



BOOK REVIEWS

PUZZLES OF PROGRESSIVE CONSTITUTIONALISM

Jonathan S. Gould

CONTENTS

INTRODUCTION	2054
I. PROGRESSIVE CONSTITUTIONAL IDEOLOGY?	2060
A. <i>Constitutionalism as Ideology</i>	2061
B. <i>Constitutionalism in the United States</i>	2064
C. <i>Implications for Progressivism</i>	2068
D. <i>Constitutionalism and Collective Identity</i>	2073
II. PROGRESSIVE CONSTITUTIONAL ARGUMENT?	2077
A. <i>The Democracy-of-Opportunity Tradition</i>	2078
B. <i>Discerning What's Constitutional</i>	2081
C. <i>Benefits and Costs of Constitutional Argument</i>	2087
III. PROGRESSIVE CONSTITUTIONAL DESIGN?	2092
A. <i>Enabling Lawmaking Versus Preventing Misrule</i>	2094
B. <i>Majority Rule Versus Minority Interests</i>	2097
C. <i>Judicial Review</i>	2100
D. <i>Progressive Institutional Design</i>	2105
CONCLUSION	2108

PUZZLES OF PROGRESSIVE CONSTITUTIONALISM

AGAINST CONSTITUTIONALISM. By Martin Loughlin. Cambridge, MA: Harvard University Press. 2022. Pp. xi, 250. \$39.95.

THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY. By Joseph Fishkin and William E. Forbath. Cambridge, MA: Harvard University Press. 2022. Pp. 601. \$39.95.

*Reviewed by Jonathan S. Gould**

This Review examines the relationship between progressivism and constitutionalism. In doing so, it considers three different ways of thinking about a constitution's role in a political system. First is constitutionalism as a distinct ideology of governance in which an apex court plays a major role in deciding issues of public policy and articulating 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 takes place. Each of these three lenses reveals distinctive costs that confront progressives engaged in constitutional politics. Courts that play an outsized role in policymaking can impede progressive agendas. A narrow band of acceptable constitutional arguments can make it hard 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 the difficulties that constitutional politics, as currently practiced in the United States, pose for progressive agendas.

INTRODUCTION

How should 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 antidemocratic ends.

* Assistant Professor of Law, University of California, Berkeley. © 2022 Jonathan S. Gould. Special thanks to Joseph Fishkin, William Forbath, and Martin Loughlin for their generous engagement with this Review of their work. For helpful comments and conversations, I am grateful to Jacob Abolafia, Erwin Chemerinsky, Joshua Cohen, Jorge Cortés-Monroy, Richard Fallon, Dan Farber, Rebecca Goldstein, David Grewal, Michael Klarman, Jacob Lipton, Nathan Pippenger, David Pozen, Jed Purdy, Sarah Song, and workshop participants at Berkeley. Thanks also to Nabila Abdallah, Katie O'Leary, and Hadley Rood for superb research assistance.

One stream of progressive thought views the constitutional order as a hurdle 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 the Supreme Court has 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 has sought to advance progressive goals, observers have charged it with being ineffectual⁷ 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

¹ See Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. 59, 114–18 (2022) (discussing this bias).

² Alfred Stepan & Juan J. Linz, *Comparative Perspectives on Inequality and the Quality of Democracy in the United States*, 9 PERSPS. 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 91–97 (arguing that asymmetric legislative ambitions mean 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 of 1993 as applied to state and local governments); *Shelby County v. Holder*, 570 U.S. 529 (2013) (striking down the coverage formula in the Voting Rights Act of 1965, as amended).

⁵ Examples of the Court striking down labor and employment legislation include *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); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923); and *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018). Examples of judicial resistance to the New Deal include *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 *NFIB v. Sebelius*, 567 U.S. 519, 575–85 (2012) (striking down the Medicaid expansion portion of the Affordable Care Act).

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, Essay, *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 CALIF. L. REV. 1703 (2021) (calling for reforms to disempower the Supreme Court).

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 pursue their vision of justice.¹¹ Further, as the left continues to reckon with the Trump presidency, fear of tyranny provides an additional reason for 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 while still celebrating 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 solidarity 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

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); and LESLIE F. GOLDSTEIN, *THE U.S. SUPREME COURT AND RACIAL MINORITIES: TWO CENTURIES OF JUDICIAL REVIEW ON TRIAL* (2017).

¹¹ See, e.g., Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 794 n.207 (1992) (reviewing BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991)) (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).

¹² See *infra* notes 166–169 and accompanying text.

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, *ROMANCE OF THE CONSTITUTION: VENERATION AND RESISTANCE IN THE AMERICAN CENTURY* (forthcoming) (on file with the Harvard Law School Library) (documenting the rise of constitutional veneration in the twentieth century); *infra* section I.D, pp. 2073–77.

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).

reasonably hope for is that their legislative and regulatory successes survive judicial review.¹⁵ Even if the political balance of the Court were different, though, a jurisprudential approach to progressive constitutionalism would still be incomplete. As has long been observed, the Court has limited ability to enact progressive social change.¹⁶ A fuller account of the relationship between progressivism and the constitutional order requires looking beyond judicial doctrine to the role of the Constitution in structuring government action and political culture more broadly.

In that spirit, I examine the relationship between progressivism and three aspects of the constitutional order in the contemporary United States: constitutionalism as an *ideology* of governance; constitutional *argument* as a mode of political discourse; and constitutional *design*, which sets out the rules of the political game.

First, constitutionalism is itself an ideology of governance, and one with an uneasy association with progressivism. *Against Constitutionalism*, by Professor Martin Loughlin, provides a comprehensive examination of constitutionalism as an ideology. Loughlin, perhaps the United Kingdom's foremost public law scholar, takes an outsider's view of United States-style constitutionalism. He explains how a written constitution can give rise to constitutionalism, "a discrete concept expressing a specific philosophy of governing" (p. 7). That philosophy, for Loughlin, is characterized by certain features, including limited government and separated powers, overseen by a judiciary operating in accordance with principles of public reason, and in which the constitution expresses the regime's political identity (pp. 6–7).¹⁷ 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 (pp. 195–202). 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: though constitutionalism can

¹⁵ The Supreme Court has struck down more major progressive policies in recent years than at any time since before 1937. *See, e.g.*, *NFIB v. Sebelius*, 567 U.S. 519, 575–85 (2012) (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) (per curiam) (mem.) (upholding an injunction against deferred action immigration programs); *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021) (per curiam) (blocking the Biden Administration's eviction moratorium during the COVID-19 pandemic); *NFIB v. Dep't of Labor*, 142 S. Ct. 661 (2022) (per curiam) (staying the Biden Administration's vaccination-or-test mandate for large employers during the COVID-19 pandemic); *see also* Joan Biskupic, *The Supreme Court Hasn't Been This Conservative Since the 1930s*, CNN (Sept. 26, 2020, 6:33 PM), <https://www.cnn.com/2020/09/26/politics/supreme-court-conservative> [<https://perma.cc/X2N4-7M9Q>].

¹⁶ *See supra* notes 7–8 and accompanying text.

¹⁷ *See infra* p. 2061.

impede progressive agendas, the legacy of the Warren Court and concerns about minority rights and misrule prevent many progressives from turning against the courts.

Second, the Constitution and constitutional values structure political discourse, again in ways that can cause challenges for progressives. *The Anti-Oligarchy Constitution*, by Professors Joseph Fishkin and William Forbath, is a leading example of progressive constitutional argument. Fishkin and Forbath, both distinguished legal scholars in the United States, seek to recover a strain of argument that treats inequality as a constitutional problem. They reconstruct the history of the “democracy-of-opportunity tradition,” an intellectual tradition that is averse to centralized economic power, requires a strong middle class, and demands political equality for all citizens regardless of race or gender (pp. 8–12). 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 about justice, but also that it is a *constitutional* worldview that the elected branches should take the lead in implementing. This effort seeks to salvage constitutionalism for the left, in the face of a conservative Supreme Court unreceptive to progressive legal arguments. But it also creates difficulties: presenting progressive agendas in constitutional terms can require stretching the definition of what counts as constitutional beyond how many Americans 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 and other legal frameworks establish the “rules of the political game.”¹⁸ These rules can make progressive policy-making difficult, but attempts to reform existing structures run up against both entrenchment and tradeoffs that pit competing progressive commitments against one another. A key question for progressives (or anyone else with 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.¹⁹

Progressives face a challenge in determining what types of institutional arrangements would be most advantageous to their agendas, 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

¹⁸ E.g., Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 700 (2011).

¹⁹ See generally Gould & Pozen, *supra* note 1 (asking this question about various parts of the U.S. constitutional order).

tensions have been the subject of academic literature and political debate for generations. They deserve renewed attention, though, because they make it quite difficult to determine what sorts of institutional design choices would best advance progressive agendas today.

Progressivism might seem an odd framework through which to evaluate constitutional arrangements. Constitutional law scholarship more typically focuses on general values such as democracy,²⁰ workable government,²¹ and avoidance of tyranny.²² 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 comprehending constitutional politics requires accounting for how our constitutional arrangements impact the most salient groups and ideologies that compete for political power. In an age of a conservative Supreme Court, it is particularly important that those of us who identify as progressives develop alternative visions of what the constitutional order might look like.

Before proceeding, a word of definition. While my focus is largely on the different understandings of the constitutional order, progressivism is also not an easy term to define.²³ Even a casual observer of American politics can identify the cluster of commitments that make up contemporary progressivism: support for a social welfare state, civil rights for demographic minorities, protections for workers and labor unions, and environmentalism, among others.²⁴ Progressives disagree,

²⁰ See generally, e.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2006) (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).

²¹ 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").

²² See, e.g., MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 4–5 (1995) (describing "the avoidance of tyranny" as a core constitutional value, *id.* at 5).

²³ For an account of the emergence of progressive ideas, see generally JAMES T. KLOPPENBERG, *UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870–1920* (1986). For a focus on leftist activism, see generally MICHAEL KAZIN, *AMERICAN DREAMERS: HOW THE LEFT CHANGED A NATION* (2011). For a statement of contemporary progressivism, with a focus on economic issues, see generally JOSEPH E. STIGLITZ, *PEOPLE, POWER, AND PROFITS: PROGRESSIVE CAPITALISM FOR AN AGE OF DISCONTENT* (2019).

²⁴ See generally JEFFREY M. BERRY, *THE NEW LIBERALISM: THE RISING POWER OF CITIZEN GROUPS* (1999) (describing the proliferation of new interest groups in the second half of the twentieth century). From the 1960s to the early twenty-first century, the political parties realigned, such that the divide between progressivism and conservatism increasingly came to track the two major political parties. See, e.g., ERIC SCHICKLER, *RACIAL REALIGNMENT: THE*

sometimes fiercely, on precisely how these general commitments should manifest as specific policies and which should take priority when conflicts arise between different progressive agenda items. A central theme of this Review is that a principal reason why it is hard to forge a progressive constitutionalism is that different progressives seek different things from a constitutional order.

I proceed 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 progressives, an ironic finding given the role of the mid-twentieth-century left 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 the peril of framing progressive commitments in constitutional terms. Part III turns to institutional design. After noting the familiar ways in which the existing constitutional order creates hurdles for progressives, it highlights how competing commitments within the progressive tent create unavoidable tradeoffs for progressives deciding which reforms to pursue, while also noting how creative institutional design can sometimes circumvent those tradeoffs. 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*, 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 has its own values, logic, and normative commitments.²⁵ Viewing constitutionalism as an ideology allows us to evaluate its intersection

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 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.” MATT GROSSMAN & DAVID A. HOPKINS, ASYMMETRIC POLITICS: IDEOLOGICAL REPUBLICANS AND GROUP INTEREST DEMOCRATS 14 (2016).

²⁵ On this view, “progressive constitutionalism,” with the phrase's first word modifying its second, masks the content of constitutionalism as a stand-alone concept. In Loughlin's words, “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).

with progressivism and reveals several difficulties that progressives confront in the face of constitutionalism.

