To: Kadish Center Workshop Participants
From: Jonathan Gould
Date: January 14, 2022

Dear all,

Enclosed please find my paper for the Kadish Center workshop on Friday, January 21. The paper is entitled *Puzzles of Progressive Constitutionalism* and it explores how different understandings of constitutionalism interface with progressivism in the contemporary United States. The paper is formally a review of two forthcoming books, and it uses the books as a springboard to talk about broader issues of constitutional theory and design.

I am grateful to you for reading and very much look forward to the conversation!

Warmly,

Jonathan Gould

PUZZLES OF PROGRESSIVE CONSTITUTIONALISM: A REVIEW ESSAY

Jonathan S. Gould

CONTENTS

PUZZLES OF PROGRESSIVE CONSTITUTIONALISM: A REVIEW ESSAY

Against Constitutionalism. By Martin Loughlin. Cambridge, MA: Harvard University Press, 2022.

The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy. By Joseph Fishkin & William E. Forbath. Cambridge, MA: Harvard University Press, 2022.

Jonathan S. Gould

This Review Essay examines the relationship between progressivism and constitutionalism. In doing so, it considers three different understandings of constitutionalism. First is constitutionalism as a distinct ideology of government in which an apex court decides issues of public policy and articulates national values. Second is the way constitutional culture prompts political actors to argue for their preferred policies in constitutional terms, even when calling for legislative rather than judicial action. Third is constitutional design, the rules of the political game that dictate how lawmaking take place. Under each of these approaches, constitutionalism imposes costs on progressives and forces them to confront difficult trade-offs. A political culture that elevates courts can impede progressive agendas. A narrow band of acceptable constitutional arguments can make it difficult for progressives to make the best case for their preferred policies. And efforts at institutional reform are made challenging by conflicting progressive commitments and fear of how a less restrained government could be deployed by conservatives. While progressives have no practical choice but to engage in constitutional politics, that reality should not obscure how constitutional structure and culture pose difficulties for progressive agendas.

INTRODUCTION

How should today's progressives think about the Constitution and the political order that it creates? Is that order an obstacle to solutions for runaway economic inequality, continued racial injustice, and impending climate disaster? Or is it the only path to a healthy civic nationalism, protection for minority rights, and preservation of civil liberties? These questions are heightened by a progressive sense that urgent challenges require energetic government, but a fear, in the shadow of the Trump presidency, that such energy could be deployed toward conservative or even anti-democratic ends.

One stream of progressive thought views the constitutional order as an obstacle to be overcome. The Constitution creates a system for electing Presidents, Senators, and House members that inflates the power of rural areas, which in effect discounts the votes of core progressive

constituencies.[1] When progressives do manage to win power, a bevy of veto points block legislative action,[2] harming efforts to realize their agendas.[3] And today's conservative Supreme Court is the heir to predecessors that repeatedly stood in the way of progressive change by striking down civil rights legislation,[4] economic regulation,[5] and efforts to expand the social safety net.[6] In those relatively rare instances in which the Court sought to advance progressive goals, observers have charged it with being ineffectual[7] or even self-defeating.[8] For these reasons, some progressives have turned against core features of the constitutional order.[9]

A competing tradition, sometimes called progressive constitutionalism, seeks to advance progressive change from *within,* rather than outside, the existing constitutional order. One reason for this approach is the skepticism that some progressives have of democracy, and a corollary faith in countermajoritarian institutions. Progressives who worry that majority rule could lead government to trample minority rights or run roughshod over civil liberties often look to counterweights to majority rule, most notably judicial review.[10] The memory of the Warren Court reinforces some progressives' faith in the courts to advance their vision of justice.[11] And as the left continues to reckon with the Trump presidency, fear of tyranny provides a further reason for

---

[1] *See* Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. __ (2022) (discussing this bias).

[2] 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) (finding the United States exceptional in the number of veto points in its legislative process).

[3] *See* Gould & Pozen, *supra* note 1, at __ (arguing that asymmetric legislative ambitions means that veto points harm progressives more than conservatives).

[4] *See, e.g.*, The Civil Rights Cases, 109 U.S. 3 (1883) (striking down the Civil Rights Act of 1875); City of Boerne v. Flores, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act as applied to state and local governments); Shelby Cnty. v. Holder, 570 U.S. 529 (2013) (striking down the Voting Rights Act's coverage formula).

[5] Examples of the Court striking down labor and employment legislation includes United States v. E. C. Knight Co., 156 U.S. 1 (1895); Lochner v. New York, 198 U.S. 45 (1905); Coppage v. Kansas, 236 U.S. 1 (1915); Hammer v. Dagenhart, 247 U.S. 251 (1918); and Adkins v. Children's Hospital, 261 U.S. 525 (1923). Examples of judicial resistance to the New Deal includes Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); United States v. Butler, 297 U.S. 1 (1936); and Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[6] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 575–85 (2012) (striking down Affordable Care Act's Medicaid expansion).

[7] *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008) (arguing that courts are limited in their abilities to advance civil rights, reproductive rights, and environmental protection, among other topics).

[8] *See, e.g.*, WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 9 (2011) (arguing that "the [Warren] Court exacerbated the inequality and instability that plagued late twentieth-century criminal justice"); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 381 (1985) (contending that "[t]he sweep and detail of the opinion [in *Roe*] stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures").

[9] *See, e.g.*, SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006) (suggesting a wide variety of constitutional reforms); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CAL. L. REV. 1703 (2021) (calling for reforms to disempower the Supreme Court).

[10] *Cf.* Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1699 (2008) ("If errors of underprotection—that is, infringements of rights—are more morally serious than errors of overprotection, and if a few other plausible conditions obtain, then there could be outcome-related reasons to prefer a system with judicial review to one without it."). For accounts of the Supreme Court's mixed record on protecting racial minorities in particular, see ORVILLE VERNON BURTON & ARMAND DERFNER, JUSTICE DEFERRED: RACE AND THE SUPREME COURT (2021); LESLIE F. GOLDSTEIN, THE U.S. SUPREME COURT AND RACIAL MINORITIES: TWO CENTURIES OF JUDICIAL REVIEW ON TRIAL (2017).

[11] *Cf., e.g.*, Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 797 n.207 (1992) (conjecturing that a "combination of their political liberalism and their inability to escape the long shadow of the Warren Court" explains some progressives' enduring attachment to judicial review).

progressives to be skeptical of unrestrained government power.[12] Other reasons for progressive embrace of the Constitution are more cultural: the Constitution provides progressives with a way to forge a national identity in the face of racial, ethnic, and religious diversity.[13]

Progressives, then, are on the horns of a dilemma. To embrace the status quo stacks the deck against their candidates, impedes their policy agendas, and empowers courts to strike down their achievements. But to call for constitutional reform risks unintended consequences, including jeopardizing minority rights and civil liberties, empowering the next Trump, and abandoning one of the few bases of unity in a diverse nation.

Attempts to harness constitutional law to progressive ends have often taken the form of thoughtful accounts of how the Supreme Court could advance progressive values.[14] A solid conservative majority on today's Court, however, means that the best judicial outcome progressives can reasonably hope for is that their legislative and regulatory successes survive judicial review.[15] But even if the political balance of the Court were different, a juriscentric approach to progressive constitutionalism would still be incomplete. As has long been observed, the Court has limited ability to advance progressive social change.[16] A fuller account of progressive constitutionalism requires looking beyond judicial doctrine to the role of the Constitution in structuring governance and politics more broadly.

In that spirit, this Review Essay examines the relationship between progressivism and the constitutional order from each of three distinctive standpoints. It considers constitutionalism as an ideology of governance, a mode of political argumentation, and an issue of institutional design. These standpoints represent different ways of understanding the concept of constitutionalism, but it is valuable to consider them alongside one another because each provides insight into the troubled relationship between constitutionalism and progressivism.

First, constitutionalism is itself an ideology of governance, and one with an uneasy association with progressivism. *Against Constitutionalism*, by Martin Loughlin, provides a comprehensive examination of constitutionalism as an ideology. Loughlin, perhaps the United

---

[12] *See, e.g.*, CARLOS A. BALL, PRINCIPLES MATTER: THE CONSTITUTION, PROGRESSIVES, AND THE TRUMP ERA 4 (2021) (arguing that conservative use of federalism and separation of powers principles "to challenge the politics of liberal administrations is a price that progressives should be willing to pay for being able to rely on the same principles to try to curb some of the most harmful, dangerous, and discriminatory policies of future right-wing autocratic presidents in the Trump mold").

[13] *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH 15 (2011) (noting that it is "tempting to see the Constitution as a means of providing either a 'sense' or even the reality of 'unity' for an otherwise fractious United States"); *see also* AZIZ RANA, RISE OF THE CONSTITUTION (forthcoming) (documenting the rise of constitutional veneration in the twentieth century).

[14] *See, e.g.*, ERWIN CHEMERINSKY, WE THE PEOPLE: A PROGRESSIVE READING OF THE CONSTITUTION FOR THE TWENTY-FIRST CENTURY (2018); GOODWIN LIU, PAMELA S. KARLAN & CHRISTOPHER H. SCHROEDER, KEEPING FAITH WITH THE CONSTITUTION (2010); ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT (1994).

[15] *Compare, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 563–74 (2012) (upholding the Affordable Care Act's individual mandate); King v. Burwell, 576 U.S. 473 (2015) (allowing the use of Affordable Care Act tax credits in all states), *with, e.g.*, *Sebelius*, 567 U.S. at 575–85 (striking down the Affordable Care Act's Medicaid expansion); West Virginia v. EPA, 577 U.S. 1126 (Feb. 9, 2016) (mem.) (staying the Obama Administration's Clean Power Plan regulation); United States v. Texas, 136 S. Ct. 2271 (2016) (upholding an injunction against deferred action immigration programs); Alabama Ass'n of Realtors v. Dep't Health & Hum. Servs., 594 U. S. ___ (2021) (per curiam) (holding that the Biden Administration's eviction moratorium during the novel coronavirus pandemic exceeded the agency's statutory authority); NFIB v. Dept. of Labor, 595 U. S. ___ (2022) (per curiam) (staying the Biden Administration's vaccination mandate during the novel coronavirus pandemic as in excess of the agency's statutory authority). *See also* Joan Biskupic, *The Supreme Court Hasn't Been this Conservative since the 1930s*, CNN (Sept. 26, 2020), https://www.cnn.com/2020/09/26/politics/supreme-court-conservative/index.html.

[16] *See supra* note 7 and accompanying text.

Kingdom's foremost public law scholar, takes an outsider's view of U.S.-style constitutionalism. He explains how a written constitution can give rise to constitutionalism, "a discrete concept expressing a specific philosophy of governing" (p. 7). Loughlin identifies constitutionalism's core features: representative government, limited government, and separated powers, all overseen by a judiciary operating in accordance with principles of public reason (pp. 6–7). Loughlin's title betrays his conclusion: constitutionalism, he argues, is a pernicious ideology that impedes democracy and facilitates elite rule by directing attention toward the courts as the proper venues for social progress. This critique resonates with an important strain in the American progressive tradition that centers legislative action and expresses skepticism about courts. Loughlin's analysis thus points toward the first challenge for progressives: to the extent that constitutionalism entails elevating the courts, that can impede progressive agendas.

Second, the Constitution and constitutional values structure political discourse, again in ways that can cause challenges for progressives. *The Anti-Oligarchy Constitution*, by Joseph Fishkin and William Forbath, is a leading example of progressive constitutional argument. Fishkin and Forbath, both prominent legal scholars in the United States, seek to recover a strain of argument that treats inequality as constitutionally anathema. They argue that a central part of U.S. constitutional thought, from the founding to the mid-twentieth century, was a "democracy-of-opportunity tradition" (p. 3). That tradition is averse to centralized economic power, supportive of a strong middle class, and demands political equality for all citizens regardless of race and gender (pp. 8–12). While the tradition's substantive themes are familiar, the book's key conceptual move is to argue that the democracy-of-opportunity tradition is not only a set of positions about public policy or even substantive justice, but that it is also a *constitutional* worldview. This effort seeks to save constitutionalism for the left, in the face of critiques like Loughlin's and a conservative Supreme Court unreceptive to progressive arguments. But it also creates difficulties for progressives. Presenting progressive agendas in constitutional terms can require stretching the definition of what counts as constitutional beyond how many American understand the term and, relatedly, can risk centering constitutional arguments for progressive agendas when other sorts of arguments might be more effective.

Third, the Constitution creates a set of institutions that can make progressive policymaking difficult, but attempts to reform those institutions run up against both entrenched structures and difficult trade-offs that pit competing progressive commitments against one another. Scholars often define and analyze constitutional law as the body of law setting out the "rules of the political game."[17] Those rules include not only a written constitution and judicial decisions interpreting that document, but also statutes that dictate the structure and powers of government[18] and the internal rules of governing institutions.[19] A key question for progressives (or anyone else with

[17] *E.g.*, Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 700 (2011).

[18] *See, e.g.*, Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717 (2005) (framework statutes in the United States); David Feldman, *The Nature and Significance of "Constitutional" Legislation*, 129 L.Q. REV. 343 (2013) (framework statutes in comparative perspective).

[19] *See, e.g.*, Jonathan S. Gould, *Law Within Congress*, 129 YALE L.J. 1946, 1959–73 (2020) (cameral rules and precedents in Congress); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017) (internal executive branch procedures). This approach is sometimes referred to as "small-c" constitutionalism, in contrast with the "big-C" constitutionalism of the document itself. *See, e.g.*, Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1082 (2013).

policy preferences) is whether a given set of institutional arrangements makes their preferred outcomes more or less likely, relative to a plausible alternative set of arrangements.[20]

Progressives face a distinctive challenge in determining what sorts of institutional arrangements would be most advantageous, because different progressive commitments pull in competing directions. Some progressive commitments require unleashing government power to enact regulations or create social programs, while others require restraints to prevent government from infringing on civil liberties. Some are furthered by majority rule, while others may require countermajoritarian institutions to protect the interests of minority groups. These tensions have been the subject of academic literature and political debate for generations. But they deserve renewed attention because they make it quite challenging to determine what sorts of institutional design choices best further progressive agendas.

Progressivism might seem an odd framework through which to evaluate constitutional arrangements. Constitutional law scholarship more typically focuses on general values, such as democracy,[21] workable government,[22] and avoidance of tyranny.[23] It might strike some as unusual, even dangerous, to focus directly on the relationship between constitutional arrangements and highly contested political philosophies—progressivism, conservatism, or others. But institutional design, constitutional culture, and modes of argumentation can all create winners and losers. Fully understanding constitutional politics requires accounting for how our constitutional arrangements impact the most salient groups and ideologies that compete for political power.

Before proceeding, a word of definition. While my focus is largely on the different understandings of constitutionalism, progressivism can also be a challenging term to define.[24] Even a casual observer of American politics can identify the cluster of commitments that make up progressivism: support for a social welfare state, civil rights, workers and labor unions, and environmentalism, among other commitments.[25] Progressives disagree, sometimes fiercely, on precisely how these general commitments should manifest as specific policies and which should take priority when different priorities conflict.[26] One of the reasons that it is difficult to forge a

---

[20] *See generally* Gould & Pozen, *supra* note 1 (asking this question about various parts of the U.S. constitutional order).

[21] *See, e.g.*, STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2007) (arguing that democratic values should inform constitutional interpretation); ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? (2d ed., 2003) (evaluating aspects of the U.S. Constitution on democratic grounds).

[22] *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (describing the Constitution's goal of creating "a workable government"); Vicki C. Jackson, *Holistic Interpretation:* Fitzpatrick v. Bitzer *and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259, 1287 (2001) (arguing that "the primary goal of a constitution . . . is to provide a stable framework for a just and workable government").

[23] *See, e.g.*, MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 5 (1995) (describing "the avoidance of tyranny" as a core constitutional value).

