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Structural Biases in Structural Constitutional Law

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STRUCTURAL BIASES IN STRUCTURAL CONSTITUTIONAL LAW

JONATHAN S. GOULD[†] & DAVID E. POZEN[‡]

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

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

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INTRODUCTION

Perhaps the most basic task of a constitution is to supply the rules of “the political game.”¹ Constitutions establish frameworks within which public power is allocated, government decisions are made, and partisan competition is waged. They also establish institutions with the authority to refine the rules over time. Yet while no one disputes that structural constitutional choices can influence political behavior and policy outcomes, the precise nature of that influence is often difficult to predict and may change as circumstances change.² Constitutional structure matters; but how?

¹ Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 659 (2011).

² “Even after decades of [comparative constitutional] scholarship on political institutions,” one leading scholar observes, “our knowledge of the interaction of particular practices with environmental factors is quite limited, and predictions of how institutions will operate are, at best, probabilistic guesses.” Tom Ginsburg, *Introduction to COMPARATIVE CONSTITUTIONAL DESIGN* 1, 1 (Tom Ginsburg ed., 2012).

In the United States today, questions about the desirability and design of structural constitutional arrangements are typically approached in one of two ways. The first focuses on the political affiliations of current officeholders. Whichever political bloc controls a given institution in a given period will tend to benefit from that institution and from any increase in its authority. A more powerful presidency benefits whichever party holds the presidency, a more powerful Supreme Court benefits those who are ideologically aligned with a majority of the Justices, and so on. Knowing this, partisans may try to strengthen the institutions they lead or to weaken those they do not.³ Many of these efforts can be expected to wash out sooner or later, on such accounts, as the parties trade control over the organs of government—a phenomenon that has been occurring with increasing frequency in the political branches.⁴

A second approach to structural constitutional analysis focuses not on transient political alignments but rather on timeless principles endorsed by all sides, at least at the level of generality at which they are invoked. In an optimistic key, for example, federalism and the separation of powers are often hailed as safeguards of liberty.⁵ In a critical register, the two-senators-per-state rule is often condemned as inconsistent with political equality.⁶ Across the globe, students of constitutional design similarly ask about the relationship between structural choices and widely shared goals such as avoidance of tyranny or preservation of effective state functioning.⁷

Both of these approaches, one that emphasizes cycles of institutional control and the other that abstracts away from distributions of

³ See generally Eric A. Posner & Cass R. Sunstein, *Institutional Flip-Flops*, 94 TEX. L. REV. 485 (2016) (discussing this phenomenon and the “flip-flopping” of positions on structural issues that it can produce).

⁴ See *infra* notes 151–53 and accompanying text.

⁵ See, e.g., *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (stating that “our system of federalism is fundamental to the protection of liberty”); *NLRB v. Canning*, 573 U.S. 513, 525 (2014) (“We recognize, of course, that the separation of powers can serve to safeguard individual liberty . . .”). These consequentialist claims are almost never specified or developed in any rigorous fashion. See David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 749–50, 774–79, 787 (2021).

⁶ See, e.g., SANFORD LEVINSON, *FRAMED: AMERICA’S 51 CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 148–51 (2012); JAMES LINDLEY WILSON, *DEMOCRATIC EQUALITY* 175–92 (2019).

⁷ See, e.g., Tom Ginsburg, Aziz Z. Huq & Mila Versteeg, *The Coming Demise of Liberal Constitutionalism?*, 85 U. CHI. L. REV. 239, 248 (2018) (“Since the American Founding, after all, the field of constitutional design has been largely oriented to resisting tyranny, among other goals.”); AZIZ Z. HUQ, *Hippocratic Constitutional Design*, in *ASSESSING CONSTITUTIONAL PERFORMANCE* 39, 56–66 (Tom Ginsburg & Aziz Huq eds., 2016) (arguing that the most plausible external measure of “constitutional success” is avoidance of state collapse).

power altogether, offer valuable insights into constitutional law. But they miss something important about constitutional politics. Throughout U.S. history, various constitutional arrangements have been associated with values and agendas that are fiercely contested along partisan lines regardless of who holds office at any particular moment. In these instances, political actors may contend that structural constitutional law is itself structurally biased—that the rules of the political game systematically tilt the playing field, whether by design or by accident, for or against the policy objectives or electoral fortunes of one faction or another. And they may be right.