A. *Constitutionalism as Ideology*

The term constitutionalism can take on different meanings in public discourse.²⁶ It is, unfortunately, “sometimes used in a way that conveys no theoretical content at all.”²⁷ Given the potential for confusion about the term’s meaning, Loughlin helpfully opens with a definition. He defines constitutionalism as existing when a written constitution:

(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)

As this definition makes plain, a written constitution is necessary but not sufficient to meet Loughlin’s criteria for a constitutionalist society. This conception of constitutionalism also diverges 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).²⁸

While constitutionalism fully matured in the twentieth century, its foundations are much older. The concept has its origins in Enlightenment

²⁶ See JEREMY WALDRON, *POLITICAL POLITICAL THEORY: ESSAYS ON INSTITUTIONS* 24 (2016) (observing that “[s]ometimes [constitutionalism] seems to mean just the thoughtful and systematic study of constitutions and various constitutional provisions” while “[s]ometimes the term is used as a label for referring to a constitutional doctrine”).

²⁷ *Id.* at 23–24.

²⁸ Other scholars have discussed constitutionalism in terms that are similar (though not identical) to Loughlin’s. Professor Jeremy Waldron, for example, notes that “constitutionalism seems to be not just a normative theory about the forms and procedures of governance,” *id.* at 29 (emphases omitted), but rather “a theory about the importance of controlling, limiting, and restraining the power of the state in a substantive way,” *id.* at 29–30. Like Loughlin, Waldron emphasizes the tension between “constitutionalism’s embrace of the idea of limited government” and the “democratic view of constitutions,” which stresses “the empowerment of ordinary people in a democracy and allowing them to control the sources of law and harness the apparatus of government to their legitimate aspirations.” *Id.* at 43. In a different vein, Professors Mark Tushnet and Bojan Bugarić analyze an account of “thin constitutionalism” defined by majority rule, entrenchment of certain rights and structures, judicial independence, and political parties. See MARK TUSHNET & BOJAN BUGARIĆ, *POWER TO THE PEOPLE: CONSTITUTIONALISM IN THE AGE OF POPULISM* 12–27 (2021).

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 constitutionalism, a written constitution does more than create, empower, and limit institutions of government. A constitution also serves as a symbol of collective political identity, advancing social cohesion by providing citizens with a basis for national unity (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). An apex court thus becomes the articulator of a society’s political identity, with its constitutional decisions pronouncing on “the soul of the nation” (p. 138).²⁹

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 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 precision, cannot definitively resolve how open-textured concepts like liberty, equality, and dignity apply to every possible situation. Judges come to play the

²⁹ 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”).

role of choosing between “contestable values claiming to be the best iteration” of constitutional values (p. 163). While judges continue to protect the classical liberal values that have long helped animate constitutionalism, in more recent years constitutional designers and judges have also deployed constitutional law “toward the quite specific end of preserving individual freedom by protecting a market-based order” (p. 193).³⁰

Over the course of the twentieth century, constitutionalism spread quickly and broadly. Nations with varied cultural backgrounds and political histories fell into the thrall of constitutionalism, from post-war Germany 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).³¹ But constitutionalism is not universal. Routes to avoiding or mitigating it include not having a written constitution in the first instance (as in the United Kingdom³²), not giving a written constitution a rarefied place in a nation’s political culture (as in France or Sweden³³), or denying courts the last word on matters of individual rights (as in Canada³⁴). The greater prevalence of constitutionalism in

³⁰ Loughlin describes this as “Ordo-constitutionalism,” a “reworking [of] classical constitutionalism for contemporary conditions” (p. 193).

³¹ 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 play the same identity-formation role played by domestic constitutions, noting Jürgen Habermas’s insight that the drafting of a European constitution “would enable diverse national traditions to be shaped into a cohesive European identity” (p. 180) (citing Jürgen Habermas, *Why Europe Needs a Constitution*, NEW LEFT REV. (2001), <https://newleftreview.org/issues/iii11/articles/jurgen-habermas-why-europe-needs-a-constitution> [<https://perma.cc/2DUD-94QU>]). 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).

³² 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”).

³³ Loughlin lists these examples (p. 7).

³⁴ 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 § 33(1), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 33 (U.K.); see also Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2784–85 (2003) (“[T]he drafters of Canada’s Charter of Rights invented weak-form judicial review in 1981.” (citing PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA (3d ed. 1992))). This “weak-form” judicial review contrasts with Loughlin’s constitutionalism, under which the judiciary acts as guardian of the constitution (pp. 4, 12–13, 34, 167). If mechanisms to override the courts are seldom used, however, as is the case in Canada, that might show that constitutionalism has strength as an ideology even if an institutional escape hatch from judicial supremacy formally exists. See Laurence Brosseau & Marc-André Roy, *The Notwithstanding Clause of the Charter*, LIBR. OF PARLIAMENT 7–8 (May 7, 2018), <https://lop.parl.ca/staticfiles/PublicWebsite/Home/>

some nations as compared to others leads to the question of why judicial politics develop differently in different places, a question to which I now turn with a focus on the United States.³⁵

B. Constitutionalism in the United States

Loughlin focuses on how constitutionalism emerges from political ideas, namely the intersection of constituent power and individual rights just discussed. That ideas-based story differs from accounts by political scientists focused on how strategic incentives can give rise to judicial supremacy. Professor Charles Epp, for example, ascribes the twentieth-century individual rights revolutions in several mature democracies to pressures from civil society organizations and activist lawyers.³⁶ Professor Ran Hirschl, in another transnational study, points to a different set of actors. He attributes the rise of juristocracy to the convergence of strategic incentives of three varieties of elites: political elites who benefit from insulating policymaking from direct democratic control, economic elites who view judicial power as a way of protecting property rights and free markets, and judicial elites who seek to enhance their own power and prestige.³⁷ Professor Keith Whittington, focusing on the United States, argues that strategic incentives of political leaders, and of Presidents in particular, explain the rise of judicial review. “Through much of American history,” he writes, “[P]residents have found it in their

ResearchPublications/BackgroundPapers/PDF/2018-17-e.pdf [https://perma.cc/RTY2-Q4VF] (noting that Canada’s notwithstanding clause has not been used by the national parliament or most provincial parliaments); see also Janet L. Hiebert, *The Notwithstanding Clause: Why Non-Use Does Not Necessarily Equate with Abiding by Judicial Norms*, in *THE OXFORD HANDBOOK OF THE CANADIAN CONSTITUTION* 695, 697 (Peter Oliver et al. eds., 2017) (noting that “[s]o potent has criticism of the notwithstanding clause become that many believe it is important to solicit from political leaders a commitment to never invoke the clause”).

³⁵ This section’s summary of *Against Constitutionalism* has focused on the book’s rich descriptive account of what constitutionalism is and how it developed and spread. The book says less in making the case *against* constitutionalism. Its final chapter does, however, argue that constitutionalism “contributes to the hollowing out of democracy and the retreat of the individual into a privatized society in which few participate in public affairs” (p. 202), emphasizing in particular the ways in which constitutionalism weakens the institutions of democracy, including legislative bodies and political parties (p. 197). It also contends that the global rise of right-wing populism is a reaction to constitutionalism, and that “increasing authoritarianism and countervailing reaction will result” (p. 202) as a reaction to constitutionalism (p. 200). This case against constitutionalism is not central to Loughlin’s largely historical and descriptive project, which can be evaluated and learned from on its own terms, regardless of whether one accepts a particular normative view of democracy or agrees with either his assessment of constitutionalism’s role in recent politics or his predictions about constitutionalism’s likely impacts in the future.

³⁶ See CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 17–22 (1998).

³⁷ See RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 11–12 (paperback ed. 2007). Loughlin discusses Hirschl’s work briefly and in largely positive terms (pp. 133–34).

interest to defer to the Court and encourage it to take an active role in . . . resolving constitutional controversies.”³⁸

Though each of these explanations differs from Loughlin’s, it is possible to harmonize Loughlin’s account with those more focused on strategic incentives. It is likely that feedback loops exist between Loughlin’s story of ideology and the political scientists’ discussions of how governmental and nongovernmental actors alike can benefit from greater judicial power. The attractiveness of constitutionalism as an ideology aids those who benefit from judicial supremacy for strategic reasons, and those actors in turn have incentives to further elevate constitutionalism. It may be impossible to fully disentangle strategic accounts from ideological ones, but it seems fair to say the two are compatible and can easily be mutually reinforcing.

Several more localized dynamics have also allowed constitutionalism to flourish in the United States. Those include both constitutional design choices made in the 1780s and political developments in the 1950s and 1960s. Ideological evolution and strategic incentives both play out in legal and political contexts, and the United States has been distinctly hospitable to constitutionalism.

A first feature that encourages constitutionalism in the United States is the near permanence of the 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.³⁹ As a result, the Constitution is de facto amended 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, the rejection of “separate but equal” in *Brown v. Board of Education*, and the rights revolution of the 1960s. Were the Constitution easier to formally amend, such constitutional transitions perhaps 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 that is functionally able to amend the Constitution.⁴⁰

This judicial role is not intrinsic to a written constitution. The U.S. Constitution is harder to formally amend than both state constitutions

³⁸ KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY* 5 (2007).

³⁹ See 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.”).

⁴⁰ The Court does not 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.

and the written constitutions of many other nations.⁴¹ If the framers had enacted more lax amendment procedures, the constitutional text would be much more malleable.⁴² This would be even more the case 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).⁴³ The politics and culture that have developed over two centuries would have likely looked different if the constitutional text were less fixed.

The Constitution's brief and open-ended language also contributes to the emergence of constitutionalism. The Constitution, especially its individual rights provisions, contains open-ended terms like "freedom of speech,"⁴⁴ "due process,"⁴⁵ and "equal protection."⁴⁶ This sort of language creates openings for courts to carve out a distinct role as expositors of those terms, which in turn allows them to oversee the activities of Congress, the executive branch, and subnational governments.⁴⁷ 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 also becomes an expositor of the nation's political morality.

It is no doubt true that the U.S. Constitution's rigidity 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 prevails in the United States is newer.

⁴¹ 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"); ROBERT L. MADDEX, *STATE CONSTITUTIONS OF THE UNITED STATES*, at xxii–xxvii (2d ed. 2005) (documenting that over half of state constitutions have been amended more than one-hundred times, and nearly all have been amended more frequently than the federal Constitution has been).

⁴² 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), <https://press-pubs.uchicago.edu/founders/documents/v1ch14s39.html> [<https://perma.cc/BSE4-XLAQ>].

⁴³ See Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in THOMAS JEFFERSON: *POLITICAL WRITINGS* 593, 596 (Joyce Appleby & Terence Ball eds., 1999).

⁴⁴ U.S. CONST. amend. I.

⁴⁵ *Id.* amends. V, XIV.

⁴⁶ *Id.* amend. XIV, § 1.

⁴⁷ 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, and tests," giving examples of tests that implement the Constitution's more open-ended provisions).

Constitutionalism today is defined not only by classical constitutionalism's limits on government 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 driven, in significant part, by the left.

The Warren Court served as the key inflection point in the left's embrace of judicial review. Progressives had fought the Supreme Court during the *Lochner* and New Deal eras, but the stirrings of the civil rights movement changed the politics of judicial review. The Warren Court's decisions on civil rights, apportionment, free speech, and the rights of criminal defendants led to support for judicial supremacy from the left.⁴⁸ In Professor 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."⁴⁹ Liberals came to endorse the view, stated most forcefully in *Cooper v. Aaron*,⁵⁰ 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."⁵¹ Some older observers, 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.⁵² The Warren Court transformed the American left, however, for the first time in the nation's history, into advocates for judicial supremacy.⁵³

The left's 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 resulted in a widespread view of the Court as having the last word.⁵⁴ The

⁴⁸ Cf. generally MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* (1999) (discussing these and other areas).

⁴⁹ LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 223 (2004). Note Kramer's use of the term "liberal" rather than "progressive"; the emergence of the term liberal is tied to the emergence of what Loughlin calls constitutionalism. Fishkin and Forbath describe the ideological content of the terminological shift: "*Liberal* social reformers and advocates for racial minorities, women, the consumer, and the environment all embraced individual rights claims addressed to courts; strong judicial oversight of administrative state institutions and private governance; and legalist, procedural conceptions of fairness and equality — all of which earlier generations of *progressives* had shunned" (p. 25) (emphases added).

⁵⁰ 358 U.S. 1 (1958).

⁵¹ *Id.* at 18.

⁵² 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, 242 (2019).