[24] For an account of the emergence of progressive ideas, see JAMES T. KLOPPENBERG, UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870-1920 (1986). For a focus on leftist activism, see MICHAEL KAZIN, AMERICAN DREAMERS: HOW THE LEFT CHANGED A NATION (2011). For a statement of contemporary progressivism, with a focus on economic issues, see JOSEPH E. STIGLITZ, PEOPLE, POWER, AND PROFITS: PROGRESSIVE CAPITALISM FOR AN AGE OF DISCONTENT (2019).

[25] *See generally* JEFFREY M. BERRY, THE NEW LIBERALISM: THE RISING POWER OF CITIZEN GROUPS (1999) (describing the proliferation of new progressive interest groups in the second half of the twentieth century).

[26] At roughly the same time interest groups began to multiply, the political parties realigned, such that the divide between progressivism and conservatism increasingly came to tracks the two major political parties. *See, e.g.*, ERIC SCHICKLER, RACIAL REALIGNMENT: THE TRANSFORMATION OF AMERICAN LIBERALISM, 1932–1965 at 1 (2016) (noting that a convergence of "Democratic partisanship, economic liberalism, and racial liberalism" emerged in the mid-1960s). As a result, the fragmented

progressive constitutionalism is that different sorts of progressives need different things from the constitutional order.

This review essay proceeds in three Parts. Part I discusses constitutionalism as an ideology, as scrutinized in *Against Constitutionalism*. It emphasizes how constitutionalism as an ideology creates challenges for the left, an ironic finding given the role of mid-twentieth century progressives in cementing constitutionalism in the United States. Part II turns to constitutional argument, as exemplified by *The Anti-Oligarchy Constitution*. It considers what it means for an argument to be constitutional in character and examines both the promise and peril of framing progressive commitments in constitutional terms. Part III turns to institutional design. After noting the familiar ways that the existing constitutional order creates hurdles for progressives, it highlights how competing commitments within the progressive tent create unavoidable trade-offs for progressives deciding which reforms to pursue. A brief conclusion follows.

I. PROGRESSIVE CONSTITUTIONAL IDEOLOGY?

The United States is in the grip of an ideology. Constitutionalism, a distinctive philosophy of governance, has quietly come to dominate and be taken for granted. So argues *Against Constitutionalism*, Martin Loughlin's ambitious account of how constitutionalism emerged, developed, and spread. The book's central insight is that constitutionalism is not an empty vessel into which other commitments can be poured, but rather that it is *itself* an ideology, with its own values, logic, and normative commitments.[27] Viewing constitutionalism as an ideology allows us to evaluate the intersection of that ideology with progressivism and reveals several challenges that progressives confront in the face of constitutionalism.

A. Constitutionalism as Ideology

Against Constitutionalism opens with a definition of constitutionalism, which entails a written constitution that

> (1) establishes a comprehensive scheme of government, founded (2) on the principle of representative government and (3) on the need to divide, channel, and constrain governmental powers for the purpose of safeguarding individual liberty. That constitution is also envisaged (4) as creating a permanent governing framework that (5) is conceived as establishing a system of fundamental law supervised by a judiciary charged with elaborating the requirements of public reason, so that (6) the constitution is able to assume its true status as the authoritative expression of the regime's collective political identity (pp. 6–7).

character of the left came to shape the Democratic Party, which political scientists have described as a "coalition of social groups that act as discrete voting blocs for candidates, constituencies for group leaders, and demanders of particular policy commitments." *See* MATT GROSSMAN & DAVID A. HOPKINS, ASYMMETRIC POLITICS: IDEOLOGICAL REPUBLICANS AND GROUP INTEREST DEMOCRATS 14 (2016).

[27] On this view, "progressive constitutionalism," with the phrase's first word modifying its second, masks the content of constitutionalism as a stand-along concept. Loughlin contends that "the use of certain adjectival qualifiers, such as 'popular constitutionalism,' 'political constitutionalism, and even 'authoritarian constitutionalism,' are misnomers: their advocates advance arguments either about popular political agency or an authoritarian regime's use of these instruments that are antithetical to the actual meaning of constitutionalism [as an ideology]" (p. 7).

As these criteria make plain, a written constitution is necessary but not sufficient to meet Loughlin's criteria for a constitutionalist polity. This conception of constitutionalism also makes plain its distinctiveness from what Loughlin calls constitutional democracy. Constitutional democracy is a means of instantiating self-government, through designing institutions, like legislatures and executives, that convert public preferences into policies (p. x). For Loughlin, constitutional democracy and constitutionalism are contradictory goals: they should "not be equated," since "constitutionalism is an aberrant mode of governing that must be overcome if faith in a constitutional democracy is to be maintained" (p. x).

While constitutionalism fully developed in the twentieth century, its foundations date back centuries. The concept has its origins in Enlightenment ideas, particularly in "a liberal ideology that sought to protect established rights by instituting a system of limited government" (p. 23). It owes a debt to John Locke's ideas about natural rights, which focused on negative liberties—the right to be free from government interference (p. 93). So, too, Loughlin highlights contemporary arguments that constitutions are necessary not only to secure negative liberty but also to affirmatively facilitate a market-based economic order (p. 73).

Under a regime of constitutionalism, written constitutions do more than constitute, empower, and limit institutions of government. Constitutions also serve as a symbol of collective political identity, advancing social cohesion by providing citizens with a common basis for national identity (pp. 112–13). The judiciary, as expositor of the constitution, is then tasked with more than ordinary legal interpretation or dispute resolution. It must also reconcile the constitution's instrumental role in organizing government with its symbolic one as a statement of national values (p. 122). Courts thus become articulators of the polity's political identity, with their constitutional decisions pronouncing on "the soul of the nation" (p. 138).[28]

The book attributes the emergence of constitutionalism to the intersection of two watershed ideas. One is constituent power: the idea that sovereignty lies with the people, whose power exists prior to and outside of any particular constitutional structure (pp. 85–86). The other is the emergence of constitutional rights. Loughlin documents the transition from a political philosophical view of natural rights to a legal regime that protects individual rights (pp. 89–95). In a rights-based order, "governmental authority rests on its capacity to protect the interests of the rights-bearing individual, the primary means of such protection being the constitution" (p. 87).

Loughlin argues that constitutionalism emerges to mediate the inevitable tension between constituent power and constitutional rights. Someone must determine when the will of the people must give way to individual rights and when, conversely, individual rights must yield to popular will. A written constitution, even if it aspires to specificity, cannot definitively resolve how open-textured concepts like liberty, equality, and dignity apply to particular situations. Judges come to play the role of choosing between "contestable values claiming to be the best iteration" of constitutional values (p. 163).

[28] Loughlin is critical of this role for the courts, though others have described the same role in positive terms. *See e.g.*, CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 3 (2001) (arguing that "the Supreme Court should be understood as a kind of representative institution well-shaped to speak on behalf of the people about questions of moral and political principle"); KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 194 (1989) (describing the role of "judges, and especially the Supreme Court, to discern and articulate substantive values that provide an important part of the 'moral cohesion' that is the cement for our national community").

Once this judicial role emerges, courts come to play a dominant role in the political culture. Loughlin does not rebut—and in fact cites approvingly—work attributing the rise of judicial supremacy to the strategic incentives of political actors (pp. 133–34[29]). His account, however, sounds more in intellectual history than in political science. He argues that constitutionally emerges to fill a need: resolving the tensions that arise from joint commitments to constituent power and constitutional rights.

B. Constitutionalism in the United States

Given these forces, constitutionalism spread quickly and broadly. Loughlin shows how nations with varied cultural backgrounds and political histories fell into the thrall of constitutionalism in the mid-twentieth century—from post-war German to independent India to newer democracies in Eastern Europe and the Global South (pp. 13–17, 127–29, 147–48). "Across the world," Loughlin observes, "the constitution is now seen as the only medium through which to realize the promise of an inclusive regime of equal rights" (pp. 176–77).[30] But constitutionalism is not universal. Democracies have avoided it by not having written constitutions in the first instance (as in the United Kingdom[31]), by not giving their constitutions a rarefied place in their political cultures (as in France or Sweden[32]), or by denying courts the last word on matters of individual rights (as in Canada[33]).

For the United States, then, the question is how a combination of institutions and culture yielded constitutionalism. The answer rests partially on choices made in the 1780s, but partially on progressive politics in the 1950s and 1960s that helped solidify constitutionalism as a dominant governing ideology.

A first feature that pushes the United States toward constitutionalism is the near permanence of the U.S. constitutional text. Many of the most contested and litigated clauses of the Constitution have never been amended. Formal amendments are infrequent and rarely concern the issues of the greatest public concern.[34] As a result, the Constitution is de facto amended

---

[29] Discussing Ran Hirschl's argument that juristocracy arises from the interplay of strategic incentives of political, economic, and judicial elites. *See* RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 11–12 (2004).

[30] Beyond state borders, the logic of constitutionalism has even shaped thinking about the necessity and goals of international institutions. Loughlin argues that transnational institutions can also play the same identity-formation role played by domestic constitutions, noting Jürgen Habermas' insight that the drafting of a European constitution "would enable diverse national traditions to be shaped into a cohesive European identity" (p. 180). He further argues that the collection of global institutions that emerged in the twentieth century to establish an integrated worldwide economic regime developed in the shadow of constitutionalism (p. 187).

[31] The United Kingdom is the paradigm case. *See, e.g.*, Jo Eric Khushal Murkens, *A Written Constitution: A Case Not Made*, 41 OXFORD J. LEGAL STUD. 965, 967 (2021) (noting that in the United Kingdom, Acts of Parliament are "the highest source of law" and so "may violate international law and fundamental rights and repeal constitutional statutes at will").

[32] Loughlin cites these, examples (p. 7).

[33] Canada's parliament or a provincial legislature can direct that a statute go into effect notwithstanding a possible conflict with individual rights protections. *See* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 33. *See also* Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2784–85 (2003). This "weak-form" judicial review contrasts with Loughlin's constitutionalism, under which the judiciary acts as "guardian of the constitution" (p. 34).

[34] *See, e.g.*, David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1458 (2001) ("[T]hrough most of our history, the amendment process has not been an important means of constitutional change.").

through the decisions of the Supreme Court. The Court has repeatedly transformed the Constitution's meaning: through the rise of Lochnerism, the "switch in time" of 1937, and the version of equal protection embraced in *Brown*. Were the Constitution easier to formally amend, such constitutional transitions could have been made through the amendment process. Instead, the brittle character of the canonical document has resulted in a Court that serves as the only institution which is functionally able to amend the Constitution.[35]

This judicial role is not intrinsic to a written constitution. The U.S. Constitution is harder to formally amend than either state constitutions or the written constitutions of many other nations.[36] If the framers had enacted more lax amendment procedures, we could imagine a much more malleable text.[37] This would be all the more true if Thomas Jefferson had prevailed in his position, which sounds quixotic today, that the Constitution should be written and ratified anew in each generation (pp. 7–8).[38] If the constitutional text were less fixed, the politics and culture that developed in the ensuing centuries would have likely looked different.

The Constitution's brief and open-ended language also contributes to the emergence of constitutionalism. The U.S. Constitution, especially its individual rights provisions, contains open-ended terms like "freedom of speech,"[39] "due process,"[40] and "equal protection."[41] This sort of language creates openings for courts to carve out a distinct role: as expositors of those terms, which they defend against encroachment from Congress, the executive branch, and subnational governments.[42] If individual rights provisions were more code-like, with greater specificity about what they do and do not cover, there would be less need for—and less room for—constitutional common law specifying the scope of those provisions. Given the significance of individual rights like free speech and racial equality in U.S. political culture, a Supreme Court that defines the scope of individual rights is inevitably also one that serves as an expositor of the nation's political morality.

It is no doubt true that the U.S. Constitution's rigidity, brevity, and open-ended character give room for courts to play an outsized role in political life. But those factors are longstanding, while the version of constitutionalism that currently exists in the United States is much newer. Constitutionalism today is defined not only by classical constitutionalism's limits on government

---

[35] The Court does not, of course, describe itself as a de facto amender; instead, it reinforces its role as constitutional guardian by describing even major changes to constitutional law as consistent with the Constitution, rightly understood.

[36] *See* RICHARD ALBERT, CONSTITUTIONAL AMENDMENTS: MAKING, BREAKING, AND CHANGING CONSTITUTIONS 97 (2019) (noting that "the U.S. Constitution is widely regarded as one of the most difficult to change by formal amendment" (internal citation omitted)); ROBERT L. MADDEX, STATE CONSTITUTIONS OF THE UNITED STATES xxii–xxvii (2005) (documenting that more than half of state constitutions have been amended more than one-hundred times, and nearly all have been amended more often than the federal Constitution).

[37] At the Virginia ratifying convention, Patrick Henry argued that the Constitution made amendments too difficult, such that "[a] trifling minority may reject the most salutary amendments." *Debate in Virginia Ratifying Convention*, *in* THE FOUNDERS' CONSTITUTION (Philip B. Kurland & Ralph Lerner eds., 2000), *available at* http://press-pubs.uchicago.edu/founders/documents/a5s9.html.

[38] *See* Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* THOMAS JEFFERSON: POLITICAL WRITINGS 593, 596 (Joyce Appleby & Terence Ball eds., 1999).

[39] U.S. CONST. amend. I.

[40] *Id.* amend. V, XIV.

[41] *Id.* amend. amend. XIV, § 1.

[42] *Cf.* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 5 (2001) (noting that "a distinctive feature of the Supreme Court's function involves the formulation of constitutional rules, formulas, tests, and features," giving examples of tests that implement the Constitution's more open-ended provisions)

power, but also by a more robust set of rights that enable the judiciary to weigh in on nearly every topic of public concern. That transition was, in significant part, driven by progressives.

The Warren Court served as the key inflection point in progressive thinking. Progressives had fought the Supreme Court during the Progressive Era and New Deal, but the stirrings of the civil rights movement changed the politics of judicial review. Progressive support for judicial supremacy emerged from the Warren Court's decisions on civil rights, apportionment, free speech, and the rights of criminal defendants.[43] In Larry Kramer's words, "as Warren Court activism crested in the mid-1960s, a new generation of liberal scholars discarded opposition to courts and turned the liberal tradition on its head by embracing a philosophy of broad judicial authority."[44] Progressives came to endorse the view, stated most forcefully in *Cooper v. Aaron*,[45] that a "permanent and indispensable feature of our constitutional system" is that "the federal judiciary is supreme in the exposition of the law of the Constitution."[46] Some older progressives, who remembered well the constitutional struggles of the New Deal era, sounded notes of caution about the left's embrace of a more muscular judiciary.[47] But the Warren Court transformed American progressives, for the first time in the nation's history, into advocates for judicial supremacy.[48]

The progressive embrace of judicial supremacy led to a cross-ideological consensus in support of the Supreme Court's role as the final arbiter of constitutional issues. To be sure, liberals and conservatives disagreed fiercely about what the Constitution meant, but the Warren Court solidified a widespread view of the Court as having the last word.[49] The past half-century of judicial conservativism has not fully dislodged progressives from their subscription to that view. Some have pursued alternative visions, as evident by academic movements calling for non-judicial constitutionalism (whether popular, legislative, or administrative).[50] Alternatives to judicial supremacy may find additional support with a Court that is polarized based on the party of the appointing President[51] and a public that recognizes the Court's political character.[52] At the same time, though center-left jurists continue to valorized the Court's role in American life and push

---

[43] *See generally* MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE (1999) (discussing these and other areas).

[44] LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 223 (2004).

[45] 358 U.S. 1 (1958).

[46] *Id.* at 18. Beyond our borders, weak-form judicial review empowers some national legislatures to override certain judicial judgments on matters of constitutionality. *See supra* note 33 and accompanying text; *see also, generally* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS (2008) (describing how weak-form judicial review operates and arguing that it provides an attractive means of advancing positive rights).

[47] *See* Jack M. Balkin, Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time, 98 Tex. L. Rev. 215, 243 (2019).