This Article introduces and develops the idea of structural biases in structural constitutional law. It is especially important, one often hears, that a society's rules for organizing government not be formulated or applied in a politically partisan manner.⁸ But structural biases are bound to exist in any constitutional system with well-defined political blocs, including our own. In such a system, there can be no truly neutral principles of constitutional governance, whether for formulating policy, administering laws, or facilitating electoral competition. Even technical-seeming arrangements will tend to favor certain outcomes favored by certain parties. Any set of rules to structure the law-making process, for instance, implicitly encodes contestable judgments about how easy or hard it should be to devise or expand regulatory and social welfare regimes. Any set of electoral rules reflects a choice among alternative modes of constructing political representation and accountability. In these domains and others, prevailing practices may be much more aligned with one side's medium- and long-term interests than a plausible alternative arrangement would be.

A few structural constitutional biases have been the subject of heated debate in recent years. Most prominently, Democrats have complained that the rules governing the apportionment of senators and the allocation of Electoral College votes are biased in favor of the Republican Party, given the spatial distribution of partisans.⁹ These complaints are just the tip of the iceberg, however. As we will show, ideological, geographic, and demographic polarization have worked in tandem to generate or exacerbate structural biases—as well as partisan strife regarding these biases—across nearly every area of structural constitutional law.¹⁰ Because Democrats now have more

⁸ See, e.g., Zachary S. Price, *Symmetric Constitutionalism: An Essay on Masterpiece Cakeshop and the Post-Kennedy Supreme Court*, 70 HASTINGS L.J. 1273, 1306–07 (2019) (“A theory of executive power or federalism or any other structural principle that is acceptable only if exercised by one’s co-partisans is not a legal theory but an act of force.”).

⁹ See *infra* Section III.A.6.

¹⁰ See *infra* Sections II.B, III.A.

ambitious legislative agendas than do Republicans, for instance, the many veto points in the federal lawmaking process have a disparate negative impact on Democratic policymakers.¹¹ Conversely, the left-leaning tilt of the civil service means that legal limits on presidential control over the bureaucracy disproportionately disadvantage Republican chief executives.¹²

The politicization of constitutional structure marks both a dramatic new development in contemporary constitutionalism and a reversion to historical precedent. Although conflict over structural biases was relatively quiet in the late twentieth century, such conflict has riven American politics since the Founding.¹³ For centuries, partisans have fought to entrench structural biases that benefit their agendas and to dismantle those that stand in their way. As straightforward as this observation might seem—and certain structural biases, at certain points in time, *are* straightforward, even if many others are subtler—legal scholarship has not taken any sort of systematic account of this phenomenon.¹⁴ Current disputes over institutions like the Electoral College and the “deep state” cannot be well understood without being placed in this larger context.

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

¹¹ See *infra* Section III.A.1.

¹² See *infra* Section III.A.4.

¹³ See *infra* Section II.A.

¹⁴ See *infra* Section I.B.

I

FRAMING THE INQUIRY

A. *Definitions and Caveats*

Both terms in this Article's title deserve some explanation. By "structural constitutional law," we refer broadly to the authoritative legal norms that guide the workings of government and the distribution of government power.¹⁵ These norms may be grounded in the text of the canonical document, of course. But they may also be part of what is often called the "small-c constitution," or the larger "web of documents, practices, institutions, norms, and traditions that structure American government."¹⁶ Structural constitutional law, on this understanding, encompasses many legal sources not taught in traditional constitutional law classes. Framework statutes such as the Administrative Procedure Act and the Congressional Budget Act of 1974,¹⁷ cameral rules in each house of Congress,¹⁸ rules considered binding within the executive branch,¹⁹ and election laws enacted by Congress and the states²⁰ may all qualify—just so long as they authoritatively determine the roles, powers, or procedures of government institutions. Expansive as it may seem, this approach to structural constitutional law is consistent with the small-c literature.²¹ The Article's field of inquiry could also be thought of as "structural public law," although we prefer "constitutional" to "public" for the way it highlights how this body of law constitutes as well as constrains the state.

¹⁵ Cf. Daryl J. Levinson, *The Supreme Court, 2015 Term—Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 33 (2016) ("[T]he focus of structural constitutional law . . . has been on how power is distributed between and among"—and we would add within—"government institutions.").

¹⁶ Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1082 (2013).

¹⁷ See Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717 (2005).

¹⁸ See JOSH CHAFETZ, CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 267–301 (2017); Jonathan S. Gould, *Law Within Congress*, 129 YALE L.J. 1946, 1959–63 (2020).

¹⁹ See Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239 (2017).