⁵³ See Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. 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").

⁵⁴ See KRAMER, *supra* note 49, 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

past half century of judicial conservatism has not fully dislodged the left from its subscription to that view. Some have pursued alternative visions, as evident by academic movements calling for nonjudicial varieties of constitutionalism — popular constitutionalism, legislative constitutionalism, and administrative constitutionalism.⁵⁵ Alternatives to judicial supremacy may find additional strength in the face of a Court that is polarized based on the party of the appointing President⁵⁶ and a public that increasingly recognizes the Court’s political character.⁵⁷ At the same time, center-left jurists have continued to valorize the Court’s role in American life and push back against perceptions of the judiciary as political.⁵⁸ These calls have sought to prop up the image of courts as what Loughlin calls “elaborating the requirements of public reason” (p. 7). It is hard to imagine that the left would have accepted this picture of the judiciary if not for the Warren Court.

C. *Implications for Progressivism*

A primary criticism of constitutionalism, on Loughlin’s definition, is that the people and their elected representatives, rather than unelected judges, should define the nation’s political identity and make its most

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.”)

⁵⁵ See generally, e.g., WILLIAM N. ESKRIDGE & JOHN A. FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010); KRAMER, *supra* note 49; 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); 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 (2003).

Looking beyond the United States, in some nations weak-form judicial review empowers national legislatures to override certain judicial judgments on matters of constitutionality. See *supra* note 34 and accompanying text; see also 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).

⁵⁶ 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”).

⁵⁷ See *62% of Americans Say Politics, Not Law, Drives Supreme Court Decisions*, GRINNELL COLL. (Oct. 20, 2021), <https://www.grinnell.edu/news/62-americans-say-politics-not-law-drives-supreme-court-decisions> [<https://perma.cc/4SSU-YHVX>] (reporting polling results).

⁵⁸ The most notable 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), <https://cnn.com/2018/10/05/politics/supreme-court-elena-kagan-legitimacy/index> [<https://perma.cc/KDQ5-W6T8>].

important policy decisions (pp. 124–35). This argument is critically important to evaluating constitutionalism on democratic theory grounds. But focusing only 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. The asymmetric policymaking ambitions of the two parties, however, mean that judicial review is likely, in the aggregate, to set back progressive policies more so than conservative ones.⁵⁹ Some nations’ courts have enforced positive rights and have required governments to create programs or spend money.⁶⁰ The U.S. Supreme Court has not generally taken this road, though, and “it is often said that our Constitution has traditionally protected negative liberties rather than positive ones.”⁶¹ While it is practically impossible to envision 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.⁶² 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 matters of regulatory and social welfare policy where progressives tend to support a federal government that is ambitious and interventionist rather than passive.

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.⁶³ Yet 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

⁵⁹ See Gould & Pozen, *supra* note 1, at 100–06 (developing this argument).

⁶⁰ See Stephen Gardbaum, *The Structure and Scope of Constitutional Rights*, in *COMPARATIVE CONSTITUTIONAL LAW* 387, 396–402 (Tom Ginsburg & Rosalind Dixon eds., 2011).

⁶¹ 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 generally* EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS* (2013). Tushnet has argued that “progressive constitutionalism should be understood in the framework of political rather than judicial constitutionalism” because courts are unlikely to be able to effectively evaluate whether public policy is “aimed at reducing and eliminating severe material deprivation.” Mark Tushnet, *Progressive Constitutionalism: What Is “It”?*, 72 *OHIO ST. L.J.* 1073, 1077 (2011).

⁶² See *NFIB v. Sebelius*, 567 U.S. 519 (2012) (adjudicating constitutional challenges to the Affordable Care Act).

⁶³ See *infra* notes 164–165 and accompanying text (discussing immigration and criminal justice).

same reform would cause if enacted legislatively. Scholars have examined this sort of backlash in the context of progressive decisions like *Brown v. Board of Education*⁶⁴ and *Roe v. Wade*.⁶⁵ Given that progressives are more likely than conservatives to seek to modify (rather than solidify) existing cultural norms through public policy,⁶⁶ 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 spills over into nonjudicial settings can also harm progressives. A distinctive set of norms dictates what sorts of constitutional arguments are and are not acceptable in court.⁶⁷ 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.”⁶⁸ Doctrine can also foreclose certain substantive arguments while elevating others. Judicial decisions on affirmative action, for instance, long encouraged proponents to defend the practice based on diversity’s educational benefits, while discouraging arguments about remedying past injustices.⁶⁹ Constitutional modalities and doctrines then become the basis for nonjudicial conversations about policy. As Professor Michael Sandel has observed, “[a]ssumptions drawn from con-

⁶⁴ 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, propell[ing] politics in virtually every southern state several notches to the right on racial issues”).

⁶⁵ 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, 2076–87 (2010) (contesting the backlash thesis with respect to *Roe v. Wade*).

⁶⁶ Cf. Garry Wills, *It’s His Party*, N.Y. TIMES (Aug. 11, 1996), www.nytimes.com/books/99/07/25/specials/wills-magparty.html [<https://perma.cc/Q3YB-9CWJ>] (quoting William F. Buckley’s quip that conservatives’ task was to stand “athwart history yelling ‘Stop!’”).

⁶⁷ See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 3–119 (1984) (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).

⁶⁸ Pozen & Samaha, *supra* note 67, at 732.

⁶⁹ 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 Court’s decades-long focus on diversity to the exclusion of other values originated in *Regents of the University of California v. Bakke*, 438 U.S. 265, 316–18 (1978) (Powell, J.).

stitutional discourse increasingly set the terms of political debate in general.⁷⁰ This is perhaps nowhere more true than with respect to individual rights: Professors Mary Ann Glendon and Jamal Greene have each documented how public discussion of rights takes its cues from constitutional law.⁷¹

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 within the domain of "policy" than "law." But those are precisely the kinds of arguments that often make the best case for progressive policies. The Affordable Care Act focused on health care access and affordability, but judicial review forced defenders of the statute to instead address the distinction between regulating action and regulating inaction (through the lens of a hypothetical that only a lawyer could love).⁷² Similarly, while the best policy arguments in favor of the Voting Rights Act of 1965⁷³ concern the need to prevent discrimination in voting, the most important voting rights decision of the last generation turned on an abstract discussion of "the principle that all States enjoy equal sovereignty."⁷⁴ The gun control and affirmative action examples given above are additional 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 types of interests. Loughlin is correct as a conceptual matter that "almost any interest can now be reformulated as a right" (p. 131). In the United States, though, rights "tend to be

⁷⁰ 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 (suggesting that "a large domain for constitutional discourse" can "crowd[] out nonconstitutional argument"); Sandel, *supra*, at 538 (arguing that "[w]hile 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").

⁷¹ 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 OBSESSION 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").

⁷² See generally Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV. 66 (2013).

⁷³ Pub. L. No. 89-110, § 2, 79 Stat. 437 (1965) (codified as amended at 52 U.S.C. § 10301).

⁷⁴ *Shelby County v. Holder*, 570 U.S. 529, 535 (2013); see also *id.* at 542–45.

presented as absolute, individual, and independent of any necessary relation to responsibilities.⁷⁵ As a result, marginalized groups often seek full inclusion in the polity by making demands for rights, because those are the kinds of claims that the Constitution privileges (p. 176). The civil rights movement followed this paradigm, prominently featuring calls for protecting individual rights through the Constitution's Equal Protection Clause⁷⁶ and creating new rights through statutes like the Civil Rights Act of 1964.⁷⁷ 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 a conception of constitutional rights as freedom from government coercion can be an impediment to progressive policies.⁷⁸ The same is true for the individualistic character of rights. It is easy to assert an individual right to contribute to a political campaign⁷⁹ or refuse to contribute to a labor union,⁸⁰ but much harder to do so for the collective interests in a fair political process or a stable labor union with meaningful bargaining power.⁸¹

Further, elevating the status of judicially recognized rights risks devaluing those interests that are not recognized as rights.⁸² Those interests include core progressive commitments, such as public health and the environment. Policy disputes during the COVID-19 pandemic, for example, made clear how rights claims can be a sword against public health interventions. It was easy for opponents of mask and vaccination

⁷⁵ GLENDON, *supra* note 71, at 12; *see also* GREENE, *supra* note 71, at 13 (describing a contemporary understanding of rights as “presumptively absolute”).

⁷⁶ *See generally, 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).

⁷⁷ *See also* 42 U.S.C. §§ 2000e to 2000e-17; *see, e.g.*, ROBERT D. LOEVY, *TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964* (1990).

⁷⁸ *See supra* notes 61–62 and accompanying text.

⁷⁹ *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978); *Randall v. Sorrell*, 548 U.S. 230 (2006) (plurality opinion); *Davis v. FEC*, 554 U.S. 724 (2008); *Citizens United v. FEC*, 558 U.S. 310 (2010); *McCutcheon v. FEC*, 572 U.S. 185 (2014) (plurality opinion).

⁸⁰ *See Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

⁸¹ 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”).

⁸² *See* GREENE, *supra* note 71, 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”).

mandates to claim the mantle of rights — namely, freedom from government coercion. It was considerably 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 freedom from government coercion is a poor fit for protecting public health.⁸³

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, thus undoing the distortions just discussed? Couldn’t they begin to recognize positive rights, or collective rights? They could in theory, but a pair of hurdles prevent that shift. The obvious one is the conservatism of today’s Supreme Court. Contemporary judicial politics are not the full story, however. 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 unelected courts exercising strong-form judicial review is the need to legitimate their role in the political process in the face of a tenuous democratic pedigree.⁸⁴ 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 unique mode of analysis helps prevent courts from “[l]osing their unique character as constitutional guardians” (p. 150).⁸⁵ 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 at times serve some progressive ends: in the

⁸³ Cf. generally WENDY E. PARMET, *CONSTITUTIONAL CONTAGION: HOW CONSTITUTIONAL LAW IS KILLING US* (forthcoming 2023) (on file with the Harvard Law School Library) (discussing tensions between constitutional law and advancement of public health).

⁸⁴ See generally Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153 (2002).

⁸⁵ 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”).

shadow of the Warren Court and the Trump presidency, some progressives hold out hope that the courts can protect the rights of racial minorities and help stave off tyranny. I discuss this reasoning at length in Part III.⁸⁶ A separate explanation, though, lies in the final pillar of Loughlin's account of constitutionalism: a point about political culture.

Under constitutionalism, a constitution shapes not only the structures of government but also 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*, under which “the norms, the values, and, more indirectly, the procedures of a liberal democratic constitution”⁸⁷ are core to a nation's political culture (pp. 106–18). Historically, nation-states could build solidarity through their citizens' shared ethnic, religious, or 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).⁸⁸

This dynamic helps explain why versions of constitutional patriotism are most prominent in contexts where shared demographic or cultural heritage cannot be relied upon to forge unity.⁸⁹ 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.⁹⁰ Constitutional veneration in the United States dates to the late eighteenth century, well before the waves of immigration that would significantly diversify the nation.⁹¹ As the nation's demographics changed, treating the Constitution as a “credal orthodoxy” gained new meaning: it provided a means of accepting newcomers as fully American.⁹²

⁸⁶ See *infra* sections III.A–B, pp. 2094–99.

⁸⁷ JAN-WERNER MÜLLER, *CONSTITUTIONAL PATRIOTISM* 1 (2007).

⁸⁸ See also GARY JEFFREY JACOBSON, *CONSTITUTIONAL IDENTITY* 206 (2010) (“It has become a commonplace . . . that the American Constitution, as the embodiment of the political ideas that provide definition to the nation, is constitutive of the society.”).

⁸⁹ Loughlin notes that in Germany, where the memory of the Holocaust means that arguments for unity based on shared heritage are rightly seen by many as potentially dangerous, constitutional patriotism steps in to fill the void (p. 118). Attempts to write a constitution for the European Union were important in part because they represented efforts to build a shared political identity among nations that had different national languages, diverse cultural backgrounds, and varied historical experiences (p. 180). See also MÜLLER, *supra* note 87, at 2–4 (discussing the European Union example).

⁹⁰ 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.’”).

⁹¹ See LEVINSON, *supra* note 13, at 9–11 (discussing constitutional veneration in the United States' early years).

⁹² See *id.* at 90.