[48] *See* Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CAL. L. REV. 959, 964 (2004) (noting that the Warren Court "for the first time in American history, gave progressives a reason to see the judiciary as a friend rather than a foe").

[49] *See* KRAMER, *supra* note 44, at 223 ("The upshot was—again, for the first time in American history—that conservatives and liberals found themselves in agreement on the principle of judicial supremacy. . . . [L]iberals and conservatives alike took for granted that it was judges who should do the interpreting and that the judges' interpretations should be final and binding.").

[50] Leading examples include WILLIAM N. ESKRIDGE & JOHN A. FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION (2010); KRAMER, *supra* note 44; MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Daniel A. Farber, *Legislative Constitutionalism in a System of Judicial Supremacy*, *in* THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE (Richard W. Bauman & Tsvi Kahana eds., 2009); Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013); Post & Siegel, *supra* note 84.

[51] *See, e.g.*, Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 301 (noting that for the first time in the Court's history, "all of the Republican-nominated Justices on the Supreme Court have [since 2010] been to the right of all of its Democratic-nominated Justices").

[52] *62% of Americans Say Politics, Not Law, Drives Supreme Court Decisions*, GRINNELL COLLEGE (Oct. 20, 2021), https://www.grinnell.edu/news/62-americans-say-politics-not-law-drives-supreme-court-decisions (reporting polling results).

back against perceptions of the judiciary as political.[53] These calls have sought to prop up the view of courts as what Loughlin calls "elaborating the requirements of public reason" (p. 7). It is hard to imagine that progressives would have accepted this role for the judiciary if not for the Warren Court.

C. Implications for Progressivism

A principal criticism of constitutionalism is that the people and their elected representatives, rather than unelected judges, should define the nation's political identity and make its most important policy decisions (pp. 124–35). This argument is critically important to evaluating constitutionalism on democratic theory grounds. But focusing on high principle can obscure a more pragmatic question: who are constitutionalism's winners and losers?

Most simply, judicial supremacy leads to courts that serve as veto points. The ability of courts to strike down statutes or regulations as violating the Constitution adds a veto point to the lawmaking process. Courts can, of course, strike down either progressive or conservative policies. But the asymmetric policymaking ambitions of the two parties mean that judicial review is likely to, in the long term, set back progressive policies more so than conservative ones.[54] Some nations' courts have enforced positive rights and required governments to create programs or spend money.[55] But the U.S. Supreme Court has not generally taken this road, and "it is often said that our Constitution has traditionally protected negative liberties rather than positive ones."[56] While it is virtually impossible to imagine even a progressive Court requiring the creation of a national health care program, the Court struck down a major expansion of Medicaid and came within one vote of striking down the entire Affordable Care Act.[57] It is fair to describe the version of constitutional judicial review practiced in the United States as a hurdle in the way of progressive action, at least on issues of regulatory and social welfare policy.

To be sure, on some issues a conception of the Constitution as a charter of negative liberties can aid progressives. This holds true in areas where progressive politics overlap with civil libertarianism.[58] But relying on courts as agents of social change comes with its own risks for progressives. Most notable is the fear that reform driven by the courts, especially on contested social issues, might induce greater backlash than the same reform would have if enacted legislatively. Scholars have examined this sort of backlash in the context of progressive decisions

[53] The most notable recent example is STEPHEN BREYER, THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS (2021). *See also* Sophie Tatum, *Justice Kagan Worries About the 'Legitimacy' of a Politically Divided Supreme Court*, CNN (Oct. 5, 2018, 10:06 PM ET), https://cnn.com/2018/10/05/politics/supremecourt-elena-kagan-legitimacy/index.html.

[54] *See* Gould & Pozen, *supra* note 1, at __ (developing this argument).

[55] *See* Stephen Gardbaum, *The Structure and Scope of Constitutional Rights*, *in* COMPARATIVE CONSTITUTIONAL LAW 387, 396–402 (Tom Ginsburg & Rosalind Dixon, eds.).

[56] Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 159 (2015) (citing Mark A. Graber, *Does It Really Matter? Conservative Courts in a Conservative Era*, 75 FORDHAM L. REV. 675, 706 (2006)). *But see* EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS (2013)

[57] *See* NFIB v. Sebelius, 567 U.S. 519 (2012).

[58] *See infra* notes 141–142 and accompanying text (discussing immigration and criminal justice).

like *Brown v. Board of Education*[59] and *Roe v. Wade*.[60] Given that progressives are more likely than conservatives to seek to modify (rather than solidify) existing cultural morays through policy changes, it stands to reason that efforts to pursue cultural liberalism through the courts might be particularly vulnerable to backlash.

The ways in which the discourse of constitutional litigation spill over into nonjudicial contexts can also harm progressives. A distinctive set of norms dictate what sorts of arguments are and are not acceptable in court.[61] For example, defenders of a gun control regulation in the face of a Second Amendment challenge cannot simply make the consequentialist argument that the regulation would save lives; they must instead invoke accepted modalities of constitutional argument. These modalities can "shut out of constitutional law virtually all the arguments that drive most citizens' views on most matters of public concern."[62] Doctrine can also foreclose certain substantive arguments while elevating others. Judicial decisions on affirmative action, for example, encourage proponents to defend the practice based on diversity's educational benefits, but discourage arguments about remedying past injustices.[63] Constitutional modalities and doctrines then become the basis for nonjudicial conversations about policy. As Michael Sandel has observed, "[a]ssumptions drawn from constitutional discourse increasingly set the terms of political debate in general."[64] This is perhaps especially true with respect to individual rights: Mary Ann Glendon and Jamal Greene have each described how public discussion of rights takes its cues from constitutional law.[65]

These discursive dynamics will often limit progressives' abilities to make the best case for their preferred policies. Constitutionalism disadvantages arguments about the just distribution of resources and the consequentialist impacts of policy choices, since each of these sorts of arguments are seen as more the domain of "policy" than "law." But those are precisely the sorts of arguments that often make the best case for progressive policies. For example, the Affordable Care Act

---

[59] See, e.g., Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 82 (1994) (arguing that "*Brown* crystallized southern resistance to racial change," and spurred "massive resistance, propel[ing] politics in virtually every southern state several notches to the right on racial issues").

[60] *See, e.g.*, William N. Eskridge, Jr., Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics, 114 Yale L.J. 1279, 1312 (2005) (arguing that *Roe* "energize[d] the pro-life movement," "accelerate[d] the infusion of sectarian religion into American politics," and "radicalized many traditionalists"). *But see* Linda Greenhouse & Reva B. Siegel. *Before (and After)* Roe v. Wade*: New Questions About Backlash*, 120 YALE L.J. 2028 (2010) (contesting the backlash thesis with respect to *Roe v. Wade*).

[61] *See, e.g.*, PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 3–119 (1982) (presenting six "modalities" of constitutional argument); David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 746–66 (2021) (presenting six "anti-modalities" outside the bounds of acceptable constitutional argument).

[62] Pozen & Samaha, *supra* note 61, at 732.

[63] *See* Sanford Levinson, *Diversity*, 2 U. PA. J. CONST. L. 573, 578 (2000) (noting that if the Court says "[s]tart talking about diversity—and downplay any talk about rectification of past social injustice," then "the [public] conversation proceeds exactly in that direction"). The roots of the Court's focus on diversity to the exclusion of other values lies in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316–18 (1978) (Powell, J.).

[64] Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CALIF. L. REV. 521, 538 (1989); *see also, e.g.*, Adam M. Samaha, *Talk About Talking About Constitutional Law*, 2012 U. ILL. L. REV. 783, 785 (2012) (suggesting that "a large domain for constitutional discourse" can "crowd[] out nonconstitutional argument"); Sandel, *supra*, at 538 ("While most at home in constitutional law, the main motifs of contemporary liberalism—rights as trumps, the neutral state, and the unencumbered self—figure with increasing prominence in our moral and political culture.").

[65] *See, e.g.*, MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 4 (1991) (arguing that the rights revolution of the mid-twentieth century transformed "the way we now think and speak about major public issues"); JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSIONS WITH RIGHTS IS TEARING AMERICA APART 143 (2021) (arguing that U.S. courts' approach to rights makes politics "a battle between those the judges think the Constitution sees and those they think it leaves out," encouraging citizens, in turn "to trumpet our own rights and deny that others have them").

focused on health care access and affordability, but judicial review forced defenders of the statute to focus instead on the distinction between regulating action and regulating inaction (through the lens of a hypothetical that only a lawyer could love[66]). Similarly, while the best policy arguments in favor of the Voting Rights Act concern the need to prevent discrimination in voting, the most important voting rights decision of the last generation instead shifted focus to an abstract discussion of "the principle that all States enjoy equal sovereignty."[67] The gun control and affirmative action examples given above are further instances of how progressives' hands can be tied by the types of arguments that courts are willing to entertain. Constitutionalism, in short, often prevents progressives from making the best arguments in defense of their preferred policies.

Relatedly, constitutionalizing political conflict risks elevating individual rights claims over other sorts of interests. Loughlin is correct as a conceptual matter that "almost any interest can now be reformulated as a right" (p. 131). But in the United States, rights "tend to be presented as absolute, individual, and independent of any necessary relation to responsibilities."[68] As a result, marginalized groups often seek full inclusion in the polity by making demands for rights, because those are the types of claims that the Constitution privileges (p. 176). The Civil Rights movement followed this paradigm, for example, prominently featuring calls for protecting individual rights through the Constitution's Equal Protection Clause[69] and creating new rights through statutes like the Civil Rights Act of 1964.[70] Not all progressive commitments, however, can be so easily captured by individual rights as understood within the norms of U.S. constitutional discourse. We have already seen how an understanding of rights as freedom from government coercion can be an impediment to progressive policies.[71] The same is true for the individualistic character of rights. It is easy to assert an individual right to contribute to a political campaign[72] or refuse to contribute to a labor union,[73] but much harder to do so for the collective interests in a fair political process or a stable labor union with meaningful bargaining power.[74]

Further, elevating the status of judicially recognized rights risks devaluing those interests that are not recognized as rights.[75] Those interests include core progressive commitments, such as public health and the environment. Policy disputes during the COVID-19 pandemic, for example,

---

[66] *See, e.g.*, Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV. 66 (2013).

[67] Shelby County v. Holder, 570 U.S. 529, 535 (2013); *see also id.* at 542–45.

[68] GLENDON, *supra* note 65, at 12.

[69] *See, e.g.*, MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2006); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (2011).

[70] *See, e.g.*, ROBERT D. LOEVY, TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964 (1990).

[71] *See supra* notes 56–58 and accompanying text.

[72] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Randall v. Sorrell, 548 U.S. 230 (2006); Davis v. Fed. Election Comm'n, 554 U.S. 724 (2008); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434 (2014).

[73] *See* Janus v. AFSME, 138 S. Ct. 2448 (2018).

[74] Loughlin does not describe rights in terms of progressive or conservative valences, but he does note that "[t]he reprocessing of democratic will-formation through the language of rights—the rights of speech and association, the right to vote, and the right to political equality—leads to individualization and thus significantly undermines the ability of collective organizations like political parties and interest groups to build coalitions of interests" (p. 135). *See also* Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 59 (2004) (arguing that rights claims fail to fully "address[] structural problems concerning the proper allocation of political representation").

[75] *See* GREENE, *supra* note 65, at 58 (noting a distinction between "those rights that count—and which judges must therefore apply vigorously against public officials—and those that don't count—which the government may therefore ignore").

made clear how rights claims can be a sword against public health interventions. It was easy for opponents of mask and vaccination mandates to claim the mantle of rights—namely, freedom from government coercion. It was much harder for those concerned about contracting a deadly virus to describe their health interest as a right, at least under the Supreme Court's approach to rights. Given that the threat of infection comes from one's fellow citizens, rather than the government, a rights frame that focuses on government coercion is a poor fit for protecting public health.[76]

One possible response to judicial elevation of certain modalities of argument and certain conceptions of rights would be for courts to broaden their approach. Couldn't U.S. courts begin to accept the types of arguments that they have traditionally marginalized, thereby undoing the distortions just discussed? Couldn't they begin to recognize positive rights, or collective rights? They could in theory, of course. But a pair of hurdles prevent that shift. The obvious one is the conservativism of today's Supreme Court. But more subtly, there are institutional reasons why courts benefit from having a *modus operandi* distinct from that of the other branches. A central problem for courts is the need to legitimate their role in the political process in the face of a tenuous democratic pedigree. One means of doing so is to present themselves as engaged in a mode of reasoning that differs from what goes on in the legislative and executive branches. If courts were to overtly make all-things-considered judgments about justice, economic efficiency, or other public policy considerations, critics could charge that such judgments are better made by elected officials or expert technocrats. Elevating constitutional law as a distinctive mode of analysis helps prevents courts from "losing their unique character as constitutional guardians" (pp. 150).[77] Once created, then, constitutionalism feeds on itself, as courts entrench their own authority over the political process.

D. Constitutionalism and Collective Identity

If constitutionalism disadvantages progressives, why have they not turned against it in a sustained way? One answer lies in the ways in which constitutionalism can be understood as serving some progressive ends: in the shadow of the Warren Court and the Trump presidency, some progressives hold out hope that constitutionalism could advance the rights of racial minorities and help stave off tyranny.[78] A separate reason, though, lies in the final pillar of Loughlin's account of constitutionalism: a point about political culture.

Under constitutionalism, a constitution serves as a basis not only for the structures of government, but also for national identity. It serves as something that everyone in a polity can, at least notionally, rally around regardless of their differences. This role is captured by the idea of *constitutional patriotism*, the idea that "the norms, the values, and, more indirectly, the procedures of a liberal democratic constitution"[79] are core to a nation's political culture (pp. 106–18). Historically, nation-states could build solidarity though their citizens' shared ethnic, religious, or

[76] *Cf. generally* WENDY E. PARMET, CONSTITUTIONAL CONTAGION, HOW CONSTITUTIONAL LAW IS KILLING US (forthcoming 2023) (discussing tensions between constitutional law and advancement of public health).

[77] This analysis provides one hypothesis as to why the U.S. Supreme Court has not embraced proportionality, an approach to judicial review common in many constitutional courts that entails more explicit balancing of competing interests. *See* Jamal Greene, *The Supreme Court 2017 Term—Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 91 (2018) (suggesting that courts may need "to gloss over the fact of continuity between their task and the tasks of elected officials and administrators" in order to "persuade citizens that courts are needed and worth listening to").

[78] *See supra* note 12 and accompanying text; *see also infra* notes 143–145 and accompanying text.

[79] JAN-WERNER MÜLLER, CONSTITUTIONAL PATRIOTISM 1 (2007).

cultural backgrounds (p. 113). Those unifying forces became weaker, and potentially exclusionary, in the face of diversity. "And that is why," Loughlin argues, "we turn to the constitution not just as an instrument but as a symbol of the values on which we might rebuild social integration in a secular, ahistorical, culturally heterogeneous society" (p. 113).

This dynamic explains why versions of constitutional patriotism are most prominent in contexts where shared demographic or cultural heritage cannot be relied upon to forge unity. The United States provides an obvious example, given the nation's size, its diversity, and the problems of invoking a history checkered by racial and ethnic subordination.[80] In Germany, where the memory of the Holocaust means that arguments for unity based on shared heritage are rightly seen by many as anathema, constitutional patriotism steps in to fill the void (p. 118). Attempts to write a constitution for the European Union were important in part as efforts to build a shared political identity among nations that had different national languages, diverse cultural backgrounds, and varied historical experiences (p. 180).[81] Constitutional patriotism certainly does not repress all political conflict, nor could it. But its prominence in heterogeneous polities suggests one reason why it can become prevalent.

