies or undermine opponents. Chile’s 1980 constitution, for instance, created “authoritarian enclaves” that allowed Pinochet regime loyalists in the armed forces to intervene in the political process, locking in a rightward bias that was only slowly chipped away at by constitutional reformers in subsequent years.

Pozen & Samaha, supra note 5, at 753–56 (explaining that “partisan arguments” are seen as illegitimate in debates over constitutional meaning).
335 See supra notes 72–75 and accompanying text.
336 Nineteenth-century Belgium, for example, gave multiple votes to citizens with more property or education as a means of limiting the number of seats won by radical or socialist parties. See PAUL STARR, ENTRENCHMENT: WEALTH, POWER, AND THE CONSTITUTION OF DEMOCRATIC SOCIETIES 112 (2019).
338 See generally Huq, supra note 185, at 1418–43 (cataloging “agenda-control instruments” in U.S. constitutional law).
There is a limit to how effectively constitutional designers can engineer structural biases, however. As we have discussed throughout, these biases ebb and flow over time, and sometimes reverse directionality altogether. Institutional arrangements are created in the context of the politics of their era. Decades or centuries later, they may have very different welfare and distributional implications than they had at the outset. The contemporary partisan bias associated with the District of Columbia’s lack of statehood, for example, arises from the fact that its residents overwhelmingly support Democrats.\textsuperscript{340} This bias could hardly have been anticipated at the Founding, long before anything like today’s party system had emerged and Black Americans (the largest demographic group in the District) had been guaranteed the right to vote.

For constitutional designers, this dynamic calls for a dose of humility. All constitutional drafters and reformers work from an understanding of society that is necessarily time-bounded to some degree. As a result, attempts to create structural biases are almost bound to have unintended consequences if a constitution endures. Still more humbling, attempts to avoid structural bias in pursuit of designs that will be neutral among political factions are likewise apt to prove quixotic. Older constitutions, such as those in the United States (1787), Belgium (1831), Argentina (1853), and Canada (1867), are especially susceptible to these shifts. But structural biases can come and go even in a short space of time. To take just one recent example, Armenia switched in 2015 to a parliamentary system in a manner that was intended to entrench that country’s Republican Party but that, by 2018, had produced the opposite effect.\textsuperscript{341} Structural biases for or against a given party emerge on account of certain contingent social facts, and they last only so long as the relevant facts last.

If constitutional designers have much to lose from the dynamic character of structural biases, constitutional scholars have much to learn from the ways in which such change occurs. This Article has tried to provide a framework for understanding which sorts of political actors will be advantaged or disadvantaged by sometimes technical-seeming design choices. In so doing, it has offered a broad, and necessarily incomplete, portrait of the structural constitutional biases that currently affect the two major political parties in the United States. In addition to filling in more details of this portrait and developing similar inventories for other constitutional systems, scholars could extend the inquiry backward in time—analyzing the historical development of specific constitutional institutions through the lens of the electoral and policy biases that they have generated in different eras.

Scholars could also extend the inquiry outward from the parties—investigating structural biases with regard to additional groups, such as political blocs that operate outside the party system, different factions within the parties, and demographic groups of various kinds. Parts II and III consider disparate effects of structural arrangements on racial and other demographic groups indirectly, through the lens of partisan bias,\textsuperscript{342} but direct treatments could allow for


\textsuperscript{341} See Laurence Broers, In Armenia, a Constitutional Power Grab Backfires, CHATHAM HOUSE (Apr. 24, 2018), https://chathamhouse.org/expert/comment/armenia-constitutional-power-grab-backfires (describing how the move to parliamentary elections, though intended to fracture opponents of the ruling Republican Party, precipitated mass nonviolent protests that led to the resignation of the Republican Party’s leader).

\textsuperscript{342} See, e.g., supra notes 131–147 and accompanying text.
significantly more nuance. Another extension of the project might look to how political actors seek to use nonstructural legal rules to disempower the opposition. Observers have noted, for example, that contemporary conservative initiatives to weaken private-sector unions and limit punitive damage awards and class action lawsuits can be understood as efforts to undermine the financial base of the Democratic Party.