A focus on diversity sheds light on why venerating the Constitution can have a special political utility for contemporary progressives. Strength in diversity has been a progressive shibboleth for a half century.⁹³ 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,” Professor Sanford Levinson has noted, “is the realization that there may be no other basis for uniting a nation of so many disparate groups.”⁹⁴ 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.”⁹⁵ 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.”⁹⁶ 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 successes in portraying the left as unpatriotic. In one historian’s words, “Democrats neglected [patriotism] amid the counterculture upheaval of the 1960s and finally ceded [it] to Republicans during the Reagan years.”⁹⁷ 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 particularly important for progressives, as a group whose patriotism has often been questioned.⁹⁸

Moreover, to the extent that the Constitution can be a source of social solidarity, that solidarity can advance progressive agendas, especially on

⁹³ Nicole Mellow, *An Identity Crisis for the Democrats?*, 52 POLITY 324, 335 (2020) (“By the 1970s . . . the Democratic Party’s definition of America was unapologetically diverse and multicultural . . .”).

⁹⁴ 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 71, 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 . . .”).

⁹⁵ Post & Siegel, *supra* note 55, at 2027.

⁹⁶ Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1304 (1937).

⁹⁷ Heather Cox Richardson, *Republicans Don’t Own Patriotism Anymore*, NEW REPUBLIC (Aug. 20, 2018), <https://newrepublic.com/article/150438/republicans-dont-patriotism-anymore> [<https://perma.cc/4K2M-SF5K>].

⁹⁸ *Cf.* Cass R. Sunstein, *Partyism*, 2015 U. CHI. LEGAL F. 1, 10 (describing a stereotype of the left as “unpatriotic socialists who do not appreciate and who seek to undermine the United States”).

issues of redistribution. Indeed, some even define solidarity as “the preparedness to share resources with others,” including “through taxation and redistribution organised by the state.”⁹⁹ A large social science literature examines whether high diversity can lead to low social solidarity, which in turn can impede generous welfare state policies.¹⁰⁰ For progressives, who tend to believe in the importance of both diversity and a generous welfare state, a challenge is to generate social solidarity in the face of demographic difference. If a constitution or the culture that emerges from it can help strengthen solidarity (itself an empirical question), it might serve a valuable purpose for progressives who need, more so than conservatives, to find bases of solidarity in order to underwrite their redistributive commitments.

Despite these possible benefits, the centrality of the Constitution to American political culture also gives rise to difficulties for progressives. First is the matter of whether the Constitution can play its symbolic role without simultaneously 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). Public law scholars have developed robust theories of constitutionalism that seek to decenter the courts.¹⁰¹ At times, political leaders have likewise sought to wrest control over constitutional meaning from the judiciary.¹⁰² But constitutional culture has developed such that when the average American thinks about constitutional meaning, they likely think about the Supreme Court rather than Congress or social movements. It is not clear that progressives can effectively use the Constitution as an instrument of national unity without also reinforcing a culture of juristocracy, even if it is not their intent to do so.

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 Professor David Pozen, that longstanding features of the U.S. constitutional order are biased against progressive candidates and that veto points in the

⁹⁹ STEINAR STJERNØ, *SOLIDARITY IN EUROPE: THE HISTORY OF AN IDEA* 2 (2009).

¹⁰⁰ Keith Banting & Will Kymlicka, *Introduction* to *MULTICULTURALISM AND THE WELFARE STATE: RECOGNITION AND REDISTRIBUTION IN CONTEMPORARY DEMOCRACIES* 1, 23–30 (Keith Banting & Will Kymlicka eds., 2006) (reviewing competing literature on the relationship between demographic diversity and redistribution).

¹⁰¹ See sources cited *supra* note 55 (describing popular, legislative, and administrative constitutionalism).

¹⁰² See, e.g., Franklin D. Roosevelt, President of the U.S., Address on Constitution Day (Sept. 17, 1937), <https://www.presidency.ucsb.edu/documents/address-constitution-day-washington-dc> [<https://perma.cc/WFZ7-RLW6>] (describing the Constitution as “a layman’s document, not a lawyer’s contract”).

lawmaking process disproportionately harm progressive agendas.¹⁰³ Progressives often invoke the Constitution in support of their preferred policies, writing books with titles like *Keeping Faith with the Constitution*.¹⁰⁴ These interventions can aid 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 described by Loughlin is no friend to progressivism, what are progressives to do? One option is to try to make different sorts of constitutional arguments in an effort to advance 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.

II. PROGRESSIVE CONSTITUTIONAL ARGUMENT?

Loughlin's account of how an ideology of constitutionalism shapes political culture explains why partisans of all stripes often present their worldviews in constitutional terms. A leading example of this type of argument is Fishkin and Forbath's *The Anti-Oligarchy Constitution*. The book masterfully shows how generations of progressives made policy arguments, including economic policy arguments, from within the American constitutional tradition. These progressives argued 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 encompasses many topics — including matters of economic regulation and the welfare state — that are typically thought of as the domain of policy rather than the Constitution (pp. 441–84).

The Anti-Oligarchy Constitution can be seen as both a symptom of Loughlin's account and an attempt to overcome it. 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 as constitutional in character illustrates how potent it is to invoke the Constitution and the fear that non-constitutional arguments might be trumped by constitutional ones. But Fishkin and Forbath attempt to overcome what for Loughlin is a core

¹⁰³ See Gould & Pozen, *supra* note 1, at 114–18 (discussing presidential, Senate, and House elections); *id.* at 91–100 (discussing asymmetric effects of veto points in the lawmaking process).

¹⁰⁴ E.g., LIU, KARLAN & SCHROEDER, *supra* note 14.

aspect of constitutionalism: the judiciary's role as the primary or ultimate arbiter of constitutional meaning. Even if Loughlin's definition of constitutionalism disadvantages progressives, Fishkin and Forbath hold out hope that there is a different, broader mode of constitutional politics 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).¹⁰⁵ This tradition consists of three pillars: opposition to concentrated economic and political power, support for a strong middle class, and inclusion of demographic minorities in political and economic life (pp. 8–12). Importantly, the book argues that these priorities make up 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). Though they refer to the democracy-of-opportunity tradition as constitutional, they do not contend that it can be implemented exclusively, or even mainly, by the courts. Instead, they argue that the other branches, principally Congress, have "affirmative constitutional obligations" to address inequality (p. 21). For Fishkin and Forbath, equality-promoting measures are constitutional in nature, 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 retelling, which holds many lessons for students of American legal and political history. This disclaimer aside, a brief sketch of the book's narrative is essential to comprehending the rise and fall of the democracy-of-opportunity tradition.

The book's historical account begins with the Founding era.¹⁰⁶ Economic questions were central to constitutional debates: state constitutions addressed distributional issues (pp. 38–39), while the framers of

¹⁰⁵ The term was most famously used by President Roosevelt, though the idea has earlier roots (p. 286). See also Franklin D. Roosevelt, President of the U.S., Acceptance Speech for the Renomination for the Presidency (June 27, 1936), <https://www.presidency.ucsb.edu/documents/acceptance-speech-for-the-renomination-for-the-presidency-philadelphia-pa> [<https://perma.cc/RD4Y-UW7A>] ("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.").

¹⁰⁶ Ideas about how economic inequality can degrade democracy predate the Founding. Professor Ganesh Sitaraman has carefully traced the roots of this argument in ancient Greece and

the federal Constitution worried that excessive democracy would have adverse economic impacts (p. 46).¹⁰⁷ Fishkin and Forbath show how major economic debates of the early Republic were viewed in constitutional terms. Debates over slavery, the national bank, tariffs, and internal improvements were all part of “a constitutional debate about the nation’s distribution of opportunity, wealth, and power” (pp. 71–73). Importantly, though, policies in these areas were predominately hammered out through the political process; there was no contradiction between seeing economic issues as constitutional and seeing them as the province of the elected branches (pp. 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: the prevention of oligarchy, the promotion of a middle class, and racial inclusion (pp. 15, 115).¹⁰⁸ 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, Reconstruction 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 (pp. 116–26).¹⁰⁹

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

Rome and early modern Europe. See GANESH SITARAMAN, *THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC* 21–58 (2017); see also *id.* at 11 (“Many in the founding generation . . . believed that the American republic was built on America’s exceptional economic conditions — on the foundation of the middle class.”).

¹⁰⁷ See also *infra* section III.A, pp. 2094–97 (discussing this point in the context of the relationship between progressives and majority rule).

¹⁰⁸ Others have likewise argued that Reconstruction was of major constitutional import, but with different framings. See, e.g., 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) (describing the struggle over the Fourteenth Amendment as “the greatest constitutional moment in American history,” *id.* at 160); ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (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,” *id.* at xx).

¹⁰⁹ 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: PRINCIPAL CONGRESSIONAL ACTS AND RESOLUTIONS, PRESIDENTIAL PROCLAMATIONS, SPEECHES AND ORDERS, AND OTHER LEGISLATIVE AND MILITARY DOCUMENTS, 1862–1875 (Frederick E. Hosen ed., 2010) (collecting Reconstruction-era statutes and congressional resolutions, among other documents).

redistribution” (p. 138). 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, framed in constitutional terms, although the commitment to racial liberalism that characterized Reconstruction fell away in the era of Jim Crow (pp. 188–89).

Fishkin and Forbath describe Franklin D. Roosevelt’s presidency as “an era of constitutional politics par excellence” (p. 251). They emphasize the “constitutional grammar” used by President 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” (pp. 254–55). On this view, the birth of Social Security and the enactment of the Fair Labor Standards Act of 1938¹¹⁰ are moments of constitutional significance (pp. 302–11). For many New Dealers, the Constitution not only permitted the enactment of statutes to create a social safety net and empower workers; it *required* such statutes (p. 253).

The story of the Supreme Court’s initial resistance to the New Deal and subsequent acquiescence is well known.¹¹¹ But Fishkin and Forbath present 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 (p. 254).

Fishkin and Forbath argue that the democracy-of-opportunity tradition largely disappeared from constitutional politics in the mid-twentieth century — which they call “The Great Forgetting” (pp. 21–23, 350–52). 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 the postwar left to defend the Court “as the indispensable constitutional guardian of civil liberties and civil rights” (p. 350).¹¹² While the rise of judicial supremacy on the left is the

¹¹⁰ 29 U.S.C. §§ 201–219.

¹¹¹ See, e.g., BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998); WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1996).

¹¹² See also pp. 354–63; *supra* notes 48–53 and accompanying text.

key feature of their story, Fishkin and Forbath also criticize midcentury progressives for failing to support workers (pp. 351, 404–10) and allowing technocrats, especially economists, to dominate domestic policymaking (pp. 363–69, 374–79).

As a historical work, the book provides a powerful 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, including on topics that are today conventionally seen more as matters of economic policy than the Constitution: labor and employment (pp. 441–43, 482–84), health care (pp. 456–61), antitrust (pp. 471–77), and corporate law (pp. 477–79). This agenda gives rise to the question of what makes a topic constitutional in character, along with the advantages and disadvantages of adopting a more expansive answer to that question.

B. *Discerning What's Constitutional*

A major issue that arises from *The Anti-Oligarchy Constitution* concerns the relationship between the Constitution and the democracy-of-opportunity intellectual tradition. What, precisely, distinguishes matters of constitutional significance from ordinary policy? Given the wide breadth of topics that the authors treat as constitutional, the book raises the question of what makes some topics constitutional and what limiting principle exists to prevent every policy dispute from being recast as a constitutional one.¹¹³

The book rejects several common dividing lines between constitutional and policy issues. It does not require that a topic 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.¹¹⁴ 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 nature. The authors

¹¹³ Cf. Adrian Vermeule, *Superstatutes*, NEW REPUBLIC (Oct. 26, 2010), <http://www.tnr.com/book/review/superstatutes> [<https://perma.cc/TD5A-4V34>] (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”).