The importance of diversity to the contemporary left explains why the Constitution-as-symbol has a distinctive political utility for progressives. Strength in diversity has been a progressive shibboleth for a half century.[82] Given this commitment, progressives can argue that the Constitution brings all Americans together despite our differences. "[O]ne reason for the emphasis on reverence for the Constitution," Sandy Levinson has noted, "is the realization that there may be no other basis for uniting a nation of so many disparate groups."[83] Some contemporary progressives have highlighted this aspect of the Constitution, describing it as "the compendium of values and commitments that holds us together despite our diversity and differences."[84] And these ideas are far from new. Nearly a century ago, one commentator described the Constitution as "principally an *assimilative*" text, "betokening the encompassing tradition into which all sorts of diverse traditions could pour themselves."[85] For those committed to diversity, the Constitution provides a useful answer to the quandary of how to create a national identity in the face of difference.

Progressives may also feel pressed to construct a political identity in the language of constitutionalism given the right's historic success in painting the left as unpatriotic. In one historian's words, "Democrats neglected [patriotism] amid the counterculture upheaval of the

[80] *See* p. 118 ("The American narrative of the Constitution as a social myth is a story of triumph. A loose nation of immigrants is forged into a singular people 'conceived in liberty, and dedicated to the proposition that all men are created equal.'").

[81] *See also* MÜLLER, *supra* note 79, at 2–4.

[82] Nicole Mellow, *An Identity Crisis for the Democrats?*, 52 J. POL. 324, 335 (2020) ("By the 1970s . . . the Democratic Party's definition of America was unapologetically diverse and multicultural.").

[83] LEVINSON, *supra* note 13, at 73; *see also id.* ("The Constitution thus becomes the *only* principle of order, for there is no otherwise shared moral or social vision that might bind together a nation."); GLENDON, *supra* note 65, at 3 ("With increasing heterogeneity, it has become quite difficult to convincingly articulate common values by reference to a shared history, religion, or cultural tradition. The language we have developed for public use in our large, multicultural society is thus even more legalistic than the one Tocqueville heard . . .").

[84] *See, e.g.*, Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2027 (2003).

[85] Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1304 (1937).

1960s and finally ceded [it] to Republicans during the Reagan years."[86] One of the key arguments of the *Anti-Oligarchy Constitution*, discussed in the next Part, is that there is a constitutional basis for progressive policies. Any political faction could benefit from yoking its agenda to constitutional values, but such a linkage may be especially important for progressives, as a group whose patriotism has often been questioned.[87]

These dynamics give rise to challenges for progressives, however. First is the matter of whether the Constitution can play its symbolic role without also empowering the judiciary to play an outsized part in political life. Loughlin suggests that that might not be possible, noting that unity requires "faith in the symbol" of a constitution alongside trust in the judiciary as the "institution acting as its guardian" (p. 120). To be sure, scholars have developed robust theories of constitutionalism that seek to decenter the courts.[88] Political leaders have likewise sought to wrest control over constitutional meaning from the courts.[89] But our constitutional culture has developed such that when the average American thinks about constitutional meaning, they think about the Supreme Court rather than Congress or social movements. Progressives who seek to use the Constitution as an instrument of national unity without advancing a narrative of juristocracy are walking a narrow road.

Another challenge is that the constitutional structure makes it difficult for contemporary progressives to win elections and thereby accomplish their agendas. I have previously argued, together with David Pozen, that longstanding features of the U.S. constitutional order are biased against progressive candidates, and that the difficulty of lawmaking disproportionately harms progressive agendas.[90] Progressives often seek to advance their worldviews through tying their arguments to the Constitution, writing books with titles like *Keeping Faith with the Constitution*,[91] and arguing that their political commitments are consistent with the Constitution's original meaning.[92] These interventions can advance progressive agendas in individual instances, but they risk further elevating the Constitution's cultural status in a manner that will ultimately harm progressives, given the ways that the document stacks the deck against their candidates and agendas.

If constitutionalism as conceived by Loughlin is no friend to progressivism, what are progressives to do? One option is to try to reinterpret constitutionalism in a way that can further progressive ends. Another is to try to change institutional arrangements to weaken the grip of constitutionalism. The next two Parts consider each of those approaches in turn.

---

[86] Heather Cox Richardson, *Republicans Don't Own Patriotism Anymore*, NEW REPUBLIC (Aug. 20, 2018), https://newrepublic.com/article/150438/republicans-dont-patriotism-anymore.

[87] *See, e.g.*, Cass R. Sunstein, *Partyism*, 2015 U. CHI. LEGAL F. 1, 10 (2015) (describing a stereotype of the left as "unpatriotic socialists who do not appreciate and who seek to undermine the United States").

[88] *See supra* note 50 and accompanying text (collecting sources on popular, legislative, and administrative constitutionalism).

[89] *See, e.g.*, President Franklin D. Roosevelt, Address on Constitution Day (Sept. 17, 1937), *available at* https://www.presidency.ucsb.edu/documents/address-constitution-day-washington-dc (describing the Constitution as "a layman's document, not a lawyer's contract").

[90] *See* Gould & Pozen, *supra* note 1, at __ (discussing presidential, Senate, and House elections); *id.* at __ (discussing asymmetric effects of veto points in the lawmaking process).

[91] *See* LIU, KARLAN & SCHROEDER, *supra* note 14.

[92] *See, e.g.*, JACK M. BALKIN LIVING ORIGINALISM (2014) (developing such a theory).

II. PROGRESSIVE CONSTITUTIONAL ARGUMENT?

Martin Loughlin's account of how constitutionalism shapes political culture explains why partisans of all stripes often present their worldviews in constitutional terms. A leading example of this sort of argument is Joseph Fishkin and William Forbath's *The Anti-Oligarchy Constitution*. The book masterfully shows how generations of progressives made policy arguments, especially economic policy arguments, from within the American constitutional tradition. It argues that "the Constitution impose[s] affirmative obligations on all branches of government, but especially on the elected branches, to pass and implement the legislation needed to enforce the Constitution" (p. 3). On Fishkin and Forbath's approach, constitutionalism should be understood to include many topics—including much of private law and social welfare issues—that are typically thought of as the domain of policy rather than the Constitution (pp. 441–84).

The Anti-Oligarchy Constitution can be understood as both a symptom of Loughlin's account and an attempt to overcome it. On the one hand, the book's choice to frame a progressive agenda in constitutional terms shows the power of what Loughlin calls the "total constitution," the idea that a constitution not only orders government but also "expresses the constitution of society" (p. 130). The fact that generations of progressives have felt moved to articulate their agendas in constitutional terms illustrates how potent it is to invoke the Constitution and the fear that non-constitutional arguments might be trumped by constitutional ones. On the other hand, though, Fishkin and Forbath attempt to overcome what for Loughlin is a core aspect of constitutionalism: the judiciary's role as the primary or ultimate arbiter of constitutional meaning. Even if Loughlin's understanding of constitutionalism disadvantages progressives, Fishkin and Forbath hold out hope that there is a different, broader version of the concept that might not.

A. The Democracy-of-Opportunity Tradition

Fishkin and Forbath seek to recover a constellation of ideas that they dub the "democracy-of-opportunity tradition" (p. 3).[93] This tradition consists of three pillars. First, it recognizes that centralized political and economic power are mutually reinforcing, giving rise to a risk of oligarchy absent concerted government action to prevent centralization, diffuse political influence, and break the link between political and economic power (pp. 8–9). Second, the tradition emphasizes the importance of a strong middle class, defined by reference to a comfortable standard of living, and promoted as necessary through government policies (p. 9). Third, it requires inclusion of demographic minorities in political and economic life, a project that the authors contend is intertwined and complementary with anti-oligarchy and building a strong middle class (pp. 10–12).

Importantly, the book advocates the democracy-of-opportunity tradition not primarily as a matter of what justice requires. It argues that democracy of opportunity is also a *constitutional* tradition. "[A]n American tradition of constitutional argument," Fishkin and Forbath write, "directly addresses the central problems of oligarchy and inequality we now face" (p. 2). By

[93] The term was most famously used by President Franklin D. Roosevelt, though it has earlier roots (p. 286; *see also* Franklin D. Roosevelt, Address at the Democratic National Convention (June 27, 1936), *available at* https://www.presidency.ucsb.edu/documents/address-accepting-the-presidential-nomination-the-democratic-national-convention-chicago-1 ("Government in a modern civilization has certain inescapable obligations to its citizens, among which are protection of the family and the home, the establishment of a democracy of opportunity, and aid to those overtaken by disaster.")).

constitutional, they do not mean that the democracy-of-opportunity tradition can be implemented exclusively, or even primarily, by the courts. Instead, they argue that the other branches, and in particular Congress, have "affirmative constitutional obligations" to address inequality (p. 21). For Fishkin and Forbath, equality-promoting measures are constitutional in character, even if they concern topics typically thought of as the domain of ordinary policy.

The bulk of the book is a comprehensive historical account showing the prevalence of this mode of reasoning throughout U.S. history. Fishkin and Forbath demonstrate how constitutional arguments grounded in the democracy-of-opportunity tradition were central to the politics of the American left from the Founding until the New Deal, only to fall away starting in the mid-twentieth century. Any summary necessarily omits much of the book's rich historical accounting. This disclaimer aside, though, a brief sketch of the book's narrative is essential to understanding the rise and fall of the democracy-of-opportunity tradition.

The book's historical account begins with the Founding era. Economic questions were central to constitutional debates: state constitutions addressed distributional questions (p. 33), while the framers of the federal Constitution worried that excessive democracy would have adverse economic impacts at home and abroad (p. 46).[94] Fishkin and Forbath show how major debates of the early republic were debates about constitutional political economy. This continued into the nineteenth century. The battle over slavery was both constitutional and economic in character, as were debates over the national bank, tariffs, internal improvements, and other contested issues in the antebellum period. Those issues were part of "a constitutional debate about the nation's distribution of opportunity, wealth, and power" (p. 71). Importantly, though, it was one predominately hammered out through the political process; despite significant Marshall Court decisions on the scope of federal power, it was broadly accepted that politics was the proper domain for contestation about economic issues (p. 83–84).

The high-water mark for the democracy-of-opportunity tradition, the authors argue, was Reconstruction. Reconstruction was the only moment in U.S. history that wove together all three threads of the democracy-of-opportunity tradition: racial inclusion, the creation of a middle class, and the prevention of oligarchy (pp. 15, 115).[95] A central tenet of Reconstruction was that "freed people's actual enjoyment of equal citizenship . . . needed a material underpinning to be real, and that Black citizens needed real political clout to hold on to whatever material independence they could achieve" (p. 110). For this reason, the Reconstruction Congress did more than expand access to the franchise and to political power (pp. 126–31); it also sought to expand economic opportunity, education, property ownership, and the ability of all citizens to participate in commercial endeavors (p. 116–26).[96] Though Reconstruction's promise of a middle-class, interracial

[94] *See also supra* section I.B (discussing this point in the context of the relationship between progressives and majority rule).

[95] Others have likewise argued that Reconstruction of constitutional import, but with different framings. *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE, VOLUME 2: TRANSFORMATIONS 160 (1998) (describing the struggle over the Fourteenth Amendment as "the greatest constitutional moment in American history"); ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION xx (2019) (describing Reconstruction as having "forged a new constitutional relationship between individual Americans and the national state" and having been "crucial in creating the world's first biracial democracy").

[96] Congress was a motivating force behind Reconstruction, acting as the first mover on the new statutes and constitutional amendments that reshaped American law in the wake of the Civil War (pp. 111–16). *See also* FEDERAL LAWS OF THE RECONSTRUCTION (Frederick E. Hosen ed. 2010) (collecting Reconstruction-era statutes and congressional resolutions, among other documents).

democracy ultimately went unfulfilled, the authors highlight the period as representing the apogee of the democracy-of-opportunity tradition.

Contestation about political economy continued through the Gilded Age and Progressive Era. The late nineteenth century witnessed "two rival visions of constitutional political economy: one requiring a major redistribution of wealth and power; the other forbidding even modest redistribution" (p. 136). These dueling visions help make sense of disputes over labor relations, trusts, currency, and tax policy (p. 140). Progressives espoused a "confident view of the potential for democratic government to intervene in political economy" alongside "radical skepticism of the role of courts in constitutional interpretation" (pp. 187–88). They developed a detailed platform of economic governance, though the commitment to racial liberalism that characterized Reconstruction fell away in an era of Jim Crow (pp. 188–89).

Fishkin and Forbath describe the New Deal as "an era of constitutional politics par excellence" (p. 251). They emphasize the "constitutional grammar" used by Franklin D. Roosevelt in discussing New Deal reforms (p.285), writing that the New Deal's "'constitutional economic order' hinged on a governmental duty to assure decent work and livelihoods, collective bargaining, social insurance, and other social goods to all Americans" (p. 254). On this view, the birth of Social Security (pp. 302–06) and the Fair Labor Standards Act (pp. 306–11) are moments of constitutional significance. For the New Dealers, the Constitution not only permitted the enactment of statutes to empower workers and create a social safety net; it *required* such statutes (p. 252).

The story of the Supreme Court's initial resistance to the New Deal and subsequent acquiescence is well known.[97] But Fishkin and Forbath have a novel interpretation of that shift. They see ominous signs in the way that the Roosevelt Administration won over the Court. While New Dealers defended their actions in the public sphere through arguments about affirmative governmental duties, they subordinated those arguments in court in favor of asking simply for judicial restraint (p. 254). This fateful choice, the authors argue, set the stage for the progressive retreat from the democracy-of-opportunity tradition.

Fishkin and Forbath argue that the democracy-of-opportunity tradition largely disappeared from constitutional politics in the mid-twentieth century—a dynamic they call "The Great Forgetting" (p. 349). A progressive embrace of the Supreme Court as the key expositor of national values was central to this forgetting. In the 1950s and 1960s, "[s]upport for civil rights entailed support for a Court-centered Constitution," leading postwar progressives to defend the Court "as the indispensable constitutional guardian of civil liberties and civil rights" (p. 350; *see also* pp. 354–63). While the rise of progressive judicial supremacy is the key feature of their story, Fishkin and Forbath also criticize midcentury progressives for abandoning labor rights (p. 351) and allowing technocrats, especially economists, to dominate domestic policymaking (pp. 363–69, 374–79). Consistent with their critique of a juriscentric constitutional law, Fishkin and Forbath treat the last gasp of the democracy-of-opportunity tradition not as the end of the Warren Court,

[97] *See, e.g.*, WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1996); BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998).

but rather as the failures of legislative efforts in the 1970s to secure full employment and repeal the Taft-Hartley Act (pp. 404–10).

As a historical work, the book provides a brilliant reconstruction of progressive economic arguments throughout U.S. history. It shows that the political left relied on arguments from the democracy-of-opportunity tradition for generations, only to leave those arguments behind in the mid-twentieth century. The book's final chapter calls for reviving those arguments, on topics ranging from those that all agree are constitutional (such as the First Amendment (pp. 433–38)) to those that are today conventionally seen more as matters of economic policy than the Constitution (such as labor and employment (pp. 441–43, 482–84), health care (pp. 456–60), antitrust (pp. 471–77), and corporate law (pp. 477–79)). This agenda gives rise to questions about what makes a topic constitutional in character, along with the advantages and disadvantages of a more expansive understanding of constitutionalism.

B. Discerning What's Constitutional

A first issue that arises from *The Anti-Oligarchy Constitution* concerns the relationship between the Constitution and the democracy-of-opportunity intellectual tradition. What, precisely, distinguishes issues of constitutional significance from ordinary policy questions? Given the wide breadth of topics that the authors treat as constitutional in character, the book raises the question of what limiting principle exists to prevent every policy issue from being recast as a constitutional one.[98]

The book rejects several common dividing lines between constitutional and policy issues. It does not require that an issue be tied to a specific textual provision in the Constitution itself, or even to the broader set of institutional structures sometimes described as the "small-c" constitution, in order to be considered constitutional.[99] Neither of these definitions is capacious enough to include issues relating to the scope of the welfare state or the regulation of business, both of which Fishkin and Forbath contend are constitutional in character. The book also does not view its intervention as "of a piece with calls for the expanded judicial enforcement of social and economic rights."[100] Such calls are an important part of progressive constitutional thought, having found prominence with the suggestion during and after the Warren Court that the Fourteenth Amendment guarantees minimal economic entitlements.[101] But Fishkin and Forbath decline to suggest that democracy-of-opportunity principles should lead to new, judicially enforceable constitutional mandates.