Because structural biases arise not from constitutional design alone but from its interaction with broader political forces, questions of structural bias will often lie at the intersection of constitutional law and other fields, including history, political science, and sociology. Legal scholars are accustomed to thinking about the ideological drift of constitutional ideas, such as the notion of “colorblindness” in equal protection doctrine. The evolution of structural biases underscores the need to think about the ideological drift of constitutional institutions as well. Tracing the rise and fall of structural biases can be a useful metric both for measuring political change and for demarcating constitutional epochs.

As some of our earlier observations suggest, one particularly promising line of interdisciplinary inquiry concerns the influence of structural biases on longer-term political development. Much of our descriptive analysis of contemporary U.S. constitutionalism has treated the parties and their coalitions as fixed, or as exogenous to constitutional design. But structure can shape the development of the parties and their coalitions over time. Without the potential for third-party “spoilers” created by first-past-the-post voting, the Democratic Party would not have felt so much pressure to move left during the New Deal Era. Without the advantages that come from the design of the Electoral College and the Senate, the Republican Party would have had no choice but to pursue policies and messages aimed at attracting more voters of color during recent decades. Structural constitutional rules can affect what positions parties take, how they build their coalitions, and how political preferences are constructed in the first place. Extralegal forces matter too, of course; an individualistic culture is sometimes said to explain much of the path of American political development. Yet however important cultural variables might be, “the interaction of culture and institutions is to some extent self-reinforcing.”

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343 See, e.g., Levinson & Sachs, supra note 29, at 402–03 (discussing political implications of Republican anti-union efforts).
344 See, e.g., Tushnet, supra note 232, at 63 (explaining that plaintiff-side trial lawyers have historically been strong supporters of the Democratic Party and describing recent Supreme Court decisions on these subjects as amounting to a “program of defunding the left through constitutional interpretation”).
345 See, e.g., J.M. Balkin, Ideological Drift and the Struggle over Meaning, 25 CONN. L. REV. 869, 870–73 (1993) (discussing this example and defining ideological drift as change over time in the normative or political valence of “[s]tyles of legal argument, theories of jurisprudence, and theories of constitutional interpretation”); Pozen, supra note 187, at 106 (discussing this example and defining ideological drift with reference to “ideas”).
346 See, e.g., supra notes 31–36, 111–114 and accompanying text.
347 See supra notes 291–294 and accompanying text.
348 See supra notes 115–147 and accompanying text.
350 Lipset & Marks, supra note 349, at 265.
evolution and competition could be understood without reference to structural constitutional law, and the biases this law produces, turns out to be every bit as fanciful as the idea that a commercial marketplace could be understood as “free” of the background legal rules that allow it to function.351

Indeed, the most profound structural biases may be the least visible. Entrenched constitutional structures may be so deeply biased against certain political or policy positions that those positions essentially disappear from mainstream debate, with the result that few even see the bias anymore. Many have suggested, for example, that the U.S. constitutional framework led more or less inexorably to a two-party system.352 To the extent this is true, the central players in both the Democratic and Republican coalitions can be seen as beneficiaries of our constitutional design, while those at the fringes of the party system are harmed by existing constitutional structures relative to alternative arrangements such as proportional representation. Some of the same institutional features of U.S. constitutionalism may have likewise prevented socialism from gaining strength here as compared to in other nations.353 Whether or not these features are themselves manifestations or epiphenomena of even deeper antisocialist biases in the very idea of constitutionalism or rule by law,354 structural constitutional rules have plainly played a role in channeling and constraining political-ideological formation. Furthermore, a two-party system in a large and diverse country tends to stimulate ongoing ideological conflict within the necessarily heterogenous major parties.355 Fights over structural biases, as we have emphasized throughout, take place within a politics that is partially constructed by those biases.