²⁰ Under the Constitution's Elections Clause, U.S. CONST. art. I, § 4, cl. 1, state legislatures share with Congress the authority to regulate federal congressional elections.

²¹ See, e.g., David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 33 (2014) ("While small-c theories come in many different stripes, they share a commitment to assimilating into constitutional analysis 'all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state' . . .") (quoting A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 22 (8th ed. 1915)); Primus, *supra* note 16, at 1082 ("[S]mall-c theorists often hold that rules not appearing in the text are nevertheless constitutional because they are important to the structure of government . . .").

By “structural biases,” we refer to situations in which constitutional arrangements disadvantage a political or ideological faction and its policy agenda over multiple election cycles, even when the arrangements are ostensibly neutral with respect to party, ideology, and policy. Structural constitutional law is sometimes described as setting out “the rules of the game by which politicians gain and use power.”²² The concept of structural bias prompts us to ask who is helped or harmed by these rules, and under what circumstances. More formally: *An institutional arrangement is structurally biased against a political faction when, for the foreseeable future, it asymmetrically harms that faction in its overall effects, relative to a normatively and practically plausible alternative arrangement.* If an electoral institution is biased against faction *A* and in favor of faction *B*, *A*’s candidates will be apt to lose races to *B*’s candidates even when the former enjoy equal or greater popular support. If a policymaking process is biased against *A* and in favor of *B*, *A*’s officeholders will face greater challenges than *B*’s officeholders in effectuating their agenda even when *A*’s agenda enjoys equal or greater popular support.

To identify a structural bias is not necessarily to identify a flaw in the system. Whether any structural biases that exist are ultimately justified or unjustified is a separate question, the answer to which requires both a positive grasp of their effects and a normative theory of constitutional politics and constitutional design. Although the term “bias” is often used as a pejorative, we deploy it in a strictly descriptive, value-neutral manner—to describe how institutional arrangements create winners and losers. Our choice of label is not meant to indicate that any given structural bias is harmful on balance, only that it is harmful to the interests of those against whom the bias operates.

As scholarship on bias in other domains has pointed out, bias can exist only relative to a baseline.²³ For many controversial features of structural constitutional law, a baseline is named or implied by critics. The Senate filibuster is typically contrasted with simple-majority voting,²⁴ *Chevron* deference with de novo judicial review of agency action,²⁵ single-member legislative districts with proportional repre-

²² Roger B. Myerson, *Economic Analysis of Constitutions*, 67 U. CHI. L. REV. 925, 927 (2000); accord Levinson, *supra* note 1, at 659.

²³ See, e.g., Ward Farnsworth, *The Legal Regulation of Self-Serving Bias*, 37 U.C. DAVIS L. REV. 567, 571 (2003) (“Before a bias can be condemned or even identified, one must identify a baseline: a goal that the bias is frustrating; a judgment that it may contaminate but should not.”).

²⁴ See, e.g., Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1011–16 (2011).

²⁵ See, e.g., *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

sentation,²⁶ and so on.²⁷ In these instances, there is an intuitive and well-established (though still disputable) reference point for current arrangements. For other features of structural constitutional law, however, an appropriate baseline for comparison is harder to specify. One may believe that existing law gives the president too much power or too little power, but there is no obvious quantum of presidential power against which the status quo can be assessed. Every constitutional rule in every system might be seen as “biased” relative to some imaginable alternative that would better serve some end. While we cannot entirely escape the ubiquitous problem of “baseline hell” in analyzing contested legal arrangements,²⁸ we focus on arrangements that systematically advance the electoral or policy interests of one discrete bloc over another, relative to an identifiable substitute used in other contexts or jurisdictions.²⁹

The number and character of veto points in the legislative process provides an illustration. For any set of rules that govern the making of legislation, one could add or subtract, or strengthen or weaken, veto points. Every possible legislative process could thus be said to be simultaneously biased both in favor of action (relative to more veto-laden alternatives) and in favor of inaction (relative to less veto-laden

²⁶ See, e.g., Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1732–33 (1999).

²⁷ When incumbent officeholders enact a reform intended to entrench their side’s policies or power against future change, see generally Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L.J. 400 (2015) (providing numerous examples of this phenomenon), the natural baseline for charges of structural bias is the pre-reform state of the law.

²⁸ Rick Hills, *Anti-Discrimination Law in Baseline Hell*, BALKINIZATION (July 20, 2020, 9:30 AM), <https://balkin.blogspot.com/2020/07/anti-discrimination-law-in-baseline-hell.html> [<https://perma.cc/289M-75V2>].