---

[98] *Cf.* Adrian Vermeule, *Superstatutes*, NEW REPUBLIC (October 25, 2010), http://www.tnr.com/book/review/superstatutes (discussing the "puzzle [of] which statutes count as small-c constitutional" and noting that "[a] great deal, both in law and in the broader political culture, turns on how the boundaries around the constitution are drawn").

[99] *See supra* note __; *see also infra* section __.

[100] Joseph Fishkin & William Forbath, *Reclaiming Constitutional Political Economy: An Introduction to the Symposium on the Constitution and Economic Inequality*, 94 TEX. L. REV. 1287, 1470 (2016).

[101] *See, e.g.*, Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987); Erwin Chemerinsky, *Making the Case for a Constitutional Right to Minimum Entitlements*, 44 MERCER L. REV. 525 (1993). The Supreme Court came within one vote of finding a federal constitutional right to an education in *San Antonio v. Rodriguez*, 411 U.S. 1 (1973).

Instead, as we have seen, the book contends that the elected branches have a constitutional duty to enact policies that advance the democracy-of-opportunity tradition. It can be analytically helpful to view the distinctive elements that this thesis depends upon. It rests on four pillars: a normative idea of a democracy, an empirical view of how democracy operates in practice, an interpretive argument about the Constitution, and a historical view about American political thought.

First is a *normative* commitment to democracy. The scholarly literature justifying democracy is large and varied, providing both intrinsic and instrumental reasons to prefer democracy to other forms of government.[102] Fishkin and Forbath's account is not a work of abstract political philosophy, so it does not spend much time on these justifications. But the book presupposes that democracy has normative value, and that equality of citizens is a core part of democracy. If this weren't so, it would hardly be worth constructing the theory that the book puts forth.

Further, the book's commitment to democracy is more than minimalist. On an understanding of democracy that requires only equal voting rights in competitive elections, an account of the relationship between economics and democracy would be unnecessary. That linkage is critical, however, on a view of democracy as incompatible with some individuals and groups having far greater power influence political outcomes than others. Such a view of democracy is widely shared on the political left, but that fact should not obscure the fact that it is itself a normative account, and a relatively thick one at that.

Second is an *empirical* view that excessive inequality in fact impedes democracy, or at least the type of democracy that Fishkin and Forbath believe is normatively desirable. It is self-evident that certain types of inequality, such as the denial of the franchise based on race or gender, is incompatible with a democracy of equal citizens. But other views about the relationship between democracy and inequality rest on falsifiable empirical claims. Arguments that economic insecurity, extreme inequality, or concentration of economic power are incompatible with democratic government require more than just a normative theory; they depend on an empirical component as well. Consistent with this reasoning, recent political science work has demonstrated links between economic conditions and democratic outcomes in the contemporary United States.[103]

Third is an *interpretive* argument, that the Constitution, rightly understood, is committed to democratic government. Normative ideals and empirical relationships would be of little use in arguing that democracy was constitutionally required if the Constitution itself were to establish a dictatorship. For an argument to be fairly understood as constitutional, as the term is typically used, that argument must find some grounding in the Constitution—perhaps in its text, but otherwise in its structure or logic.

---

[102] *See* Tom Christiano & Sameer Bajaj, *Democracy*, in Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., 2021), https://plato.stanford.edu/entries/democracy (section 2).

[103] *See, e.g.*, LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE (2008); and MARTIN GILENS, AFFLUENCE & INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA (2012). *See also* GANESH SITARAMAN, THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC (2017).

The Constitution itself sends mixed messages about democracy. The document as amended contains many democratic components, including provisions for regular elections,[104] protection for voting rights,[105] and a guarantee of republican government in the states.[106] But it has many undemocratic components as well: it creates the Electoral College, requires two Senators per state, grants federal judges life tenure, and makes amendment extremely difficult.[107] These undemocratic features were a central goal of many of the framers, who succeeded in insulating the new national government "far more from popular political influence than most Americans at the time would have anticipated or desired."[108] It would be wrong to argue that the Constitution is a straightforwardly democratic document, and Fishkin and Forbath do not do so.

Instead, the book contends that the democracy-of-opportunity tradition is constitutional because it is a *prerequisite* to the Constitution's proper functioning. Its core argument is worth quoting at length:

> The American Constitution is the constitution of a republic, not an oligarchy. It can continue to function as such only if Americans prevent would-be oligarchs from accumulating excessive political and economic power. Americans also need to maintain a broad, open, and racially inclusive middle class. To do that, it is necessary to restore the political power of ordinary workers, as represented by labor, as a counterweight to wealth and capital. It is also necessary to build and maintain pathways to political office for those who can win popular support but not the support of wealthy would-be oligarchs. These are not merely constitutionally permissible goals. They are constitutional necessities. (p. 441).

This approach denies that there is a clean separation between what the Constitution commands, by its own terms, and the preconditions for making constitutional government work. But it begs the question of what, precisely, it means for the Constitution to "function."

The Constitution's text, structure, and logic are open-ended enough to create room for different views about what a functioning constitutional order looks like. In deriving theories of a well-functioning Constitution, some will rely more on text, some more on history, and some more on pragmatic considerations. The same episodes can often be interpreted as successes or failures in terms of constitutional functioning, depending on one's perspective.[109]

Fishkin and Forbath are not neutral arbiters of what constitutional functioning entails. They have a clear view about the economic prerequisites to a functioning constitution, which the book develops at length. Many progressives will find their conception of a functioning Constitution highly appealing, while many conservatives will reject it. In both instances, it seems likely that partisans will attribute their views about justice or democracy to the Constitution. This is inevitable, and perhaps even desirable. Constitutional interpretation is necessarily a normative enterprise, not a mechanical one. But it does raise the question of how much independent work the constitutional aspect of the authors' theory does. It seems unlikely, for example, that many

[104] *See* U.S. CONST. art. I, § 2, cl. 1 (House elections); *id.* amend. XVII (Senate elections).
[105] *See id* amends. XV, XIX, XXIV, XXVI.
[106] *See id.* art. IV, § 4.
[107] For discussions of these features of the Constitution, see generally DAHL, *supra* note 21; and LEVINSON, *supra* note 9.
[108] *See* MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 6 (2016).
[109] Congress's inability to pass even highly popular measures into law, for example, can be taken either as evidence of constitutional dysfunction or as evidence that the Constitution is working precisely as it should in making lawmaking difficult.

Americans would reject strong labor unions as a matter of policy or justice, but would nonetheless embrace them as a constitutional necessity. The presence of this sort of reasoning would suggest that constitutional argument does independent work; its absence would suggest the opposite.

Fourth is a *historical* argument. One of Fishkin and Forbath's major contributions is showing how Americans in each generation have recognized that there are economic preconditions to meaningful self-government. The founders' "republican brand of freedom required material independence" (p. 33). Likewise, for the Jacksonians, "[t]he central problem was that economic inequality inevitably has corrosive effects on political equality" (p. 76). In the postbellum period, "[s]ecuring the freed people's rights and outfitting Black ex-slaves and poor whites as equal citizens and real free laborers, with a measure of education and material independence, was [viewed as] legislative constitutional work" (p. 111 (emphasis omitted)). By the early twentieth century, progressives recognized that "full membership in the political community depends on material independence." (p. 209). Time and again, the book shows, progressives adopted a common set of normative and empirical views about what democracy requires, and they linked those views with the Constitution.

Acknowledging the importance of the democracy-of-opportunity tradition is not to say that it is the only tradition of constitutional thought. Fishkin and Forbath acknowledge that only once—during Reconstruction—have commitments to anti-oligarchy, a strong middle class, and racial inclusion been joined in a sustained way. "After Reconstruction's collapse, and through the entire twentieth century," they note, "there was no major party that brought together all three strands of the democracy-of-opportunity tradition" (p. 485). Some on the political right could counter the democracy-of-opportunity tradition by invoking a libertarian constitutional countertradition.[110] A libertarian countertradition represents a coherent through-line across more than two centuries of constitutional history, even if it (like the democracy-of-opportunity tradition) has sometimes been ignored. Indeed, the book acknowledges that libertarianism has "deep[] roots" in American constitutional culture (p. 139).

Having seen these four streams of argument, we can ask whether and how they come together to render the democracy-of-opportunity tradition constitutional in character. One possible approach draws from a thinker not mentioned in the book: Ronald Dworkin. Dworkin's writings mostly focus on judicial decisionmaking, rendering him a strange bedfellow with Fishkin and Forbath. But his approach to constitutional interpretation sheds light on how the various aspects of Fishkin and Forbath's argument relate. For Dworkin, courts should decide hard cases by looking to two dimensions: *fit* with existing legal materials and *justification* in light of moral and political theory.[111] A similar paradigm could be used not at the level of how to decide a case, but rather to evaluate possible constitutional theories. Fishkin and Forbath argument depends on their approach being both a fit with the U.S. constitutional tradition and being justified as a matter of democracy.

[110] On that tradition, see, for example, RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION (2014); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); David E. Bernstein & Ilya Somin, *The Mainstreaming of Libertarian Constitutionalism*, 77 L. & CONTEMP. PROBS. 43 (2014).

[111] *See* RONALD DWORKIN, LAW'S EMPIRE 228–32, 255 (1986).

The analogy to Dworkin can help organize possible criticisms to the authors' approach and suggest possible rejoinders in its defense. One set of critiques could charge Fishkin and Forbath with falling short on the dimension of fit. A textually oriented critic could argue that the democracy-of-opportunity tradition cannot be considered constitutional in character because it departs too much from the Constitution's text and even from the broader range of modalities of constitutional argument to, as the term is generally understood. To this, the authors might have no choice but to play down the constitutional text, argue that existing modalities are too narrow, and contend that the preconditions that allow the mode of government that the Constitution establishes to function should count as constitutional. In a different vein, a historically minded critic could emphasize that the democracy-of-opportunity tradition was merely one tradition among several, and that it only carried the day for a brief period. Perhaps most pointedly, such a critic could note the long intellectual tradition emphasizing that the Constitution was designed to entrench a degree of oligarchy and insulate politics from popular control.[112] To this charge, the authors' best response is to emphasize that fit need not be perfect, only plausible, and that their extensive history suffices to clear whatever bar fit demands.[113]

Another set of critiques would focus on justification, by attacking the book's normative theory of democracy. Fishkin and Forbath embrace a thick conception of what democracy requires, even if that normative case is largely presupposed rather than expressly made. Those who disagree can put forward alternative visions of democracy in response, and this Review Essay is not the forum for adjudicating that debate. But it seems likely that Fishkin and Forbath would much rather have that self-consciously normative dispute, rather than the interpretive debates over originalism and living constitutionalism that have dominated constitutional law in recent decades. That normative debate underlies much existing constitutional discourse, and bringing it into the open would make for a more candid public discussion.

C. Benefits and Costs of Constitutional Argument

Fishkin and Forbath call for progressives to invoke constitutional values in advocating for their preferred policies. Conservatives, they note, are "busily framing in constitutional terms their many objections to liberal programs of social insurance, redistribution, labor rights, racial and gender inclusion, and the administrative state, using diverse doctrinal tools from the First Amendment to federalism and the separation of powers" (p. 19). Fishkin and Forbath argue that progressives must respond in kind, contending that "[t]he strongest response to these arguments" is "better substantive constitutional arguments" (p. 19).

This call leads naturally to the question of impact: would it help progressives if they made constitutional arguments in support of their policy commitments? Or is it more likely that such arguments would be inconsequential, or even counterproductive?

---

[112] The most famous articulation of this argument is CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION (1913). For a more recent iteration, see KLARMAN, *supra* note 108. Fishkin and Forbath note that during the Progressive Era, "[s]ome candidly acknowledged . . . that the Constitution was marred from the start by 'the fear of too much democracy' on the part of the propertied elite" (p. 241).

[113] The authors' desire to "build a future constitutional order that Americans can recognize as authentically ours" (p. 424) is best understood as an argument about fit.

On the one hand, there are reasons to think that there are benefits to arguing for economic progressivism in constitutional terms. Given the Constitution's rarified status in political discourse, framing a policy proposal as continuous with the Constitution can only serve that proposal well. This is especially true given that conservatives consistently make constitutional arguments in support of their worldview; for progressives to decline to do the same could surrender the Constitution to the right. Further, in an era of a conservative judiciary, it may be especially important that progressive scholars develop the resources to attack the Supreme Court's decisions not only in legalist terms (say, as inconsistent with original understanding or unfaithful to precedent) but also based on a broader, progressive understanding of what the Constitution requires. Fishkin and Forbath's expansive understanding also provides an alternative to trying to shoehorn progressive commitments into a judicially acceptable framework—such as a grounding in constitutional text and a focused on individual rights—which the previous Part argued can impede progressive agendas.[114]

There are several reasons to be skeptical, however, about the efficacy of a constitutional framing of the progressive policy goals that the book seeks to advance. With respect to elites, there is no framing of progressive commitments—constitutional or otherwise—that would be accepted by a conservative Supreme Court or Republican elected officials. As for the public, evidence suggests that many Americans see constitutional meaning at least partially in terms of the text of the canonical document.[115] As a matter of public persuasion, then, it is an uphill climb to sell opportunity-promoting policies like expanded health care access and vibrant labor unions as constitutional, based on arguments from history and theory. At worst, some might find the constitutional argument for such policies uncompelling, even if they would have been persuaded by arguments based on values like fairness, dignity, or opportunity, or even by pragmatic considerations. A constitutional frame risks crowding out these other arguments in favor of constitutional ones that a text-centric public may greet with skepticism.

Further, most Americans don't think about economic issues in constitutional terms, and understandably so. People facing unemployment, housing or food insecurity, high medical bills, or other economic deprivations don't think about those challenges as constitutional failures—they think about them in terms of material well-being. Even accepting that Fishkin and Forbath are correct that inequality has implications for democracy, that argument is beside the point of how most Americans think about economic issues. So long as this is the case, material arguments might be more persuasive than constitutional ones in advancing the democracy-of-opportunity tradition.[116]

Recent years provide at least some support for the view that progressive arguments, in line with the democracy-of-opportunity tradition, can gain traction even without a constitutional hook. Racial liberalism is a bedrock commitment among progressives;[117] Senators Bernie Sanders and

---

[114] *See supra* section I.C.

[115] *See* Jamal Greene, Stephen Ansolabehere & Nathaniel Persily, *Profiling Originalism*, 111 COLUM. L. REV. 356 (2011) (collecting public opinion data on attitudes toward originalism).

[116] For additional concerns about constitutional arguments for economic progressivism, see Jedediah Purdy, *Overcoming the Great Forgetting: A Comment on Fishkin and Forbath*, 94 TEX. L. REV. 1415, 1425 (2016) (noting that a constitutional case for economic opportunity can lead to overly parochial responses to transnational challenges and can marginalize thinkers and arguments that operate outside of the constitutional tradition).

[117] *See supra* note 82 and accompanying text.

Elizabeth Warren both built serious presidential campaigns around fighting economic inequality;[118] and President Joe Biden's early presidency led some to call him the most progressive president in a half-century.[119] Today's progressive leaders often do focus on what Fishkin and Forbath describe as democracy-of-opportunity issues, they just do not invoke the Constitution. Fishkin and Forbath make clear that constitutional argument does not require using "any particular magic words" (p. 429). Nonetheless, it is striking how little today's progressives seem to claim the mantle of the Constitution in support of their agendas, as compared to the earlier generations of progressives that are the subject of the book.[120] One reason for this might be the triumph of constitutionalism as understood by Loughlin: if courts are understood to be the central actors in determining constitutional meaning, there may be little benefit to trying to cast progressive policies in constitutional terms when those terms differ so dramatically from how the judiciary understands the Constitution.