Structural biases are also fertile ground for empirical scholars. As discussed in Part I, this Article is a close cousin of scholarship in comparative political science and political economy exploring the impacts of various governance arrangements.356 Most of that scholarship has been quantitative in approach, focused on national constitutions, and limited to macro-level design questions such as presidential versus parliamentary systems. Relaxing any of those constraints could yield fruitful research agendas oriented around qualitative methods, subnational constitutions, or meso-level arrangements, including arrangements governing the internal operation of institutions. To date, broad questions concerning the electoral and policy effects of constitutional design choices have largely been the domain of quantitative social scientists. This disciplinary division of labor has left legal scholars on the sidelines of some of the most important debates about how structural constitutional law affects their societies. Yet as this Article has demonstrated, no econometric pyrotechnics are needed. A lawyerly concern for institutional detail

351 On the fancifulness of the latter idea, see generally BERNARD E. HARcourt, THE ILLUSION OF FREE MARKETS (2012).
352 See Samuel Issacharoff, Fragile Democracies, 120 HARV. L. REV. 1405, 1419 (2007) (describing “a well-trodden path in political theory . . . explaining the propensity of single-seat, single winner elections to produce two and only two relatively stable, relatively centrist parties”).
353 See, e.g., LIPSET & MARKS, supra note 349, at 43–84 (providing a skeptical reconstruction of standard arguments about how the United States’ two-party system and federalist structure prevented the emergence of socialism).
356 See supra section I.C.
and careful counterfactual reasoning can identify structural biases arising from any number of complex constitutional rules.

Attention to structural bias can enrich normative analysis as well. In circumstances where a structural arrangement is strongly biased against one political party or against a desirable policy outcome, that bias may be reason alone to condemn the arrangement. More generally, in circumstances where every plausible specification of a constitutional institution is likely to be biased relative to competitors, the ideal of “neutrality” loses purchase. Some political bloc is going to be made better or worse off by any set of rules, relative to realistic alternatives. This observation counsels that we look beyond political neutrality and procedural fairness to more substantive normative criteria—whether keyed to democracy, equality, social welfare, or other values—for evaluating the “the rules of the game by which politicians gain and use power.”\(^{357}\) Meanwhile, the observation that many structural biases are the product not just of strategic behavior but of unanticipated social and political developments should prompt us to interrogate how all such biases operate and whether they are justifiable. “Reflecting on the accidental quality of our institutions and practices,” Michael Dorf has noted, “can be a first step toward examining their efficacy relative to other possible arrangements.”\(^{358}\)

In sum, a focus on structural bias facilitates politically grounded, mid-level work on the practical and distributional implications of constitutional institutions. Such work has been in short supply in the legal academy. A number of prominent U.S. constitutional scholars have called in recent years for a reorientation of the field toward “constitutional political economy,”\(^{359}\) or toward “law and political economy” more broadly,\(^{360}\) while leaving open exactly what such a reorientation might entail. The concept of structural bias provides one means of organizing and advancing the constitutional-political-economy project across issue areas.

**Conclusion**

The idea of structural constitutional biases might seem obvious. After all, even casual observers of contemporary U.S. politics know that many Democrats view the design of the Senate and the Electoral College as giving an edge to Republicans. But such biases, this Article has argued, are much broader and deeper than has been appreciated—broader in that they now pervade virtually every part of our constitutional order, and deeper in that they shape not only a discrete set of electoral outcomes but also countless government decisions and policy paths taken and not taken. At the same time, such biases are more contingent and dynamic than many assume. Whether and to what extent any given constitutional arrangement advantages or disadvantages any given political party in any given period depends on the nature of the parties and their coalitions.

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\(^{357}\) Myerson, *supra* note 23, at 927.


Structural biases are therefore liable to change as American politics changes, sometimes in response to those very same biases.

Attending to structural bias enables us to think more clearly about both domestic and comparative constitutionalism. It can help scholars trace the relationships between partisan polarization and constitutional design, analyze the distributional and aggregate effects of constitutional arrangements, theorize the conditions for large-scale constitutional conflict and change, and evaluate how constitutions are performing relative to other constitutions and to the aims of their framers. The idea unifies existing work in several fields while pointing to new areas of inquiry. Although this Article’s focus has been on the contemporary United States, its basic methodology and lessons generalize broadly. Any student of constitutional politics stands to benefit from inquiring into the structure of structural bias in her own system.