²⁹ An alternative approach to identifying and assessing structural bias might stipulate a normative standard, and then compare every arrangement in every domain against that baseline—for example, majoritarianism. See Lawrence Lessig, *US: A(nother) Minoritarian Nation*, MEDIUM (Mar. 17, 2021), <https://medium.lessig.org/us-a-nother-minoritarian-nation-fcee9d68605e> [<https://perma.cc/8RRP-GMWD>]. The more an arrangement deviated from the standard, the more biased it would be. While this approach may be invaluable for certain sorts of critical analyses and reform projects, see *infra* notes 44–59 and accompanying text (discussing scholarship that highlights democratic deficits in the U.S. Constitution’s design), it requires the adoption of a universal benchmark of unbiasedness that is bound to be both contestable in principle and difficult to translate to certain settings. From the standpoint of majoritarianism, say, which ways of allocating authority in Congress among party leaders, committee chairs, and rank-and-file members are less biased than others? Does adopting a more expansive approach to federal preemption of state law lead to more majoritarian policy outcomes? Such questions admit of no clear answers. This Article’s method of conceptualizing structural bias is less satisfying in one sense, relying on a series of institution-specific pairwise comparisons instead of any one global baseline, but it has the virtue of being relatively easy to apply in an objective fashion.

alternatives). But this fact only becomes politically meaningful—and only gives rise to a structural bias in our sense—when veto points bear on a discrepancy among rival factions. If political party *A* has an ambitious legislative agenda whereas political party *B* prefers statutory inertia, then a proliferation of veto points does not just hinder lawmaking in the abstract. It takes on new meaning as anti-*A* and pro-*B*, relative to the status quo ante.

Structural biases can advantage or disadvantage political factions of any sort, including interest groups, demographic groups, and socio-economic classes.³⁰ In the U.S. system, political parties play an especially central role in determining the salience and significance of structural biases. Because the two major parties are the key institutions that organize political contestation,³¹ biases will be most likely to generate political conflict when they benefit Democrats or Republicans to the detriment of the other. Moreover, many social identities are now subsumed into party identities, and many demographic and interest groups are now firmly ensconced in either the Democratic or Republican coalition.³² As a result, biases against those groups become biases against one of the parties, and vice versa. The design of the Senate, for example, harms not only residents of more populous states but also the Democratic Party, given the prevailing partisan geography.³³ And because the design of the Senate harms Democrats, by extension it harms every voting bloc that makes up the party's base, from labor unions to certain communities of color to reproductive-rights advocates to environmentalists.³⁴ Both for these reasons and to keep the scope of the project manageable, this Article homes in on biases that affect the two major political parties.

³⁰ See *infra* notes 358–74 and accompanying text (expanding on this point and noting possible extensions of this project that would focus on political and social blocs outside the party system).

³¹ See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2385 (2006) (“From nearly the start of the American republic, . . . [t]he enduring institutional form of democratic political competition has turned out to be not branches but political parties.”); see also E.E. SCHATTSCHEIDER, PARTY GOVERNMENT 1 (2004) (observing that “modern democracy is unthinkable save in terms of the parties” and claiming that parties are the “makers of democratic government”); MARK TUSHNET, WHY THE CONSTITUTION MATTERS 13 (2011) (“In short, the Constitution matters because political parties matter, and the Constitution has some influence on the way parties operate.”).

³² See, e.g., Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1113–16 (2014) (reviewing “an ever-growing body of social science work” on partisanship as a sociopolitical identity).

³³ See *infra* Section III.A.6.

³⁴ See MATT GROSSMANN & DAVID A. HOPKINS, ASYMMETRIC POLITICS: IDEOLOGICAL REPUBLICANS AND GROUP INTEREST DEMOCRATS 100–01 (2016) (discussing the Democratic coalition since the mid-1970s).

Complicating matters, the parties not only seek to alter or exploit certain constitutional arrangements at certain junctures but also have themselves been shaped by such arrangements—meaning that fights over structural biases take place within a politics that is partially constructed by those biases. We return to this endogeneity issue, as well as to the issue of biases that empower or disempower different factions within a party, in Part IV.³⁵

Constitutional arrangements do not always intersect neatly with partisan cleavages. Historically, any number of arrangements have been accused of contributing to the subordination of racial minority groups and economically vulnerable Americans in ways that were taken for granted by the leadership of both parties.³⁶ Today's federal lawmaking process might be seen as tilted toward, say, international trade, and thus toward groups that benefit from such trade, on account of special procedures that make it easier to pass trade agreements than ordinary laws.³⁷ But if the parties are either mutually aligned or internally divided on trade policy, then this tilt would not amount to a structural bias in favor of one party over the other.