The choice between constitutional and non-constitutional argument might be lower stakes than it seems at first glance. Macro-level forces, beyond the dynamics that are the book's focus, typically determine the rise and fall of political regimes. Consider the rightward shift of the late twentieth century. Conservative ascendancy was attributable to changing racial politics, rising anti-tax sentiment, the emergence of law-and-order politics, and anti-Communist attitudes, among other factors.[121] In the face of these powerful forces, the book's "Great Forgetting" seems unlikely to have done much to shape electoral or policy outcomes. If in a future chapter American political history takes a progressive turn, that shift will likely result from a yet-unknown combination of political, economic, social, and demographic changes, rather than a reembrace of a constitutional case for progressive outcomes. Indeed, history provides examples of how progressives can advance the interests of the poor and middle class even without self-consciously embracing constitutional argument.[122]

The importance of the *constitutional* version of the democracy-of-opportunity tradition rests, at bottom, on an empirical question: would framing the tradition in constitutional terms help

---

[118] *See* sources cited supra note 103.

[119] *See, e.g.*, Susan B. Glasser, *Is Biden Really the Second Coming of F.D.R. and L.B.J.?*, THE NEW YORKER (Apr. 1, 2021), https://www.newyorker.com/news/letter-from-bidens-washington/is-biden-really-the-second-coming-of-fdr-and-lbj.

[120] *See, e.g.*, Purdy, *supra* note 116, at 1422 (noting that Bernie Sanders, "who comes as close to the democracy of opportunity tradition as any major national politician in decades, has more to say about the Scandinavian model of social democracy than about any specifically constitutional source of his program").

[121] *See, e.g.*, THOMAS BYRNE EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 3 (1991) (arguing that "[t]he overlapping issues of race and taxes have permitted the Republican party to adapt the principles of conservativism to break the underlying class basis of the Roosevelt-Democratic coalition and build a reconfigured voting majority in presidential elections"); DONALD KRITCHLOW, CONSERVATIVE ASCENDANCY 1 (2007) (arguing that the "foundations for the GOP Right" were "a movement to stop . . . the advance of the collectivist state embodied in modern liberalism and the New Deal political order" and "anti-Communist activists across grassroots America"); LISA MCGIRR, SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT 11 (2015) (describing how the conservative grassroots "championed virulent anticommunism, celebrated laissez-faire capitalism, evoked staunch nationalism, and supported the use of the state to uphold law and order"). Global dynamics were likely at play as well: across the world, the late twentieth century saw neoliberal and market-centered ideas taking priority over egalitarian ones. *See, e.g.*, DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2–3 (2007) (noting that "there has everywhere been an emphatic turn towards neoliberalism in political-economic practices and thinking since the 1970s").

[122] Fishkin and Forbath note, for example, that during the Great Society "[p]overty seemed an urgent moral problem, but not a constitutional one" (p. 382). Despite this fact, and criticism of the War on Poverty from both the left and right, a detailed evaluation of its impacts concludes that "poverty rates are lower today than they would have been had the War on Poverty never been declared." Martha J. Bailey & Sheldon Danziger, *Legacies of the War on Poverty* 1, 25, *in* LEGACIES OF THE WAR ON POVERTY (Martha J. Bailey & Sheldon Danziger eds. 2013).

or hinder its acceptance by the public and lawmakers? The choice between constitutional arguments against inequality and arguments of other sorts should be made on prudential grounds. The task for those who seek to advance democracy-of-opportunity policies is to determine how best to do so. Even if inequality is indeed a constitutional problem, the most promising approach to remedy it may not be to speak in a constitutional register.

In sum, casting progressive commitments in constitutional terms gives rise to several challenges. Forcing the progressive agenda into a traditional mode of constitutional argument can distort that agenda in order to make it recognizably constitutional. Taking a broader view of what counts as constitutional, as Fishkin and Forbath do, solves that problem but gives rise to other difficulties—most notably, the risks that the public might not view a progressive agenda as authentically constitutional or might be more easily persuaded to support that agenda if it were articulated in different terms. So long as constitutional argument is viewed as a privileged mode of political discourse, there are no easy answers for progressives.

III. PROGRESSIVE CONSTITUTIONAL DESIGN?

Our focus thus far provides a rich picture of constitutionalism as an ideology and mode of argument. But constitutional politics takes place against a backdrop of institutions, which have received little attention to this point. The most basic role for a constitution is to establish the rules of the political game—the procedures under which elections are held, laws are made and enforced, and power is allocated among government actors.[123] This Part considers what it would mean for progressive constitutionalism to refocus on those basics.

Institutional arrangements create winners and losers. A constitution cannot create a level playing field; instead, it necessarily stacks the deck in favor of some outcomes and against others. Decide how legislative districts are to be drawn, and whatever choice you make will advantage some types of constituencies at the expense of others. Create a set of legislative procedures, and they will make it either easier or harder to enact legislation as compared to alternative procedures. Change the rules around budgeting, and there will be either more or less government spending. This is not a claim about intent, since constitutional structures could be created with the exclusive goal of advancing politically neutral values such as participation, accountability, deliberation, or stability. But as a matter of effect, constitutional rules are inexorably tied to electoral and policy outcomes.[124]

A question for any political faction, then, is which constitutional structures advance their electoral prospects and policy agendas and which hold them back.

For progressives, some answers to this question are easy. Consider equal state representation in the Senate. Equal state representation causes Democrats to control fewer Senate

[123] *See supra* note 17 and accompanying text; *see also* H.L.A. HART, THE CONCEPT OF LAW 94 (3d ed. 2012) (discussing "secondary rules" which "specify the way in which the primary rules [of conduct] may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined").

[124] For an extended development of this paragraph's argument, see Gould & Pozen, *supra* note 1.

seats than they would if the body comported with a one-person-one-vote principle,[125] overrepresents white voters relative to voters of color,[126] and shapes both policy outcomes and the distribution of federal funds.[127] These dynamics are not immutable, but they are deeply rooted given the relatively stable geographic distribution of progressives and conservatives. Similar geographic dynamics give rise to biases against progressive candidates in the Electoral College.[128] Though the difficulty of amending the Constitution makes reforming the Senate and the Electoral College difficult if not impossible in practice,[129] there is little ambiguity that those institutions harm progressive candidates and agendas.[130]

The analysis is more complex for other features of the United States' constitutional order. The reason lies in two dilemmas that afflict progressives: the tension between effective government and preventing misrule, and the tension between allowing majority rule and protecting the interests of minorities.

A. Enabling Lawmaking Versus Preventing Misrule

A first dilemma for progressives is the tension between enabling effective lawmaking and preventing misrule. A central question of constitutional design is how easy or hard it should be to make law, whether through enacting legislation or promulgating regulations. If lawmaking is too difficult, there is a risk of government being unable to meet pressing national challenges. But if lawmaking is too easy, there is a risk that government might enact bad policy, trample civil liberties or the interests of minorities, or, in the extreme, become tyrannical. One task for constitutional design is to find a middle path.

This challenge is particularly acute for progressives. If lawmaking is too difficult, ambitious programs cannot be enacted. In recent decades, Democratic control of Congress has been associated with higher rates of legislative activity, as measured by the number of bills introduced, hearings held, and bills passed.[131] A similar asymmetry exists in the executive branch:

---

[125] *See, e.g.*, Stephen Ansolabahere & William Leblanc, *A Spatial Model of the Relationship Between Seats and Votes*, 48 MATHEMATICAL & COMPUTER MODELING 1409 (2008) (showing a bias toward Republicans in Senate elections); Nate Silver, *The Senate's Rural Skew Makes It Very Hard For Democrats To Win The Supreme Court*, FIVETHIRTYEIGHT (Sept. 20, 2020, 9:42 AM), https://fivethirtyeight.com/features/the-senates-rural-skew-makes-it-very-hard-for-democrats-to-win-the-supreme-court (showing that "the Senate is effectively 6 to 7 percentage points redder than the country as a whole, which means that Democrats are likely to win it only in the event of a near-landslide in their favor nationally").

[126] *See* David Leonhardt, Opinion, *The Senate: Affirmative Action for White People*, N.Y. TIMES (Oct. 14, 2018), https://www.nytimes.com/2018/10/14/opinion/dc-puerto-rico-statehood-senate.html; Jonathan Chait, *The Senate Is America's Most Structurally Racist Institution*, N.Y. MAG. (Aug. 10, 2020), https://nymag.com/intelligencer/2020/08/senate-washington-dc-puerto-rico-statehood-filibuster-obama-biden-racist.html.

[127] *See* FRANCES E. LEE & BRUCE I. OPPENHEIMER, SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION 158–222 (1999).

[128] *See* Gould & Pozen, *supra* note 1, at __.

[129] The Senate's structure is entrenched even against change through a constitutional amendment. *See* U.S. CONST. art. V ("[N]o state, without its consent, shall be deprived of its equal suffrage in the Senate."). As for the Electoral College, reformers have proposed a workaround to allow for a de facto national popular vote even without a formal amendment. See JOHN R. KOZA, EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT (4th ed. 2013).

[130] Fishkin and Forbath primarily focus on substantive arguments, not structural arrangements, but they likewise call for reform to the Senate and Electoral College given those institutions' bias against progressive outcomes (pp. 486–87).

[131] *See* GROSSMAN & HOPKINS, supra note 26, at 264–65.

federal agencies engage in significantly more rulemakings under Democratic presidents,[132] especially in regulatory and social welfare agencies.[133]

The climate crisis provides a bracing account of the progressive dependence on government action. Progressives have sought to address the crisis through a combination of federal actions: proposed regulatory legislation,[134] spending,[135] and interventions by administrative agencies.[136] Veto points in the lawmaking system is one reason why these interventions have not always succeeded: the Senate's sixty-vote cloture threshold forecloses most new regulatory statutes,[137] and the Supreme Court prevented arguably the most important climate regulation of the past decade from going into effect.[138] The challenges of legislating and regulating are not unique to the climate sphere, as similar stories could be told about progressive attempts to expand health care access, reform the immigration system, and respond to public health emergencies. In short, progressives suffer if there are too many barriers to government action.

One response to this challenge is to make lawmaking easier. But that is not without risks for progressives. If lawmaking is too easy, the powers of government could be directed toward purposes to which most progressives would fiercely object. On the legislative front, some progressives have expressed concern that eliminating the filibuster, thus making it easier to legislate, would allow Congress to restrict voting rights, ban abortion nationwide, undermine labor unions, or repeal existing progressive legislation.[139] With respect to regulation, less judicial scrutiny of executive action would empower whichever party holds the White House, and so would sometimes benefit conservatives even if progressives on the whole have more ambitious regulatory

---

[132] *See Congressional Review Act*, GOV'T ACCOUNTABILITY OFFICE, https://gao.gov/legal/other-legal-work/congressional-review-act (last visited January 12, 2022).

[133] *See Economically Significant Rules by Agency*, GW REGULATORY STUD. CTR., https://regulatorystudies.columbian.gwu.edu/economically-significant-rules-agency (last visited January 12, 2022). Partisan asymmetry in regulatory activity would likely look even larger if the data included only rulemakings that made policy in the first instances, rather those that repealed earlier rules. *Cf., e.g.*, Nadja Popovich, Livia Albeck-Ripka & Kendra Pierre-Louis, *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here's the Full List*, N.Y. TIMES (Jan. 20, 2021), https://nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html.

[134] *See, e.g.*, American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009) (Waxman-Markey bill).

[135] *See, e.g.*, Build Back Better Act, H.R. 5376, 117th Cong. §§ 30204, 31046, 40006, 110002 (2021). *{Author to editors: I'll revise this cite depending on what happens with BBB in early 2022.}*

[136] *See, e.g.*, *A Historic Commitment to Protecting the Environment and Addressing the Impacts of Climate Change*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA, https://obamawhitehouse.archives.gov/the-record/climate (last visited Nov. 11, 2021) (summarizing the Obama Administration's climate change policies); Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) (Obama Administration's "Clean Power Plan" regulation); Coral Davenport, *Biden Crafts a Climate Plan B: Tax Credits, Regulation and State Action*, N.Y. TIMES (Oct. 22, 2021), https://www.nytimes.com/2021/10/22/climate/biden-climate-plan.html (describing the Biden Administration's plans for "tough regulations to restrict pollution coming from power plants and automobile tailpipes").

[137] *See* Thomas O. McGarity, *The Disruptive Politics of Climate Disruption*, 38 NOVA L. REV. 393, 466 (2014) (noting that the threat of a Senate filibuster for climate legislation means that "bills' sponsors simply assume[] that it would take sixty votes to pass them").

[138] *See* West Virginia v. Env't Prot. Agency, 577 U.S. 1126 (2016) (granting a stay of the Clean Power Plan pending review of several petitions for writ of certiorari); *see also* ALEXANDRA M. WYATT, CONG. RESEARCH SERV., CLEAN POWER PLAN: LEGAL BACKGROUND AND PENDING LITIGATION IN *WEST VIRGINIA V. EPA* (2016) (describing challenges to the Clean Power Plan and the procedural history of *West Virginia v. EPA*).

[139] *See, e.g.,* Ruth Marcus, *Opinion: Kill the Filibuster—And Reap What You Sow*, WASH. POST (Mar. 19, 2021), https://www.washingtonpost.com/opinions/imagine-2025-with-a-republican-government-and-no-filibuster-welcome-to-the-apocalypse/2021/03/19/ea60e41a-88d1-11eb-8a8b-5cf82c3dffe4_story.html; David Super, *Keep the Filibuster. It Could Save Progressive Legislation in the Future*, WASH. POST (June 22, 2021), https://www.washingtonpost.com/outlook/2021/06/22/filibuster-reform-republican-extremism-hr1.

agendas.[140] Further, some progressive commitments, most notably opposition to both the carceral state[141] and strict immigration enforcement,[142] call for *less* active government, rather than more.

Perhaps most of all, progressive concerns about unshackling the powers of government are particularly acute in the wake of the Trump Administration. Writing in the aftermath of the tyranny of Nazi Germany, Judith Shklar famously described a "liberalism of fear" that focused not on enacting particular agendas but that instead "begins with the assumption that the power to govern is the power to inflict fear and cruelty."[143] Shklar's words take on new relevance in the face of Trump Administration actions that struck many progressives as gratuitously cruel, like the policy of deliberately separating migrant parents and their children in immigration detention facilities.[144] Further, the Trump presidency caused leading scholars to seriously consider whether the United States is vulnerable to authoritarianism.[145] In the face of those risks, progressives may hesitate before calling to make it easier for government to act.

A comparison with a libertarian approach to constitutionalism throws the progressive dilemma into sharp relief. Those who see most government action as an impediment to freedom or a departure from an otherwise efficient market have little to lose from making lawmaking difficult. A generalized aversion to legislation and regulation points toward a constitutional system that creates hurdles to those activities—say, through supermajority rules in Congress, extensive procedural requirements for agency rulemaking, or judicial review that closely scrutinizes the actions of the executive and legislative branches. For a constitutional designer hostile to government action, these mechanisms have a twofold benefit: they both advance preferred policy outcomes *and* reduce the risk of misrule.[146] Progressives, by contrast, face a dilemma in that advancing their preferred policies and preventing misrule point toward very different constitutional arrangements.

B. Majority Rule Versus Minority Interests

A second dilemma concerns how legal rules allocate power between majorities and minorities. Majority rule of some kind is a necessary component of democracy, but without limits, it risks trampling the interests of minorities.[147] This tension has been central to constitutional theory for decades, most prominently expressed in the literature on judicial review.[148] It also

---

[140] *See* Gould & Pozen, *supra* note 1, at ___.