¹¹⁴ See, e.g., Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1082 (2013) (distinguishing this “small-c” constitutionalism from the “big-C” constitutionalism of the document itself).

also do not view their intervention as “of a piece with calls for the expanded judicial enforcement of social and economic rights.”¹¹⁵ 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.¹¹⁶ Fishkin and Forbath observe, though, that a framework of judicially enforceable individual rights is a poor fit for a theory concerned with “inequality — not only at the bottom but also at the middle and the top — and with the connections between economic power and political power.”¹¹⁷

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 separate the distinctive elements upon which this thesis depends, so that each can be evaluated individually. The book’s account rests on four pillars: a normative conception of democracy, an empirical picture of how democracy operates in practice, an interpretive argument about the Constitution, and a historical understanding of 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.¹¹⁸ 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 were not so, it would hardly be worth constructing the theory that the book puts forth.

Importantly, the book’s commitment to democracy is more than minimalist. On a theory of minimal democracy that requires only equal voting rights in competitive elections,¹¹⁹ an account of the relationship between economics and democracy would be unnecessary. That linkage is critical, however, to a conception of democracy as incompatible with some individuals and groups having far greater influence over political

¹¹⁵ Joseph Fishkin & William Forbath, *The Democracy of Opportunity and Constitutional Politics: A Response*, 94 TEX. L. REV. 1469, 1470 (2016).

¹¹⁶ 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, *Essay, 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).

¹¹⁷ Fishkin & Forbath, *supra* note 115, at 1470.

¹¹⁸ See Tom Christiano & Sameer Bajaj, *Democracy* § 2, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2022), <https://plato.stanford.edu/entries/democracy> [<https://perma.cc/P2JQ-E6UT>] (summarizing relevant literature).

¹¹⁹ A famous formulation of a minimal definition is Joseph Schumpeter’s statement that “the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote.” JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 269 (Routledge 2003).

outcomes than others. Such a picture 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 inequalities, such as the denial of the franchise on the basis of race or gender, are incompatible with a democracy of equal citizens. 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 how policy outcomes in the contemporary United States are more likely to reflect the preferences of the wealthy than those of other citizens.¹²⁰ The relationship between economic distribution and democracy is an ongoing research area in political science, and the book's theory depends on distribution of resources having a bearing on political outcomes.

Third is an *interpretive* argument that the Constitution, rightly understood, is committed to democratic government. Normative ideals and empirical facts 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 characterized 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.

The Constitution itself sends mixed messages about democracy. The document as amended contains many democratic components, including provisions for regular elections,¹²¹ bars on certain types of discrimination in voting laws,¹²² and a guarantee of republican government in the states.¹²³ 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.¹²⁴ These undemocratic features were a central goal of many of the framers, who succeeded in insulating the new national government “far more from

¹²⁰ See, e.g., LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* (2008); MARTIN GILENS, *AFFLUENCE & INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* (2012).

¹²¹ See U.S. CONST. art. I, § 2, cl. 1 (House elections); *id.* amend. XVII (Senate elections).

¹²² See *id.* amends. XV, XIX, XXIV, XXVI.

¹²³ See *id.* art. IV, § 4.

¹²⁴ For discussions of these features of the Constitution and their relationship with democracy, see generally DAHL, *supra* note 20; and LEVINSON, *supra* note 9.

popular political influence than most Americans at the time would have anticipated or desired.”¹²⁵ It would be wrong to argue that the Constitution itself 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 economic preconditions for making constitutional government work.¹²⁶ It does, however, beg 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 ideas 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.¹²⁷

Fishkin and Forbath are not neutral arbiters of what constitutional functioning entails. They have a clear perspective 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 maybe even desirable. Constitutional interpretation is necessarily a normative enterprise, not a mechanical one. Yet the question remains of

¹²⁵ See MICHAEL J. KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* 6 (2016).

¹²⁶ Cf. SITARAMAN, *supra* note 106, at 4 (“[O]ur Constitution assumes relative economic equality in society; it assumes that the middle class is and will remain dominant.”).

¹²⁷ Congress’s inability to pass even highly popular measures into law, for example, may be taken by some as evidence of constitutional dysfunction, because of a failure to translate public opinion into policy, while others may see such inaction as evidence that the Constitution is working precisely as it should, because the document makes lawmaking difficult by design.

how much independent work the constitutional aspect of the authors' theory does. It seems unlikely, for example, that many 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 suggests 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).¹²⁸ 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.

Recognizing 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 respond to the democracy-of-opportunity tradition by invoking a libertarian constitutional countertradition.¹²⁹ Libertarian readings of the Constitution represent a coherent through-line across much of our constitutional history, even if they (like the democracy-of-opportunity tradition) have 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

¹²⁸ Emphasis has been omitted.

¹²⁹ On that tradition, see, for example, RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004); RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* (2014); David E. Bernstein & Ilya Somin, *The Mainstreaming of Libertarian Constitutionalism*, 77 *LAW & CONTEMP. PROBS.* 43 (2014).

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 constitutional cases by looking to two dimensions: *fit* with existing legal materials and *justification* in light of moral and political theory.¹³⁰ 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's argument depends on their approach being both a fit with the U.S. constitutional tradition and being justified as a matter of democratic theory.

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 detractor could argue that the democracy-of-opportunity tradition cannot be considered constitutional because it departs too much from the Constitution's text and even from the broader range of modalities of constitutional argument. To this, the authors might have no choice but to play down the constitutional text and existing modalities as too narrow. One objective of the book's historical account is to provide support for the position that mainstream approaches to constitutional interpretation today represent a narrowing of how Americans have historically argued about the Constitution.¹³¹

Another possible critique also focuses on fit, but it centers on history rather than text. A historically minded critic could highlight that the democracy-of-opportunity tradition was merely one among several and that it only carried the day for a very short period of the nation's history. Perhaps most pointedly, such a critic could emphasize the long intellectual tradition that viewed the Constitution as designed to entrench a degree of oligarchy — precisely the opposite of the authors' vision. The most famous articulation of this argument dates to the Progressive Era.¹³² Indeed, Fishkin and Forbath note that some progressives during

¹³⁰ See RONALD DWORKIN, *LAW'S EMPIRE* 228–32, 255 (1986).

¹³¹ Alternatively, defenders of the authors' constitutional vision could attempt to ground that vision in the text of the document or its amendments. The Reconstruction Amendments, in particular, can be read to support significant parts of the authors' agenda: all three Reconstruction Amendments directly support government efforts to secure racial equality, and the Fourteenth Amendment can be understood as a guarantee of minimum economic entitlements. See *supra* note 116 and accompanying text. But given the breadth of the authors' substantive economic vision, including their desire to characterize topics like corporate law and antitrust law as constitutional, clause-bound approaches are likely to be insufficient for achieving the totality of their agenda.

¹³² See generally CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913).

that period “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). In the face of this history, some might conclude that the fit between the Constitution and the democracy-of-opportunity tradition is too loose. 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.¹³³

Moving from fit to justification, a separate line of critique attacks 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 is not the forum for adjudicating that debate. But it seems likely that Fishkin and Forbath would 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. Disagreement about what type of democracy is normatively desirable or required underlies many existing constitutional disputes, and bringing the normative stakes into the open would make for a more candid judicial, scholarly, and public discourse.

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 “[t]he strongest response to these arguments” is “better substantive constitutional arguments” (p. 19). The book’s call is not for progressives to make exclusively constitutional arguments, but rather to supplement the arguments that they are already making with constitutional arguments of the type that the authors propose.

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? Progressives can argue for their agendas in terms of fairness, dignity, opportunity, economic efficiency, or even by invoking democracy decoupled from the Constitution. Each of these kinds of arguments has their own advantages and disadvantages, depending on the context. This section

¹³³ The authors’ goal of “build[ing] a future constitutional order that Americans can recognize as authentically ours” (p. 424) is best read as an argument about fit.

considers whether constitutional argument might do distinctive work for progressives that other sorts of arguments do not.

There are some reasons to think progressives could benefit from 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 frame seems to have been effective, or at least not harmful, during previous periods in which the Supreme Court featured a conservative majority. During both the Progressive Era and early New Deal era, progressives in the elected branches developed their own constitutional arguments to compete with the conservative arguments coming from the Court (pp. 185–318). Doing the same today would give progressives the intellectual resources to attack the Court's decisions not only in legalist terms (say, as inconsistent with original understanding or unfaithful to precedent) but also based on an alternative, affirmative vision of what the Constitution requires. Fishkin and Forbath's expansive treatment of what makes for a constitutional argument also helpfully provides an alternative to trying to shoehorn progressive commitments into a judicially acceptable framework. Rather than argue for progressive commitments in terms of constitutional text and individual rights, an approach that the previous Part argued can impede progressive agendas,¹³⁴ Fishkin and Forbath provide a picture of what a more holistic progressive constitutional argument could look like.

Despite these benefits, there are reasons to question the efficacy of a constitutional framing of progressive policy goals, especially economic ones. First, the book's framing of economic opportunity as constitutional in character runs against the grain of how many Americans think about both the Constitution and economic issues. With respect to the Constitution, survey evidence suggests that many understand constitutional meaning at least partially in terms of the Constitution's text or its original meaning.¹³⁵ As for economic issues, people facing unemployment, housing or food insecurity, high medical bills, or other economic

¹³⁴ See *supra* section I.C, pp. 2068–73.

¹³⁵ See Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 695 (2009) (summarizing data from the 2000s showing significant support for originalism among survey respondents, including among roughly a third of Democrats); Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Essay, Profiling Originalism*, 111 COLUM. L. REV. 356, 359–60 (2011) (analyzing survey data from 2003 to 2010 and concluding that “most respondents believe judges ought to factor original intent into their interpretations of the Constitution,” *id.* at 359–60, but “very few believe it should be determinative” and “[e]ven those who ally themselves with originalism as an abstract concept tend to sacrifice originalism as an interpretive value in a concrete context,” *id.* at 360). *But see* Kristen Bialik, *Growing Share of Americans Say Supreme Court Should Base Its Rulings on What Constitution Means Today*, PEW RSCH. CTR. (May 11, 2018), <https://www.pewresearch.org/fact-tank/2018/05/11/growing-share-of-americans-say-supreme-court-should-base-its-rulings-on-what-constitution-means-today> [<https://perma.cc/SSN3-X4BK>] (showing a modest increase in recent

deprivations do not think about those challenges as constitutional failures — they think about them in terms of material well-being. As a matter of public persuasion, then, even if Fishkin and Forbath are correct that economic inequality degrades democracy, it is likely an uphill climb to sell opportunity-promoting policies as constitutionally required. Doing so requires shifting public understandings both of what counts as constitutional and of why economic opportunity matters.

Consistent with the difficulty of framing economic opportunity in constitutional terms, recent years provide at least some support for the proposition that progressive arguments can gain traction even without a constitutional hook. Senators Bernie Sanders and Elizabeth Warren both built serious presidential campaigns around fighting economic inequality,¹³⁶ and President Joe Biden's early presidency led some to call him the most progressive President in a half century.¹³⁷ 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.¹³⁸ One reason for this shift might be the triumph of constitutionalism as defined by Loughlin: if courts have come to be the central actors in determining constitutional meaning, the public might not see as credible efforts to cast progressive policies in constitutional terms when progressive agendas differ so dramatically from the judiciary's view of the Constitution.

At worst, some might find the constitutional argument for progressive policies less compelling than arguments based on values like fairness, dignity, or opportunity, or even economic efficiency. To be sure, Fishkin and Forbath do not call for making exclusively constitutional arguments; instead, their vision is one of constitutional arguments and nonconstitutional ones working in harmony to advance progressive

years in the share of Americans who believe that the Constitution should be interpreted based on what it means today as opposed to what it originally meant).

¹³⁶ See BERNIE SANDERS, *WHERE WE GO FROM HERE: TWO YEARS IN THE RESISTANCE* 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").

¹³⁷ See Susan B. Glasser, *Is Biden Really the Second Coming of F.D.R. and L.B.J.?*, *NEW YORKER* (Apr. 1, 2021), <https://www.newyorker.com/news/letter-from-bidens-washington/is-biden-really-the-second-coming-of-fdr-and-lbj> [<https://perma.cc/SSZ8-QUMC>].