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

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

³⁵ See *infra* Section IV.C.

³⁶ See *infra* notes 73–83 and accompanying text.

³⁷ See IAN F. FERGUSSON & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R43491, TRADE PROMOTION AUTHORITY (TPA): FREQUENTLY ASKED QUESTIONS 22 (2019) (describing these expedited procedures).

American constitutionalism, we hope to provide tools for thinking about the role of these biases across constitutional systems.

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

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

The first, descriptive body of work looks at how views on issues of structural constitutional law vary depending on which party holds office. The central finding is that views seem to vary quite a lot. When a party gains control over a government institution, it tends to endorse expansive understandings of that institution's authority; losing control over an institution tends to have the opposite effect. Legal scholars have explored this dynamic in particular depth for theories of judicial review.³⁸ A similar sort of cycling, or "flip-flopping," has characterized the parties' positions on federalism, the separation of powers, the Senate filibuster, and more.³⁹

Institutional flip-flopping plainly occurs to some significant extent, which suggests that political opportunism and motivated reasoning play a significant role in debates over structural constitutional law.⁴⁰ But just as plainly, some people's views on structural questions do not hinge exclusively, if at all, on the short-term distribution of partisan power. Nor does this distribution fully determine the political or practical effects of any given structural arrangement.

Consider, for example, what Richard Briffault calls the "new pre-emption": the "emergence and rapid spread of . . . sweeping state laws that clearly, intentionally, extensively, and at times punitively bar

³⁸ See, e.g., Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215 (2019); Barry Friedman, *The Cycles of Constitutional Theory*, L. & CONTEMP. PROBS., Summer 2004, at 149.

³⁹ See Posner & Sunstein, *supra* note 3, at 496–504.

⁴⁰ See *id.* at 504–16. *But cf.* Mark Tushnet, *Politics as Rational Deliberation or Theater: A Response to "Institutional Flip-Flops,"* 94 TEX. L. REV. 82, 83–90 (2016) (noting that most of Posner and Sunstein's examples of flip-flopping involve "aggregates," such as "Democratic Senators" or "Republican Senators," rather than individuals).

local efforts to address a host of local problems.”⁴¹ An account based on rotation of power would predict that views about this sort of preemption will flip-flop depending on whether relevant state and local governments happen to be controlled by Democrats or Republicans at a given moment. But there is a deeper, longer-term dynamic at play. The political geography of the contemporary United States has resulted in many large, Democratic-controlled cities in states with Republican-controlled state governments. The result, as Briffault documents, is that “the preponderance of new preemption actions and proposals have been advanced by Republican-dominated state governments, embrace conservative economic and social causes, and respond to—and are designed to block—relatively progressive local regulations.”⁴² Rotation-of-power accounts have little to say about cases like Alabama’s reliably Republican state government preempting a minimum wage ordinance in the equally reliably Democratic city of Birmingham.⁴³ A focus on structural bias better explains the politics of the new preemption by highlighting how, under prevailing political conditions, state preemption of local law favors conservative Republican agendas not cyclically or episodically but *systematically*.

The second, normative strain of literature that partially overlaps with our analysis examines the relationship between structural constitutional arrangements and enduring democratic values. In a book titled *How Democratic Is the American Constitution?*, Robert Dahl famously enumerated a number of undemocratic aspects of the original constitutional design.⁴⁴ More recently, Sanford Levinson has emerged as the academy’s most forceful critic of the Constitution’s democratic shortcomings.⁴⁵ For Levinson, “many structural provisions of the Constitution . . . place almost insurmountable barriers in the

⁴¹ Richard Briffault, *The Challenge of the New Preemption*, 70 *STAN. L. REV.* 1995, 1997 (2018).

⁴² *Id.* at 1997–98.

⁴³ *See id.* at 2009; *see also id.* at 1999–2002 (cataloging related examples involving gun control, environmental protection, public health, civil rights, and more); KIM HADDOW, *LOC. SOL. SUPPORT CTR., UNDER THE COVER OF COVID: A SURVEY OF 2020-2021 STATE PREEMPTION TRENDS* 4 (2021), <https://static1.squarespace.com/static/5ce4377caeb1ce00013a02fd/t/604faee2e641222b084316ff/1615834855353/LSSC-UndertheCoverofCovid-March2021.pdf> [<https://perma.cc/X762-5RBD>] (discussing “an avalanche of legislation” introduced in 2021 “that would further limit local authority” to address the COVID-19 pandemic and “block local government initiatives to reform police departments”).