[141] *See, e.g.*, Maurice Chammah, *Two Parties, Two Platforms on Criminal Justice*, MARSHALL PROJECT (July 18, 2016), https://www.themarshallproject.org/2016/07/18/two-parties-two-platforms-on-criminal-justice ("Parts of the [2016] Democratic draft platform clearly repudiate the tough language their party embraced a generation ago.").

[142] *See, e.g.*, Asma Khalid, *Democrats Used to Talk About "Criminal Immigrants," So What Changed the Party?* NPR (Feb. 19, 2019), https://www.npr.org/2019/02/19/694804917/democrats-used-to-talk-about-criminal-immigrants-so-what-changed-the-party (discussing how the Democratic base "has adopted a fundamentally more progressive attitude on immigration in a relatively short time span").

[143] JUDITH N. SHKLAR, ORDINARY VICES 238 (1984).

[144] *See generally* JACOB SOBOROFF, SEPARATED: INSIDE AN AMERICAN TRAGEDY (2020) (providing a journalistic account of the policy and its impacts).

[145] *See* CAN IT HAPPEN HERE? AUTHORITARIANISM IN AMERICA (Cass R. Sunstein ed., 2018).

[146] This analysis applies to libertarians, but not to those conservatives who propose affirmative economic or social policy agendas of one kind or another. *See* Gould & Pozen, *supra* note 1, at __ (providing examples).

[147] *See, e.g.*, THE FEDERALIST No. 10, at 72 (James Madison) (Clinton Rossiter ed., 1999) (warning of "the superior force of an interested and overbearing majority").

[148] *See* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002).

emerges in debates about other features of the constitutional order. Both sides of the dispute over the Senate filibuster frequently invoke the importance of protecting minorities as a basis for their position.[149] These debates often sound in democratic theory, but the allocation of power between majorities and minorities poses a distinctive challenge for progressives. This challenge cannot be understood without looking to the *specific groups* which minority-protective institutional arrangements safeguard in practice.

Protection of minorities is most often associated with minority demographic groups, paradigmatically racial and ethnic minorities. The fact that the generic term "minority" connotes demographic minorities in contemporary political discourse—rather than any numerically small group—is one sign among many of the central importance of demographic cleavages in American politics.

When the most salient minority groups are identity-based minorities, progressives should endorse institutions that protect minority interests. Advancing the wellbeing of racial and ethnic minorities has been central to progressive politics for more than a half-century: "The New Deal ideology, having already justified the extension of its role for dealing with mass economic distress, provided the national government with responsibility for ending racial discrimination."[150] The parties realigned, with Democrats and Republicans becoming the parties of racial liberalism and conservatism, respectively.[151] As a result, the Democratic presidential nominee has not won a majority of white voters since 1964.[152] During that same period, Black voters have been core to the Democratic Party's electoral success—and thus the viability of the progressive agenda.[153] As the progressive coalition has become increasingly demographically diverse, the Democratic Party platform has shifted to better account for the interests of minorities.[154] Against this backdrop, it is no surprise that President Biden vowed to place "racial justice at the center of his governing agenda."[155]

The relationship between progressivism and minority rights looks very different when the focus shifts to a different sort of minority: economic elites. Elites (a minority) have long been concerned that majority rule would allow the masses (a majority) to vote to redistribute wealth from rich to poor. The Framers, Michael Klarman has argued, sought to make the federal government "more resistant to populist influence, and explicitly constrain the redistributive

---

[149] *Compare, e.g.*, RICHARD A. ARENBERG & ROBERT B. DOVE, DEFENDING THE FILIBUSTER: THE SOUL OF THE SENATE 4 (2012) (arguing that Senate procedures make the institution "a symbol of respect for the rights of minorities in a democratic system of government"), *with, e.g.*, ADAM JENTLESON, KILL SWITCH: THE RISE OF THE MODERN SENATE AND THE CRIPPLING OF AMERICAN DEMOCRACY 242–43 (2021) (describing the filibuster as a "Jim Crow relic" that has done "incalculable harm . . . to [B]lack Americans").

[150] EDWARD G. CARMINES & JAMES A. STIMSON, ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS 116 (1989).

[151] *See generally* SCHICKLER, *supra* note 26 (documenting this transformation).

[152] *See* Gary Miller & Norman Schofield, *The Transformation of the Republican and Democratic Party Coalitions in the U.S.*, 6 PERSPS. ON POL. 433, 438 (2008).

[153] *See* ISMAIL K. WHITE & CHRYL N. LAIRD, STEADFAST DEMOCRATS: HOW SOCIAL FORCES SHAPE BLACK POLITICAL BEHAVIOR 3 (2020) (noting that survey data has placed Black identification with the Democratic Party "in the neighborhood of 80 percent" from the late 1960s to the present).

[154] Joshua N. Zingher, *Polarization, Demographic Change, and White Flight from the Democratic Party*, 80 J. POL. 860, 860 (2018).

[155] Lauren Gambino, *Biden vowed to make racial justice the heart of his agenda – is it still beating?*, GUARDIAN (Sept. 8, 2021), https://www.theguardian.com/us-news/2021/sep/08/joe-biden-racial-justice-voting-rights.

tendencies of the more populist state governments."[156] This view belongs to an intellectual tradition dating back at least to Charles Beard's description of the U.S. constitutional system as "constructed . . . to break the force of majority rule and prevent invasions of the property rights of minorities."[157] On this worldview, minority rights are not associated with protection of marginalized demographic groups. Instead, they can impede attempts by legislatures to redistribute resources from a wealthy minority to larger groups of poor and middle-class citizens. Fishkin and Forbath quote Franklin Roosevelt as describing the New Deal in these terms: as necessary "to protect majorities against the enthronement of minorities" (p. 253). Because the poor and working class are more numerous than the wealthy, majority rule holds the possibility (though certainly not the guarantee[158]) of greater social welfare spending and less economic inequality. Restraints on majority rule, by contrast, provide a means of curbing redistribution.

Contemporary progressives, in sum, have inherited competing traditions with respect to minority interests. Their commitments to advancing the interests of demographic minorities provide reason for hesitation about unrestrained majority rule. But an economic redistributionist agenda provides a reason to fully embrace majoritarianism. The twin projects of advancing the wellbeing of minority groups and supporting the poor and middle class are linked in several important respects. Both are often motivated by the same normative commitments to equality, the politics of the two are often similar, and the same social policies can often advance both goals. But the two projects diverge in their relationship with majority rule. Whatever the ideal institutional arrangement is for advancing the interests of (class) majorities, that arrangement may differ from the one that would best advance the interests of (demographic) minorities.

C. Judicial Review

These two dilemmas help shed light on perhaps the most pressing structural constitutional question facing today's left: judicial review. There are two possible progressive responses, which are in significant tension with each other. One approach charges the contemporary Supreme Court with making the wrong decisions in major cases, often on account of it either holding the wrong view of constitutional interpretation or being too willing to depart from its precedents.[159] But this line of attack does not seek to disempower the Court or reduce its outsized role in American life; it focuses only on the substance of the Court's decisions. A more systemic critique contends that progressives have more to fear from the Court than its current composition. On this view, progressives should seek to disempower the Court because it undermines democracy and harms progressive causes as a more general matter.[160]

---

[156] KLARMAN, *supra* note 108, at 249; *see also id.* at x (describing the Constitution as "a conservative counterrevolution" against "excessive democracy").

[157] See BEARD, *supra* note 112, at 154.

[158] On policy outcomes tracking the preferences the wealthy, see, for example, BARTELS, *supra* note __; GILENS, *supra* note __.

[159] This sort of critique is standard fare in the pages of law reviews and progressive political discourse. For one example among many, see Sheldon Whitehouse, *A Right-Wing Rout: What the "Roberts Five" Decisions Tell Us About the Integrity of Today's Supreme Court*, AM. CONST. SOC'Y (April 2019), https://www.acslaw.org/wp-content/uploads/2019/04/Captured-Court-Whitehouse-IB-Final.pdf.

[160] This argument is developed in Doerfler & Moyn, *supra* note 9; and Ryan Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND. L. REV. (forthcoming 2022), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3970932. The non-majoritarian character of the Supreme Court is a function not only of lifetime appointment, but also of the non-majoritarian character of the modes of electing Presidents (who appoint Justices) the Senate (which confirms them). *See* Joshua P. Zoffer & David Singh Grewal, *The Counter-Majoritarian Difficulty of a Minoritarian Judiciary*, 11 CALIF. L. REV. ONLINE 437 (2020).

The competing risks of lawmaking being either too easy or too hard help shed light on progressive ambivalence about judicial review. In the face of a conservative Supreme Court that will closely scrutinize progressive legislative and regulatory achievements,[161] "disempowering reforms" that would limit judicial authority hold obvious appeal for the left.[162] The rejoinder to this argument concerns what would happen without the Court: there would be fewer checks on the most egregious executive action,[163] and, at the extreme, one less stopping point on the road to tyranny.

Protection of minorities likewise pulls progressives in competing directions with respect to judicial review. The argument that judicial review is justified by virtue of its role in protecting minorities is among the most important responses to the countermajoritarian difficulty, the question of why unelected judges should be able to override the decisions of the elected branches.[164] This line of argument is especially important for progressives, who—unlike their conservative counterparts—typically do not believe that originalism provides an answer to the countermajoritarian difficulty.[165] Further, for many on the left, the Supreme Court's finest moments have involved standing up for minority rights: religious minorities in *West Virginia v. Barnette*,[166] racial minorities in *Brown v. Board of Education*,[167] and sexual minorities in *Obergefell v. Hodges*.[168] The celebrated nature of the Court's rights-protective decisions, coupled with the long shadow of the Warren Court, has led many to see judicial review as indispensable to protecting demographic minorities.[169]

One rejoinder to this optimistic picture, though, is that, in practice the Supreme Court has often failed to protect minorities, either by deferring to the political branches or by striking down or narrowly interpreting minority-protective legislation.[170] But even if the courts were effective at protecting demographic minorities, the older association of minority rights with the wealthy gives the concept a different resonance for progressives, for whom reducing economic inequality is a core commitment.[171] Minority rights, or structural constitutional provisions limiting majority

---

[161] *See supra* note 15 (providing several recent examples).

[162] *See* Doerfler & Moyn, *supra* note 9, at 1721.

[163] Progressives who take this view would likely emphasize Trump Administration defeats in court, even in the face of a conservative judiciary. *See, e.g.,* Dep't Homeland Sec. v. Regents Univ. California, 140 S. Ct. 1891 (2020); Dep't Com. v. New York, 139 S. Ct. 2551 (2019); *see also Roundup: Trump-Era Agency Policy in the Courts*, INST. FOR POL'Y INTEGRITY, https://policyintegrity.org/trump-court-roundup (last visited Nov. 11, 2021) (collecting examples).

[164] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (noting that "prejudice against discrete and insular minorities" can "curtail the operation of those political processes ordinarily to be relied upon to protect minorities" and so "may call for a correspondingly more searching judicial inquiry"); JOHN HART ELY, DEMOCRACY AND DISTRUST 135–80 (1980) (developing this insight).

[165] *Compare, e.g.*, John O. McGinnis & Michael B. Rappaport, *In Praise of Supreme Court Filibusters*, 33 HARV. J.L. & PUB. POL'Y 39, 46 (2010) (arguing that "following the original meaning of the Constitution will overcome the countermajoritarian difficulty"), *with, e.g.*, Michael C. Dorf, *A Nonoriginalist Perspective on the Lessons of History*, 19 HARV. J.L. & PUB. POL'Y 351, 353 (1996) (describing arguments that "originalism merely substitutes one countermajoritarian difficulty for another" by "empower[ing] judges to override modern majorities in the name of old majorities").

[166] 319 U.S. 624 (1943).

[167] 347 U.S. 483 (1954).

[168] 576 U.S. 644 (2015).

[169] *See supra* note 11 and accompanying text.

[170] *See supra* note 4 (providing examples); supra note 10 (citing relevant scholarship).

[171] Contemporary statements of this commitment include BERNIE SANDERS, WHERE WE GO FROM HERE 9 (2018) ("[W]orking people all over this country were prepared to support an agenda that stood up to the billionaire class and that called for the transformation of our economic and political life."); ELIZABETH WARREN, THIS FIGHT IS OUR FIGHT: THE BATTLE TO SAVE AMERICA'S MIDDLE CLASS 5 (2017) (arguing for changing policies under which "the rich and powerful are always taken care of" as the middle class is "hollow[ed] out").

power,[172] have consistently been invoked in attempts to block efforts at redistribution. During the Progressive Era, the Supreme Court struck down state-level worker protections[173] and an initial attempt at federal income tax legislation.[174] Redistributive programs during the New Deal (such as Social Security) and the Great Society (such as Medicare) faced constitutional challenges in their early years, albeit unsuccessful ones.[175] The Affordable Care Act is the most challenged statute in the nation's history,[176] and similar lawsuits will almost certainly be lodged against future redistributive efforts.[177] To be sure, judicial review certainly did not cause the United States' welfare state to be smaller than that of other wealthy democracies.[178] But its potential to rein in future progressive efforts to expand the safety net gives progressives reasons to turn against the practice.

Neither *Against Constitutionalism* nor *The Anti-Oligarchy Constitution* expressly takes a side in this debate, but the logic of both suggests virtues of the more systemic approach. A core cause of constitutionalism, for Loughlin, is the outsized power of courts in many contemporary democratic nations. A more progressive Supreme Court would change judicial outcomes, but it would leave the broader dynamics that Loughlin documents entirely intact. To the extent that constitutionalism could be dislodged, a significant reduction in the Court's power is likely necessary.

Fishkin and Forbath's account is largely consistent with the skepticism of judicial review that some progressives hold. It argues that the elected branches are the primary venue for advancing a democracy-of-opportunity agenda (e.g., p. 3). It discusses the many times the Supreme Court has blocked policies which would have furthered the democracy-of-opportunity

---

[172] Such structural provisions are not typically viewed as directly protective of minority rights, but constitutional rights and structure are partially interchangeable, in that "both can be used in domains of collective decisionmaking to protect minorities (or other vulnerable groups) from the tyranny of majorities (or other dominant social and political actors)." Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1288 (2012).

[173] *See supra* note 5 (citing cases).

[174] *See* Pollock v. Farmers' Loan and Trust Co., 158 U.S. 601 (1895) (striking down the Income Tax Act of 1894). The Sixteenth Amendment overruled *Pollock* and paved the way to subsequent income tax legislation. *See* U.S. CONST. amend. XVI; *see also* JOHN D. BUENKER, THE INCOME TAX AND THE PROGRESSIVE ERA (2018).

[175] *See* Helvering v. Davis, 301 U.S. 619 (1937) (upholding the Social Security Act against a constitutional challenge); Timothy Stoltzfus Jost, *Governing Medicare*, 51 ADMIN. L. REV. 39, 46 (1999) (describing the Supreme Court's rejection of early challenges to provisions of the Medicare statute and explaining that "[t]hese decisions set the tone for the lower courts, which soon lost their own early hospitality to constitutional claims in Medicare cases").

[176] *See* Abbe Gluck, Mark Regan & Erica Turret, *The Affordable Care Act's Litigation Decade*, 108 GEO. L. J. 1471, 1472–73 (2020) (describing the Affordable Care Act as "the most challenged statute in American history" with "more than 2,000 legal challenges" filed against it).

[177] *See, e.g.*, Dawn Johnsen & Walter Dellinger, *The Constitutionality of a National Wealth Tax*, 93 IND. L.J. 111, 114 (2018) (discussing the "formidable" belief that a wealth tax would be unconstitutional, which has "origins dating back more than a century" and has been "reinforced by judicial precedent," though ultimately concluding that this belief is erroneous); Mark Tushnet, *Talking about Judge Kavanaugh as a Justice*, BALKINIZATION (July 10, 2018), https://balkin.blogspot.com/2018/07/talking-about-judge-kavanaugh-as-justice.html (speculating that a conservative Court may develop new doctrine to strike down a Medicare-for-All statute, were one to be enacted).