¹³⁸ See, e.g., Jedediah Purdy, *Overcoming the Great Forgetting: A Comment on Fishkin and Forbath*, 94 *TEX. L. REV.* 1415, 1422 (2016) (noting that Senator 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").

agendas. In an age of short attention spans,¹³⁹ however, there may be inevitable tradeoffs, in which time devoted to constitutional arguments necessarily crowds out other sorts of arguments.¹⁴⁰

Why have these reasons for skepticism not doomed past efforts? After all, one of the book's major contributions is showing how in previous generations constitutional and other types of arguments operated together to advance progressive agendas (p. 2). One response is that we do not know the degree to which constitutional arguments aided progressive goals in the past. As noted above, the book shows that reformers during the Progressive Era and New Deal era frequently made constitutional arguments (pp. 185–318). There are many reasons for the successes of those reform movements.¹⁴¹ It is impossible to know precisely what role constitutional argument played because we do not know what the fate of Progressive Era and New Deal reforms would have been if — counterfactually — their proponents hadn't made constitutional arguments. Moreover, even if constitutional arguments did advance progressive agendas in the past, changing conditions might imperil such arguments today. The rise of original meaning as a dominant feature of contemporary constitutional interpretation means that arguments of the kind that the book proposes may face a more skeptical reaction now than they did in earlier periods.

The choice between constitutional and nonconstitutional argument may also have 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. The rightward shift of the late twentieth century is illustrative. Conservative ascendancy was caused by changing racial politics, rising anti-tax sentiment, the emergence of law-and-order politics, and anti-Communist attitudes, among other factors.¹⁴² In the face of these powerful forces, the book's "Great

¹³⁹ See, e.g., ROBERT HASSAN, *THE AGE OF DISTRACTION: READING, WRITING, AND POLITICS IN A HIGH-SPEED NETWORKED ECONOMY* 3 (2011) (describing the recent emergence of "a chronic and pervasive mode of cognitive distraction" (emphasis omitted)).

¹⁴⁰ For additional concerns about constitutional arguments for economic progressivism, see Purdy, *supra* note 138, at 1425 (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).

¹⁴¹ For discussions, see, for example, JEFFERSON COWIE, *THE GREAT EXCEPTION: THE NEW DEAL AND THE LIMITS OF AMERICAN POLITICS* (2017); RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* (1955); and IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* (2013).

¹⁴² See, e.g., DONALD T. CRITCHLOW, *CONSERVATIVE ASCENDANCY: HOW THE GOP RIGHT MADE POLITICAL HISTORY* 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"); 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 conservatism to

Forgetting” may not 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 provide for the interests of the poor and middle class even without self-consciously embracing constitutional argument.¹⁴³

The importance of the *constitutional* version of the democracy-of-opportunity tradition rests, at bottom, on empirical questions. Would framing the tradition as a constitutional tradition help or hinder its acceptance? Would it provide a persuasive way of pushing back against a conservative Supreme Court or of convincing lawmakers and the public more broadly? Even if inequality is indeed a constitutional problem, progressives should decide on prudential grounds whether and when the most promising strategy for remedying that inequality is to speak in a constitutional register.

In sum, casting progressive commitments in constitutional terms brings about 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 may not see a progressive agenda as authentically constitutional or may be more easily persuaded to support that agenda if it were articulated in different terms. So long as constitutional argument is regarded as a privileged mode of political discourse, there are no easy answers for progressives.

break the underlying class basis of the Roosevelt-Democratic coalition and to build a reconfigured voting majority in presidential elections”); 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 (2007) (noting that “[t]here has everywhere been an emphatic turn towards neoliberalism in political-economic practices and thinking since the 1970s”).

¹⁴³ 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, the Johnson Administration succeeded in enacting its War on Poverty, and 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*, in *LEGACIES OF THE WAR ON POVERTY* 1, 25 (Martha J. Bailey & Sheldon Danziger eds., 2013).

III. PROGRESSIVE CONSTITUTIONAL DESIGN?

The discussion to this point has provided an account of constitutionalism as an ideology and different modes of constitutional argument. But constitutional politics takes place against a backdrop of institutions, which received little attention in the previous Parts. Law establishes 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.¹⁴⁴ In the United States, this role is played not only by the Constitution itself and constitutional common law, but also by framework statutes¹⁴⁵ and the internal rules of governing institutions.¹⁴⁶ This Part considers how progressives in the United States fare under the currently prevailing rules of the game and examines the dilemmas that they face in thinking about reform.

Institutional arrangements create winners and losers. Legal rules necessarily stack 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 governmental structures could in theory be created with the exclusive goal of advancing politically neutral values such as participation, accountability, deliberation, or stability. As a matter of effect, though, constitutional rules are inexorably tied to electoral and policy outcomes.¹⁴⁷

A question for any political faction, then, is which constitutional structures advance their electoral prospects and policy agendas and which hold them back. Prior generations of progressives asked precisely this question and sought to reform constitutional structures accordingly, typically in the direction of greater democracy. Most notable in this

¹⁴⁴ See *supra* notes 18, 114 and accompanying text; see also H.L.A. HART, *THE CONCEPT OF LAW* 94 (3d ed. 2012) (discussing “secondary rules,” which “specify the ways in which the primary rules [of conduct] may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined”).

¹⁴⁵ See generally, e.g., Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717 (2005) (framework statutes in the United States); see also David Feldman, *The Nature and Significance of “Constitutional” Legislation*, 129 LAW Q. REV. 343 (2013) (framework statutes in comparative perspective).

¹⁴⁶ See, e.g., Jonathan S. Gould, *Law Within Congress*, 129 YALE L.J. 1946, 1959–73 (2020) (Congress’s cameral rules and parliamentary precedents); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017) (internal executive branch procedures).

¹⁴⁷ For an extended development of this paragraph’s points, see generally Gould & Pozen, *supra* note 1.

regard are efforts during the Progressive Era. Fishkin and Forbath discuss a “politics of constitutional amendment and revision at both state and national levels” that “embraced the ‘excess of democracy’ that most appalled the framers, upending the foundational notion that a republican form of government required legislation by elected representatives” (p. 232).¹⁴⁸ In recent years, some progressives have likewise called for reforms of constitutional structures that set back their agendas.¹⁴⁹

Constitutional structures sometimes have fairly clear impacts. Consider equal state representation in the Senate. Equal state representation causes Democrats to control fewer Senate seats than they would if the body comported with a one-person-one-vote principle,¹⁵⁰ overrepresents white voters relative to voters of color,¹⁵¹ and shapes both policy outcomes and the distribution of federal funds.¹⁵² These dynamics are not immutable, but they are deeply rooted given the relatively stable geographic distribution of progressives and conservatives. Similar geographic patterns lead to biases against progressive candidates in the Electoral College.¹⁵³ The difficulty of amending the Constitution makes wholesale reform to the Senate and Electoral

¹⁴⁸ See also pp. 230–42 (discussing movements for constitutional amendments, including direct election of Senators, and state-level reforms, including initiatives and referenda); BENJAMIN PARKE DE WITT, *THE PROGRESSIVE MOVEMENT: A NON-PARTISAN, COMPREHENSIVE DISCUSSION OF CURRENT TENDENCIES IN AMERICAN POLITICS* 142 (1915) (“[T]he progressive movement in the nation aims to . . . modify the structure of the federal government so as to make it more directly responsive to the will of the majority.”); *id.* at 189 (noting that progressives believed that “the structure of [state] government must be modified so as to allow a greater and more direct participation by the people”).

¹⁴⁹ See Gould & Pozen, *supra* note 1, at 79–80, 83 & n.115.

¹⁵⁰ See, e.g., Stephen Ansolabehere & William Leblanc, *A Spatial Model of the Relationship Between Seats and Votes*, 48 *MATHEMATICAL & COMPUT. MODELLING* 1409, 1418–20 (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> [<https://perma.cc/KE2W-ZUKB>] (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” (emphasis omitted)).

¹⁵¹ See 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> [<https://perma.cc/JX4Q-RGQS>]; 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> [<https://perma.cc/5CCK-Y2QM>].

¹⁵² See generally FRANCES E. LEE & BRUCE I. OPPENHEIMER, *SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION* 158–222 (1999).

¹⁵³ See Gould & Pozen, *supra* note 1, at 115–16 & n.296.

College impossible in practice,¹⁵⁴ but there is little ambiguity that those institutions harm progressive candidates and agendas.¹⁵⁵

The analysis is more complex for other features of the United States' constitutional order. The reason lies in two dilemmas facing progressives: first, the tension between effective government and preventing misrule, and, second, 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 issue 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 problems. 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 enable a middle path.

For progressives, this challenge is acute. If lawmaking is too hard, 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.¹⁵⁶ A similar asymmetry exists in the executive branch: federal agencies engage in significantly more rulemakings under Democratic Presidents.¹⁵⁷

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

¹⁵⁴ 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 generally JOHN R. KOZA ET AL., *EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE* (4th ed. 2013).

¹⁵⁵ 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).

¹⁵⁶ See GROSSMAN & HOPKINS, *supra* note 24, at 264–65.

¹⁵⁷ See *Congressional Review Act*, U.S. GOV'T ACCOUNTABILITY OFF., <https://gao.gov/legal/other-legal-work/congressional-review-act> [<https://perma.cc/S4QY-KKBM>]; *Reg Stats*, GW REGUL. STUD. CTR., <https://regulatorystudies.columbian.gwu.edu/reg-stats> [<https://perma.cc/TD7P-CF0W>] (providing data on rulemakings by year). Partisan asymmetry in regulatory activity would likely be even larger if the data included only rulemakings that made policy in the first instance, rather than 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> [<https://perma.cc/DZ5Z-GMJJ>].

legislation,¹⁵⁸ spending,¹⁵⁹ and interventions by administrative agencies.¹⁶⁰ Veto points in the lawmaking system are one reason why these interventions have not always succeeded: the Senate's sixty-vote cloture threshold forecloses most new regulatory statutes,¹⁶¹ and the Supreme Court prevented arguably the most important climate regulation of the past decade from going into effect.¹⁶² The challenges of legislating and regulating are not unique to the climate sphere, as parallel 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 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 curb voting rights, restrict access to abortion nationwide, undermine labor unions, or repeal existing progressive legislation.¹⁶³ With respect to regulation, lower judicial scrutiny of executive action would empower whichever party holds the

¹⁵⁸ See, e.g., American Clean Energy and Security Act of 2009 ("Waxman-Markey"), H.R. 2454, 111th Cong. (2009).

¹⁵⁹ See, e.g., *What's in the \$2.2 Trillion Social Policy and Climate Bill*, N.Y. TIMES (Nov. 21, 2021), <https://www.nytimes.com/article/build-back-better-explained.html> [<https://perma.cc/R3JX-X3ZB>].

¹⁶⁰ 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> [<https://perma.cc/EU8C-V6YN>] (summarizing the Obama Administration's climate change policies); Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662 (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 (Nov. 13, 2021), <https://www.nytimes.com/2021/10/22/climate/biden-climate-plan.html> [<https://perma.cc/4XXF-UP4L>] (describing the Biden Administration's plans for "tough regulations to restrict pollution coming from power plants and automobile tailpipes").

¹⁶¹ 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 has meant that "bills' sponsors simply assumed that it would take sixty votes to pass them").

¹⁶² See *West Virginia v. EPA*, 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. RSCH. SERV., R44480, 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*, 577 U.S. 1126).

¹⁶³ 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 [<https://perma.cc/ART9-JVEN>]; David Super, *Keep the Filibuster. It Could Save Progressive Legislation in the Future.*, WASH. POST (June 22, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/06/22/filibuster-reform-republican-extremism-hr1>

White House, and so it would sometimes benefit conservatives even if progressives on the whole have more ambitious regulatory agendas. Further, some progressive commitments, most notably opposition to both the carceral state¹⁶⁴ and strict immigration enforcement,¹⁶⁵ call for less active government and more checks on government power.

Perhaps most of all, the Trump Administration made progressive concerns about unshackling the powers of government once again salient. Professor Judith Shklar famously described a “liberalism of fear” that focused not on enacting agendas but that instead “begins with the assumption that the power to govern is the power to inflict fear and cruelty.”¹⁶⁶ Shklar wrote in the aftermath of the horrors of Nazi Germany, but her 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.¹⁶⁷ The Trump presidency caused leading scholars to seriously consider whether the United States is vulnerable to authoritarianism.¹⁶⁸ In the face of those risks, some progressives have become hesitant about calling for reforms that would make it easier for government to act. Professor Carlos Ball, for example, has argued that conservative use of federalism and separation of powers principles “to challenge the policies 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.”¹⁶⁹ This reasoning might hold the potential of reining in

[<https://perma.cc/AXL2-NCS7>]; see also Mark A. Graber, *Social Democracy and Constitutional Theory: An Institutional Perspective*, 69 *FORDHAM L. REV.* 1969, 1986 (2001) (noting that “many institutional reforms that increase the likelihood that progressive policies will be passed and implemented also increase the likelihood that regressive policies will be passed and implemented”).