[178] Social scientists have argued that economic factors, political institutions, political ideology, and racial heterogeneity help explain why the United States' welfare state is smaller than those in European nations. *See, e.g.*, ALBERTO ALESINA & EDWARD L. GLAESER, FIGHTING POVERTY IN THE US AND EUROPE: A WORLD OF DIFFERENCE (2004); SEYMOUR MARTIN LIPSET & GARY MARKS, IT DIDN'T HAPPEN HERE: WHY SOCIALISM FAILED IN THE UNITED STATES (2000); JONAS PONTUSSON, INEQUALITY AND PROSPERITY: SOCIAL EUROPE VERSUS LIBERAL AMERICA (2005); HAROLD WILENSKY, RICH DEMOCRACIES (2002). Recent work in American politics has focused on more localized political dynamics that have led to inequality-increasing policies in recent decades. *See, e.g.*, JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS (2010); JACOB S. HACKER & PAUL PIERSON, LET THEM EAT TWEETS: HOW THE RIGHT RULES IN AN AGE OF EXTREME INEQUALITY (2020).

agenda (e.g., pp. 148–50, 174–81, 433–37, 441–47, 456–60). It even criticizes the left for having vested too much hope in the Court in the face of the Warren Court's judicial progressivism (pp. 24, 354–63). This case could easily lead to a call to weaken the judiciary or even do away with strong-form judicial review altogether. But it doesn't.

The authors do not explain why they do not call for curbs on judicial review more broadly, but the very fact of their position may shed light on progressive ambivalence toward judicial power. A complete turn against judicial review would force progressives to denounce some major victories, especially on civil rights and civil liberties issues. If the Supreme Court did not have the power to strike down acts of Congress, the Defense of Marriage Act would likely still be on the books.[179] If the Court could not strike down state laws, then it could not have decided *Brown v. Board of Education* [180] and *Roe v. Wade*.[181] A position that would render these cases wrongly decided may be beyond the pale for progressives, even those who believe that the Court is likely to set back their agendas in the aggregate.

Closely related to this backward-looking rationale is a forward-looking one. Progressives may hope that, whatever the Supreme Court's orientation today, they can provide a roadmap for how it should decide cases if it swings leftward in the future. Fishkin and Forbath, for example, contend that accounting for democracy-of-opportunity principles would have led the Court to uphold rather than strike down union agency fees (pp. 441–47[182]) and the Affordable Care Act's Medicaid expansion (pp. 456–60[183]). In those cases, though, an affirmative progressive constitutionalism would have yielded the same outcome as judicial restraint. Those two come apart not in cases where the Court evaluates progressive policies, but when it evaluates conservative ones. Consider legislative efforts to enact regressive tax laws,[184] federal right-to-work legislation,[185] or repeals of social welfare programs.[186] Judicial restraint would leave such efforts undisturbed, while an activist version of progressive constitutionalism might strike down those laws as undermining the economic prerequisites to a democracy of free and equal citizens. If the Court's composition were to ever lean leftward, the debate between these two options would gain renewed importance.

In the present moment, the question arises yet again about the comparative effectiveness of different sorts of arguments. As we have just seen, when a conservative Supreme Court evaluates liberal policies, there is no functional difference between a well-developed progressive constitutionalism and simple calls for judicial restraint. Why, then, bother with the former when the latter yields the same outcome? Fishkin and Forbath provide one answer: a better progressive constitutional theory can signal to the public and the political branches the substantive stakes of

---

[179] *See* United States v. Windsor, 570 U.S. 744 (2013); Obergefell v. Hodges, 576 U.S. 644 (2015).

[180] 347 U.S. 483 (1954).

[181] 410 U.S. 113 (1973).

[182] Discussing Janus v. AFSCME, 138 S. Ct. 2448 (2018).

[183] Discussing NFIB v. Sebelius, 567 U.S. 519 (2012).

[184] *Cf.* William G. Gale, *A Fixable Mistake: The Tax Cuts and Jobs Act*, BROOKINGS (Sept. 25, 2019), https://www.brookings.edu/blog/up-front/2019/09/25/a-fixable-mistake-the-tax-cuts-and-jobs-act/ ("[The Tax Cuts and Jobs Act] is regressive and will make the distribution of after-tax income more unequal.").

[185] *See* Dave Jamieson, *Republicans Want to Pass a National Right-To-Work Law*, HUFFINGTON POST (Feb. 22, 2017), http://huffpost.com/entry/republicans-pursue-national-right-to-work-law-while-they-hold-the-reins-in-washington_n_5891fb30e4b0522c7d3e354d.

[186] *Cf.* JONATHAN COHN, THE TEN YEAR WAR: OBAMACARE AND THE UNFINISHED CRUSADE FOR UNIVERSAL COVERAGE 211–325 (2021) (discussing ACA repeal efforts).

major constitutional decisions in a way that mere calls for judicial restraint cannot (e.g., p. 447). Perhaps the authors are right that a sophisticated progressive constitutional vision is the best way mobilize opposition to the decisions of a conservative Court. It seems equally plausible, though, that progressives can mobilize against the Court with a far simpler argument: that unelected judges are wrong to strike down policies, enacted by the elected branches, that would benefit the American people.[187]

D. Progressive Institutional Design

The difficulty of amending the Constitution means that progressives will not have the opportunity to rewrite the rules of the political game any time soon. Even if they could, though, the two dilemmas that opened this section—the promise and peril of government action, and the competing pulls of majorities and minorities—make it hard for progressives to wholeheartedly either endorse or condemn many aspects of constitutional design. A reform that would advance progressive agendas in part, or even in the aggregate, may set back at least some progressive priorities.

One way of overcoming these tradeoffs is through what might be called *bespoke* institutional design. The project of institutional design can easily be thought of as transsubstantive in character: constitutions and framework statutes set out rules for passing legislation, promulgating regulations, judicial review, and so forth. If there were only one type of rule for each of these activities, progressives would squarely face the two dilemmas described above. But real-world institutions are much more varied. For each of these activities of governance, there is not one set of rules—there are multiple. Attending to this heterogeneity, and thinking of creative ways to build upon it, offers one way forward. Within each of the three branches, operating procedures can put a thumb on the scale for or against particular outcomes. This insight yields a possible roadmap for progressive institutional design.

Begin with Congress. Though the Constitution says precious little about the legislative process,[188] Congress has developed tremendous procedural heterogeneity through its own rules and practices. The most famous procedural feature of the Senate, the filibuster, provides a prominent example. Senate rules generally require sixty votes to close debate, which in turn enables the filibuster.[189] But there are many exceptions to the three-fifths cloture requirement. The Senate can close debate with a simple-majority vote on budget reconciliation bills, trade agreements, resolutions pursuant to the Congressional Review Act or War Powers Resolution, and judicial nominations.[190] Some have proposed creating a new exception—so-called "democracy

[187] Fishkin and Forbath make one additional argument concerning the judicial role. Courts invariably need to interpret ambiguous statutes and regulations, and a democracy-of-opportunity approach can be an aid to courts in those efforts (pp. 29, 248). The advantages and disadvantages of this approach mirror those of other substantive canons of construction. It seems likely, though, that any court willing to interpret statutes and regulations in light of the democracy-of-opportunity tradition would also be willing to interpret labor, civil rights, or other statutes in a manner that furthers those statutes' purposes. For a court willing to take a purposivist approach to individual statutes, it is not clear how much is added by further using the democracy-of-opportunity tradition as an aid in interpretation.

[188] *See* U.S. CONST. art. I, § 7.

[189] *See* STANDING RULES OF THE SENATE r. XXII(2), S. DOC. NO. 113-18 (2013), https://rules.senate.gov/imo/media/doc/CDOC-113sdoc18.pdf.

[190] *See generally* MOLLY E. REYNOLDS, EXCEPTIONS TO THE RULE: THE POLITICS OF FILIBUSTER LIMITATIONS IN THE U.S. SENATE (2017) (discussing exceptions to the general cloture requirement).

reconciliation"—to allow the Senate to invoke cloture on voting rights legislation.[191] This proposal exemplifies how tailored congressional rules could advance specific policy priorities. The principle extends beyond filibuster carve-outs: Congress could employ fast-track or other special procedures to privilege certain types of legislation over others.[192]

The power of presidents and administrative agencies can likewise make some policy outcomes easier to achieve than others. One way to accomplish this is through tailoring administrative procedure. Procedures for notice-and-comment rulemaking, for example, are mostly transsubstantive but include carve-outs for a few enumerated subject areas, such as foreign affairs.[193] Exemptions from notice-and-comment requirements demonstrate how Congress could ratchet procedural requirements up or down in ways designed to favor particular outcomes. This is a powerful tool in the hands of progressives. Congress could, for instance, relax procedural requirements for rules that would protect public health and safety, while imposing additional procedural requirements for rules that would have the opposite effect.

More substantively, Congress can also delegate authority for the executive branch to make policy in only one direction. As an example, consider the Antiquities Act,[194] which authorizes the president to set aside land for national monuments but does not allow the president to unilaterally shrink or abolish monuments already created.[195] It therefore creates a one-way ratchet in favor of protecting land from development. A progressive Congress could mimic the Antiquities Act and seek to give authority for changes only in a favored direction—perhaps delegating to agencies the power to expand (but not contract) the coverage of a particular benefits program or make stricter (but not more lenient) health and safety regulation.

Finally, the judiciary. Different procedures for different scenarios can also be written into a court's operating procedures. Supreme courts in several states and foreign nations require a supermajority vote to invalidate legislation on constitutional grounds,[196] and some have proposed that the U.S. Supreme Court adopt a similar rule.[197] An even more precise intervention would be to institute different sorts of voting rules in different sorts of cases. One could imagine different voting rules for striking down federal versus state action, executive versus legislative action, cases

---

[191] *See, e.g.*, Norman Eisen et al., *The Most Important Exception the Senate Can Make*, CNN (Mar. 5, 2021), https://www.cnn.com/2021/03/05/opinions/senate-filibuster-exception-eisen-painter-mandell/index.html; *see also* Carl Hulse, *Schumer Will Try to Change Senate Rules if G.O.P. Stalls Voting Bill*, N.Y. TIMES (Dec. 20, 2021), https://www.nytimes.com/2021/12/20/us/politics/filibuster-senate-voting-rights.html.

[192] Such efforts would be lawful exercises of each chamber's constitutional power to "determine the Rules of its Proceedings." U.S. CONST. art. I, § 5, cl. 2; *see also* Stanley Bach, *The Nature of Congressional Rules*, 5 J.L. & POL. 725, 731 (1989) (describing Congress's rules as "essentially endogenous").

[193] *See* 5 U.S.C. § 553(b)-(e) (general procedures); *but see id.* § 553(a)(1) (exceptions for matters relating to "a military or foreign affairs function of the United States"); *id.* § 553(a)(2) (exception for "matter[s] relating to agency management or personnel or to public property, loans, grants, benefits, or contracts").

[194] Pub. L. 59-209, 34 Stat. 225 (1906).

[195] *See* 54 U.S.C. § 320301(a)-(b). This interpretation is the view of most, but not all, legal scholars who have written on the topic. *See, e.g.*, Letter from 121 Law Professors to Sec'y of Interior Ryan Zinke and Sec'y of Commerce Wilbur Ross (July 6, 2017), https://legal-planet.org/wp-content/uploads/2017/07/national-monuments-comment-letter-from-law-professors_as-filed.pdf. *But see, e.g.*, Richard H. Seamon, *Dismantling Monuments*, 70 FLA. L. REV. 553 (2018).

[196] *See, e.g.*, NEB. CONST. art. V, § 3; N.D. CONST. art VI, § 4; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 93 § 7; DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 113 (S. Kor.).

[197] *See, e.g.*, Jed Handselman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893 (2003). For a skeptical account of simple-majority voting rules in the judicial context, see Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts?*, 123 YALE L.J. 1626 (2014).

involving the Constitution's rights versus structural provisions, and so forth. In a different vein, Congress has at times limited (or attempted to limit) courts' jurisdiction over specified topics, though the outer limit of that power remains an open question.[198] And it is familiar from administrative law that Congress has the power to specify the standard of review that courts apply when evaluating agency action. While the Administrative Procedure Act provides for transsubstantive standards of review,[199] Congress could tailor standards of review to put a thumb on the scale in favor of certain types of agency action while requesting that courts more closely scrutinize others.[200]

This brief tour of levers that might be pulled to advance particular outcomes may seem far afield from traditional constitutional law. Most do not think about filibuster exceptions or administrative procedure as core features of the United States' constitutional order. But if we understand constitutional design to encompass all the rules of how government may act, then attention to a broader range of mechanisms provides a promising way forward for progressive constitutionalism. The hard-wired features of the Constitution are virtually impossible to change through the amendment process, and courts will not be changing them in a progressive direction any time soon. Even if those features could be changed, the twin dilemmas described in Part I provide reasons for progressives to hesitate before making some sweeping changes.[201] Instead, a more promising and realistic way of using institutional design to achieve progressive ends might be through more surgical changes to how each of the three branches operates.

CONCLUSION

The U.S. Constitution, and the constitutional order that flows from it, impacts nearly every aspect of our politics. Rules of the political game shape who wins elected office and what policies the legislative and executive branches can enact. The judiciary has become a central expositor not only of constitutional meaning, but also of national identity. Modes of legal argument, like an emphasis on individual rights, ripple outward from the courts and into political discourse. Those who would advocate for changes in the economic or social order often feel compelled to advocate for those changes through the rhetoric of constitutional principle, both in the courts and through the political process.

---

[198] For discussion and competing views, see Laurence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981); Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043 (2010); Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What* The Dialogue *(Still) Has to Teach Us*, 69 DUKE L.J. 1 (2019). The foundation of much scholarship on this topic remains Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

[199] *See* 5 U.S.C. § 706.

[200] At times, Congress has done exactly that. *See, e.g.*, 15 U.S.C. § 6714(e) (providing that a federal court shall resolve conflicts between federal and state regulators regarding insurance issues "based on its review on the merits" and "without unequal deference"); 29 USCA § 1401(c) (providing that, in ERISA litigation, "there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct"). *See also* Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 300, 301 (2006) (noting that "Congress has repeatedly legislated as to the standard of judicial review for agency action" and arguing that the Necessary and Proper Clause is "[t]he most logical constitutional source for this power").

[201] This holds true for structural constitutional law, but less so for electoral institutions—like the Electoral College and the use of single-member House districts—the reform of which would not risk adversely effecting progressives' substantive agendas.

This state of affairs poses challenges for progressives. Constitutional structures make it difficult for progressives to enact their agendas; judicial power has been far more effective in striking down regulations or social welfare programs than in creating them; and norms of constitutional argument can make it challenging for progressives to make the best case for their preferred policies, many of which are best understood as positive and collective goods, rather than negative and individual rights. Despite these impediments, many progressives are hesitant to call for wholesale change to the constitutional order. The gravitational pull of constitutional culture, the shadow of the Warren Court, and fear of what an unrestrained conservative government might do all provide reasons for progressives to make arguments from within a constitutional tradition rather than outside of it.

Arguments from within the constitutional tradition include much of the most important public law scholarship of the past century. Much of this literature has focused on the courts, explaining why courts can and should be agents of progressive change. Other contributions, most recently *The Anti-Oligarchy Constitution*, make the case for progressive reform through legislation, but in a constitutional register. The political culture that prompts these sorts of arguments has deep roots, as *Against Constitutionalism* demonstrates. Progressives should continue to advocate for change within the existing legal framework and constitutional culture; there is hardly an option to do otherwise. But they should also recognize the ways in which constitutional structure and culture shape our politics, often to the detriment of progressives. Recognizing the distortions of constitutionalism is a small but necessary step to changing them.