¹⁶⁴ See, e.g., Maurice Chammah, *Two Parties, Two Platforms on Criminal Justice*, MARSHALL PROJECT (July 18, 2016, 9:51 PM), <https://www.themarshallproject.org/2016/07/18/two-parties-two-platforms-on-criminal-justice> [<https://perma.cc/5LVQ-HWSN>] (“Parts of the [2016] Democratic draft platform clearly repudiate the tough language their party embraced a generation ago . . .”).

¹⁶⁵ See, e.g., Asma Khalid, *Democrats Used to Talk About “Criminal Immigrants,” So What Changed the Party?*, NPR (Feb. 19, 2019, 5:00 AM), <https://www.npr.org/2019/02/19/694804917/democrats-used-to-talk-about-criminal-immigrants-so-what-changed-the-party> [<https://perma.cc/TS9D-H4CG>] (discussing how the Democratic base “has adopted a fundamentally more progressive attitude on immigration in a relatively short time span”).

¹⁶⁶ JUDITH N. SHKLAR, *ORDINARY VICES* 238 (1984).

¹⁶⁷ See generally JACOB SOBOROFF, *SEPARATED: INSIDE AN AMERICAN TRAGEDY* (2020) (providing a journalistic account of the policy and its impacts).

¹⁶⁸ See generally CAN IT HAPPEN HERE? *AUTHORITARIANISM IN AMERICA* (Cass R. Sunstein ed., 2018).

¹⁶⁹ CARLOS A. BALL, *PRINCIPLES MATTER: THE CONSTITUTION, PROGRESSIVES, AND THE TRUMP ERA* 4 (2021).

misrule, but it risks standing in the way of effective progressive governance.¹⁷⁰

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 legislative and executive 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.¹⁷¹ For progressives, by contrast, 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.¹⁷² This tension has been central to constitutional theory for decades, most prominently expressed in the literature on judicial review.¹⁷³ It also emerges in debates about other features of the constitutional order. Both sides of the dispute over the Senate filibuster have invoked the importance of protecting minorities as a basis for their position.¹⁷⁴ These debates often sound in general democratic principles,

¹⁷⁰ For a historical perspective on this tradeoff, see Noah A. Rosenblum, *The Antifascist Roots of Presidential Administration*, 122 COLUM. L. REV. 1, 66 (2022) (“In response to the threat of fascism, [New Deal-era] architects of executive control over the administrative state embraced separation of powers . . .”).

¹⁷¹ 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 124 & n.332; see also Henry Olsen, Opinion, *Conservatives’ Debate over Their Future Is Going to Be Bitter and Fierce*, WASH. POST (Nov. 29, 2019), <https://www.washingtonpost.com/opinions/2019/11/29/conservatives-debate-over-their-future-is-going-be-bitter-fierce> [https://perma.cc/SZ4U-CN8L] (describing debates on the right about the “reigning neo-libertarian economic orthodoxy”); Stephanie Slade, Opinion, *Republicans Are Ripping Out “the Very Heart and Soul” of Their Party*, N.Y. TIMES (Aug. 25, 2020), <https://nytimes.com/2020/08/25/opinion/republicans-libertarians-economics.html> [https://perma.cc/Y5JA-6GW3] (arguing that Republicans “seem[] to become more comfortable with top-down economic interventionism by the day”).

¹⁷² See, e.g., THE FEDERALIST NO. 10, at 72 (James Madison) (Clinton Rossiter ed., 2003) (warning of “the superior force of an interested and overbearing majority”).

¹⁷³ See *supra* note 84 and accompanying text.

¹⁷⁴ 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

but the allocation of power between majorities and minorities poses a particular challenge for progressives. This challenge cannot be understood without looking to the *specific groups* that benefit from minority-protective institutional arrangements.

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 demographic minorities, it makes sense that progressives would endorse institutions that protect minority interests. Advancing the wellbeing of racial and ethnic minorities has long been central to progressive politics: “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.”¹⁷⁵ The parties realigned in the second half of the twentieth century, with Democrats and Republicans becoming the parties of racial liberalism and conservatism, respectively.¹⁷⁶ As a result, the Democratic presidential nominee has not won a majority of white voters since 1964.¹⁷⁷ During that same period, Black voters have been core to the Democratic Party’s electoral success, and therefore to the viability of the progressive agenda.¹⁷⁸ As the progressive coalition has become increasingly demographically diverse, the Democratic Party platform has shifted to better account for the interests of minorities.¹⁷⁹ Against this backdrop, it is no surprise that President Biden has placed “racial justice at the center of his governing agenda.”¹⁸⁰

institution “a symbol of respect for the rights of the minority 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”).

¹⁷⁵ EDWARD G. CARMINES & JAMES A. STIMSON, *ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS* 116 (1989).

¹⁷⁶ See generally SCHICKLER, *supra* note 24 (documenting this transformation).

¹⁷⁷ Gary Miller & Norman Schofield, *The Transformation of the Republican and Democratic Party Coalitions in the U.S.*, 6 *PERSPS. ON POL.* 433, 438 (2008).

¹⁷⁸ 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).

¹⁷⁹ See Joshua N. Zingher, *Polarization, Demographic Change, and White Flight from the Democratic Party*, 80 *J. POL.* 860, 860 (2018).

¹⁸⁰ Lauren Gambino, *Biden Vowed to Make Racial Justice the Heart of His Agenda — Is It Still Beating?*, *THE GUARDIAN* (Sept. 8, 2021, 3:00 AM), <https://www.theguardian.com/us-news/2021/sep/08/joe-biden-racial-justice-voting-rights> [<https://perma.cc/H2XY-5ZT4>].

The relationship between progressivism and minority rights looks very different when the focus shifts to another sort of numerical 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. Many of the framers, Professor Michael Klarman has argued, sought to make the federal government “more resistant to populist influence, and explicitly constrain the redistributive tendencies of the more populist state governments.”¹⁸¹ This outlook 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.”¹⁸² 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 President Roosevelt describing the New Deal in these terms: as necessary “to protect majorities against the enthronement of minorities” (pp. 252–53). Because the poor and working class are more numerous than the wealthy, majority rule holds the possibility (though certainly not the guarantee¹⁸³) 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, while an economic redistributionist agenda provides a reason to embrace majoritarianism.¹⁸⁴ The twin projects of advancing the wellbeing of demographic minorities 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 public policies can often advance both goals. But the two projects diverge with respect to 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 provide for the interests of (demographic) minorities.

¹⁸¹ KLARMAN, *supra* note 125, at 249; *see also id.* at x (describing the Constitution as “a conservative counterrevolution” against “excessive democracy”).

¹⁸² *See* BEARD, *supra* note 132, at 154.

¹⁸³ On policy outcomes tracking the preferences of the wealthy, *see generally* sources cited *supra* note 120.

¹⁸⁴ *Cf.* William E. Forbath, *Class, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 1 (1999) (contrasting two “egalitarian constitutional tradition[s]”: a “familiar one” that is “[c]ourt-centered and counter-majoritarian” and a “forgotten one” that is “a majoritarian tradition, addressing its arguments to lawmakers and citizens, not to courts”).

C. Judicial Review

These two dilemmas help shed light on what might be the most pressing structural constitutional question facing today's left: what to do about judicial review in the face of a conservative judiciary. 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 theory of constitutional interpretation or being too willing to depart from its precedents. 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 in order to advance both their agendas and democracy more broadly.¹⁸⁵

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,¹⁸⁶ "disempowering reforms" that would limit judicial authority hold obvious appeal for the left.¹⁸⁷ The rejoinder to this argument concerns what would happen without the Court: there would be fewer checks on the most egregious executive action, and, at the extreme, one less stopping point on the road to tyranny.¹⁸⁸

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

¹⁸⁵ For a development of this argument, see generally Doerfler & Moyn, *supra* note 9; and Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND. L. REV. 769 (2022). The nonmajoritarian character of the Supreme Court is a function not only of lifetime appointment, but also of the nonmajoritarian character of the modes of electing the President (who appoints Justices) and the Senate (which confirms them). See generally Joshua P. Zoffer & David Singh Grewal, *Essay, The Counter-Majoritarian Difficulty of a Minoritarian Judiciary*, 11 CALIF. L. REV. ONLINE 437 (2020).

¹⁸⁶ See *supra* note 15 (providing recent examples).

¹⁸⁷ See Doerfler & Moyn, *supra* note 9, at 1721.

¹⁸⁸ See *supra* notes 166–169 and accompanying text. Progressives who take this view would likely emphasize Trump Administration defeats in court, even at the hands of a conservative judiciary. See *Roundup: Trump-Era Agency Policy in the Courts*, INST. FOR POL'Y INTEGRITY (Apr. 1, 2021), <https://policyintegrity.org/trump-court-roundup> [<https://perma.cc/6P4J-3XQJ>] (collecting examples); see also, e.g., *Dep't of Com. v. New York*, 139 S. Ct. 2551 (2019); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020).

question of why unelected judges should be able to override the decisions of the elected branches.¹⁸⁹ 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.¹⁹⁰ Further, for many on the left, the Supreme Court’s finest moments have involved standing up for minority rights: religious minorities in *West Virginia State Board of Education v. Barnette*, racial minorities in *Brown v. Board of Education*, and sexual minorities in *Obergefell v. Hodges*. The celebrated nature of these 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.¹⁹¹

One rejoinder to this optimistic picture, though, is that in practice the Supreme Court has often failed to protect minorities. Sometimes the Court has deferred to actions by the elected branches that harm minorities, and sometimes it has struck down or narrowly interpreted minority-protective legislation.¹⁹² Even accepting that courts have sometimes acted to protect 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.¹⁹³ Minority rights, or structural constitutional provisions limiting majority power,¹⁹⁴ have consistently been invoked in attempts to block redistribution. During the Progressive Era, the Supreme Court struck down state-level worker protections¹⁹⁵ and an initial attempt at

¹⁸⁹ 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: A THEORY OF JUDICIAL REVIEW* 135–80 (1981) (developing this insight).

¹⁹⁰ Compare, e.g., John O. McGinnis & Michael B. Rappaport, *In Praise of Supreme Court Filibusters*, 33 HARV. J.L. & PUB. POL’Y 39, 42 n.16 (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”).

¹⁹¹ See *supra* note 11 and accompanying text.

¹⁹² See cases cited *supra* note 4. See generally BURTON & DERFNER, *supra* note 10; GOLDSTEIN, *supra* note 10.

¹⁹³ See *supra* note 136 and accompanying text.

¹⁹⁴ 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).

¹⁹⁵ See cases cited *supra* note 5.

federal-income tax legislation.¹⁹⁶ 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.¹⁹⁷ The Affordable Care Act is the most challenged statute in the nation's history,¹⁹⁸ and the Supreme Court's decision to strike down part of the statute, thereby allowing states to decline to expand Medicaid, resulted in inferior health care coverage for millions of Americans.¹⁹⁹ Constitutional challenges will likewise almost certainly be lodged against future efforts to expand the welfare state or otherwise to enact redistributive policy.²⁰⁰ To be sure, judicial review certainly did not cause the United States' welfare state to be smaller than that of other wealthy democracies.²⁰¹ But the possibility that a conservative

¹⁹⁶ The Supreme Court struck down the Income Tax Act of 1894, ch. 349, § 27, 28 Stat. 553, in *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601 (1895). The Sixteenth Amendment overruled *Pollock* and paved the way for subsequent income-tax legislation. See U.S. CONST. amend. XVI; see also Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 40 (1999) ("The point of the Sixteenth Amendment was . . . to overrule *Pollock*.").

¹⁹⁷ 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").

¹⁹⁸ See Abbe R. 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," *id.* at 1472, with "more than 2,000 legal challenges" filed against it, *id.* at 1473).

¹⁹⁹ See *NFIB v. Sebelius*, 567 U.S. 519, 575–85 (2012); Rachel Garfield, Kendal Orgera & Anthony Damico, *The Coverage Gap: Uninsured Poor Adults in States that Do Not Expand Medicaid*, KAISER FAM. FOUND. (Jan. 21, 2021), <https://www.kff.org/medicaid/issue-brief/the-coverage-gap-uninsured-poor-adults-in-states-that-do-not-expand-medicaid> [<https://perma.cc/J4KW-SL6Y>] (documenting that, as of 2021, 2.2 million Americans who resided in states that had not expanded Medicaid under the Affordable Care Act fell into a "coverage gap" by virtue of their incomes being too high for Medicaid and too low for marketplace subsidies).

²⁰⁰ See, e.g., MARK TUSHNET, *TAKING BACK THE CONSTITUTION: ACTIVIST JUDGES AND THE NEXT AGE OF AMERICAN LAW* 198–99 (2020) (sketching avenues through which the Supreme Court could strike down a possible future Medicare for All statute); Dawn Johnsen & Walter Dellinger, *The Constitutionality of a National Wealth Tax*, 93 IND. L.J. 111, 113–14 (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, *id.* at 114).

²⁰¹ Comparativist scholars have argued that economic factors, political institutions, political ideology, and racial heterogeneity help explain why the United States' welfare state has long been smaller than those in European nations. See generally, 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 L. WILENSKY, *RICH DEMOCRACIES: POLITICAL ECONOMY, PUBLIC POLICY, AND PERFORMANCE* (2002). Scholarship in American politics has focused on the 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*

judiciary could use judicial review to thwart future efforts at redistributive economic policy gives progressives reasons to turn against the practice.

Neither *Against Constitutionalism* nor *The Anti-Oligarchy Constitution* expressly takes a side in current debates over judicial review in the United States, 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. For constitutionalism to be dislodged, a significant reduction in the Court's power is necessary. The power of constitutionalism as an ideology, however, helps explain why such a reduction is unlikely in the short term.

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 (p. 3). It discusses the many times the Supreme Court has blocked policies that would have advanced the democracy-of-opportunity agenda.²⁰² 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). These arguments could easily lead to a call to weaken the judiciary or even to do away with strong-form judicial review altogether. But they do not.

The authors' decision not to call for curbs on judicial review exemplifies many progressives' ambivalence toward judicial power. A complete turn against judicial review would force progressives to denounce some major victories, most notably 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 Act²⁰³ would almost certainly still be on the books.²⁰⁴ If the Court could not strike down state laws, then it could not have decided *Brown v. Board of Education* and *Roe v. Wade*. 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. This is likely especially true in the political sphere; nobody would get very far in progressive politics by taking positions that would call into doubt past gains, each of which is associated with its own constituencies and interest groups.

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).

²⁰² E.g., pp. 148–50, 174–81, 433–38, 441–47, 456–61.

²⁰³ Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C).

²⁰⁴ See *United States v. Windsor*, 570 U.S. 744 (2013); *Obergefell v. Hodges*, 576 U.S. 644 (2015).

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 a Supreme Court that accounted for democracy-of-opportunity principles would have upheld union agency fees (pp. 441–47)²⁰⁵ and the Affordable Care Act's Medicaid expansion (pp. 456–61).²⁰⁶ In those cases, though, an affirmative progressive constitutionalism would have yielded precisely the same outcome as judicial restraint. Those two come apart not when the Court evaluates progressive policies, but when it evaluates conservative ones. Consider legislative efforts to enact regressive tax laws,²⁰⁷ federal right-to-work legislation,²⁰⁸ or repeals of social welfare programs.²⁰⁹ 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. So why 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 to the elected branches the substantive stakes of major constitutional decisions in a way that mere calls for judicial restraint cannot (p. 447). Perhaps the authors are right that a sophisticated progressive constitutional vision is the best way to mobilize opposition to the decisions of a conservative Court. It seems equally plausible, however, that progressives can mobilize against the Court with a much simpler argument: that unelected judges are wrong to strike

²⁰⁵ The authors make this argument in the context of *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018).

²⁰⁶ The authors make this argument in the context of *NFIB v. Sebelius*, 567 U.S. 519 (2012).

²⁰⁷ 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> [<https://perma.cc/ZUU4-KJBM>] (“[The Tax Cuts and Jobs Act] is regressive and will make the distribution of after-tax income more unequal.”).

²⁰⁸ 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 [<https://perma.cc/XR86-UM69>].

²⁰⁹ Cf. JONATHAN COHN, THE TEN YEAR WAR: OBAMACARE AND THE UNFINISHED CRUSADE FOR UNIVERSAL COVERAGE 211–325 (2021) (discussing Affordable Care Act repeal efforts).

down policies, enacted by the elected branches, that would benefit the American people.²¹⁰

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 either wholeheartedly endorse or condemn many aspects of constitutional design. A reform that would advance progressive agendas in part, or even in the aggregate, may nonetheless 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 at first glance look transsubstantive: 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 considerably 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 a way forward. Within each of the three branches, operating procedures can put a thumb on the scale for or against specific outcomes. This insight yields a possible roadmap for progressive institutional design.

Begin with Congress. Although the Constitution says relatively little about the legislative process,²¹¹ 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,²¹² but there are many exceptions to

²¹⁰ 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, they argue, can be an aid to courts in those efforts (pp. 29, 428). The advantages and disadvantages of this approach mostly mirror those of other substantive canons of statutory interpretation. As a practical matter, it seems likely 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 progressive statutes in an expansive 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, as a practical matter, by layering on democracy-of-opportunity principles to aid statutory interpretation.

²¹¹ See generally Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361 (2004) (discussing this body of law).

²¹² See STANDING RULES OF THE SENATE r. XXII(2), reprinted in S. DOC. NO. 113-18, at 16 (2013), <https://rules.senate.gov/imo/media/doc/CDOC-113sdoc18.pdf> [<https://perma.cc/VVQ5-RKUC>].

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 Act²¹³ or War Powers Resolution,²¹⁴ and judicial nominations.²¹⁵ Some have proposed creating a new exception — so-called “democracy reconciliation” — to allow a simple majority of the Senate to close debate and proceed to a final vote on voting rights legislation.²¹⁶ This proposal exemplifies how tailored congressional rules could support identifiable policy priorities. The principle extends beyond filibuster carveouts: Congress could employ fast-track or other special procedures to privilege certain categories of legislation over others.²¹⁷

Laws defining the powers 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 exceptions for a few enumerated subject areas, such as foreign affairs.²¹⁸ 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 to the executive branch to make policy in only one direction. As an example, consider the Antiquities Act of 1906,²¹⁹ which authorizes the President to set aside land for national monuments but does not allow the

²¹³ 5 U.S.C. §§ 801–808.

²¹⁴ 50 U.S.C. §§ 1541–1548.

²¹⁵ 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).

²¹⁶ See, e.g., Norman Eisen, Richard W. Painter & Jeffrey Mandell, Opinion, *The Most Important Exception the Senate Can Make*, CNN (Mar. 5, 2021, 12:15 AM), <https://www.cnn.com/2021/03/05/opinions/senate-filibuster-exception-eisen-painter-mandell/index> [<https://perma.cc/R3MF-CS9C>]; 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> [<https://perma.cc/TX9E-EXGQ>].

²¹⁷ 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”).

²¹⁸ See 5 U.S.C. § 553(b)–(e) (general procedures); *id.* § 553(a)(1) (exception 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”).

²¹⁹ Pub. L. No. 59-209, 34 Stat. 225 (1906) (codified as amended at 54 U.S.C. §§ 320301–320303).

President to shrink or abolish monuments already created without congressional consent.²²⁰ It thereby 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 — say, by delegating to agencies the power to expand (but not contract) the coverage of a given benefits program or to make stricter (but not more lenient) a certain health or 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,²²¹ and some have proposed a similar rule for the U.S. Supreme Court.²²² An even more precise intervention would be to institute different voting rules in different kinds of cases. One could imagine different voting rules for striking down federal versus state action, executive versus legislative action, cases involving the Constitution's rights versus structural provisions, and so forth. In another 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.²²³ 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 Act²²⁴ provides transsubstantive standards of review,²²⁵ Congress could tailor standards of review to put

²²⁰ See 54 U.S.C. § 320301(a)–(b). This interpretation is the view of most legal scholars. See Letter from 121 Law Professors to Ryan Zinke, Sec'y of Interior, and Wilbur Ross, Sec'y of Com. (July 6, 2017), https://legal-planet.org/wp-content/uploads/2017/07/national-monuments-comment-letter-from-law-professors_as-filed.pdf [<https://perma.cc/R9DU-ABZA>] (“[T]he Antiquities Act is a limited delegation: it gives the President authority only to identify and reserve a monument, not to diminish or abolish one.”).

²²¹ See, e.g., NEB. CONST. art. V, § 2; N.D. CONST. art. VI, § 4; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] [CONSTITUTION] art. 93, § 7 (Chile); DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 113 (S. Kor.).

²²² See, e.g., Jed Handelsman 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. 1692 (2014).

²²³ 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).

²²⁴ 5 U.S.C. §§ 551, 553–559, 701–706.

²²⁵ See *id.* at § 706.

a thumb on the scale in favor of certain forms of agency action while requesting that courts more closely scrutinize others.²²⁶

This brief tour of levers that might be pulled to advance specific 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 that structure government power, then attention to a broader range of mechanisms provides a promising way forward for progressive constitutionalism.²²⁷ 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 altered, the twin dilemmas described above provide reasons for progressives to hesitate before making some sweeping changes.²²⁸ Instead, a more promising and realistic way of using institutional design to achieve progressive ends might be through more surgical reforms to how each of the three branches operates.

CONCLUSION

The U.S. Constitution, and the constitutional order that flows from it, impact nearly every aspect of our politics. Rules of the political game affect who wins elected office and what policies the legislative and ex-

²²⁶ 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 U.S.C. § 1401(c) (providing that in litigation between an employer and plan sponsor under the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.), “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, 300–01 (2006) (noting that “Congress has repeatedly legislated as to the standard of judicial review for agency action,” *id.* at 300, and arguing that the Necessary and Proper Clause is “[t]he most logical constitutional source for this power,” *id.* at 301).

²²⁷ My focus in this section has been on possible reforms to existing legislative, executive, and judicial institutions. Beyond my scope, but worthy of mention, is recent literature by political theorists calling for reforms beyond existing institutions, often motivated by concern about economic elites exercising disproportionate political power. *See, e.g.*, HÉLÈNE LANDEMORE, *OPEN DEMOCRACY: REINVENTING POPULAR RULE FOR THE TWENTY-FIRST CENTURY* 8 (2020) (arguing that “empowering all members of the demos equally, and in particular giving them all an equal right of access to the deliberation shaping the laws and policies that govern us all, is overall the best method we have to figure out solutions to common problems”); JOHN P. MCCORMICK, *MACHIAVELLIAN DEMOCRACY* 2 (2011) (calling for “excavat[ing] the techniques besides elections by which common citizens attempted to restrain wealthy citizens and public magistrates in prominent ancient, medieval, and Renaissance republics” and “imagin[ing] how they might be reconstructed within contemporary democracies”).

²²⁸ 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 affecting progressives' substantive agendas.

ecutive 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 by invoking constitutional principles, both in the courts and in the political process.

This state of affairs poses challenges for progressives. Constitutional structures make it difficult for progressives to enact their agendas; judicial power has been significantly more effective in striking down regulations or social welfare programs than in creating them; and current norms of constitutional argument can prevent progressives from making the best case for their preferred policies, many of which are most naturally 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 the fear of what an unrestrained conservative government might do all provide reasons for progressives to make arguments from within the 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. This literature typically focuses 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 still in a constitutional register. The political culture that prompts these sorts of interventions has deep roots, as *Against Constitutionalism* demonstrates. Progressives have no choice but to advocate for their preferred policies within the existing legal framework and constitutional culture. But they should also recognize the ways in which constitutional structure and culture shape our politics. The ways in which structure and culture hold back progressive agendas can provide a road map for progressive reforms. Many such reforms will be hard to develop, both conceptually (given competing progressive commitments) and practically (given the entrenchment of existing structures and cultures). Even so, the two books both encourage us to imagine how our constitutional order might be different, not merely at the level of different judicial outcomes but in deeper ways as well.