⁴⁴ ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 15–20 (2d ed. 2003) (discussing slavery, restrictions on suffrage, modes of selecting presidents and senators, Senate apportionment, and judicial power).

⁴⁵ *See, e.g.*, SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006).

way of any acceptable notion of democracy.”⁴⁶ He shows how all three branches have significant democratic deficits. The legislative process impedes majority rule, mainly on account of the Senate; the presidency is determined by the Electoral College, rather than a nationwide vote, and a president who loses popular support cannot be replaced mid-term on that basis; and federal judges are given life tenure.⁴⁷

As vital as it is to identify such democratic deficits, they need not go hand in hand with structural biases.⁴⁸ Either can exist without the other. Levinson’s critique of the president’s fixed term in office, for example, arguably shines light on a democratic flaw in the U.S. constitutional framework: The people’s representatives cannot end a failed presidency through a “no-confidence” vote or similar mechanism.⁴⁹ But this flaw is not a structural bias, at least not in any obvious sense, as making it easier to remove the president would not clearly help or hurt any political faction over an extended period of time.⁵⁰ Whether or not a system with an easier-to-remove president would be desirable as a matter of democratic theory, it is hard to conclude that the existing removal rules are systematically skewed for or against either party.

Conversely, structural biases can exist without democratic deficits. Consider the line-item veto, which allows a chief executive to veto a portion of a bill without vetoing the entire bill. A line-item veto exists in a majority of U.S. states,⁵¹ and it briefly existed at the federal

⁴⁶ *Id.* at 6.

⁴⁷ *Id.* at 25–78 (Congress); *id.* at 79–122 (presidency); *id.* at 123–40 (courts). For another prominent call for structural constitutional reform keyed to democratic values, see AM. ACAD. ARTS & SCI., OUR COMMON PURPOSE: REINVENTING AMERICAN DEMOCRACY FOR THE 21ST CENTURY (2020), https://amacad.org/sites/default/files/publication/downloads/2020-Democratic-Citizenship_Our-Common-Purpose_0.pdf [<https://perma.cc/7HND-N48J>].

⁴⁸ Though they certainly can: The malapportionment of the Senate and the Electoral College provide the most familiar examples of institutions that are both democratically suspect and structurally biased. See *infra* Section III.A.6.

⁴⁹ See LEVINSON, *supra* note 45, at 119–21.

⁵⁰ In the seven decades that Gallup has been measuring presidential approval ratings, the five presidents whose approval ratings dipped below thirty percent—and thus would have been ripe for removal if the Constitution contained a no-confidence procedure—included two Democrats and three Republicans. See *Presidential Approval Ratings—Gallup Historical Statistics and Trends*, GALLUP, <https://news.gallup.com/poll/116677/Presidential-Approval-Ratings-Gallup-Historical-Statistics-Trends.aspx> [<https://perma.cc/S9DE-9YXE>].

⁵¹ See *Gubernatorial Veto Authority with Respect to Major Budget Bill(s)*, NAT’L CONF. OF STATE LEGISLATURES (Dec. 2008), <https://ncsl.org/research/fiscal-policy/gubernatorial-veto-authority-with-respect-to-major.aspx> [<https://perma.cc/MX2D-P2SX>].

level before being struck down as unconstitutional.⁵² The line-item veto alters the relationship between the political branches. Its introduction transfers legal authority from the legislature to the executive; its elimination transfers authority in the opposite direction.⁵³ Yet because neither branch is clearly more or less democratic than the other,⁵⁴ any attempt to evaluate the line-item veto in democratic terms would require a complex and contestable judgment.

Analysis of the line-item veto is easier from the standpoint of structural bias. Whatever it means for democracy, the line-item veto gives chief executives “a specific tool for counteracting improvident funding.”⁵⁵ The tool is a one-way ratchet. While an executive wielding a line-item veto can block appropriations that the legislature has authorized, she cannot force appropriations beyond ceilings set by the legislature. If line-item veto provisions work as their proponents intend, they lead to less government spending.⁵⁶ This policy bias aligns with a contemporary partisan bias, given the two parties’ different attitudes toward public spending.⁵⁷ It is no surprise, then, that when

⁵² See *Clinton v. City of New York*, 524 U.S. 417 (1998) (striking down the Line Item Veto Act of 1996 as a violation of the Presentment Clause).

⁵³ *But cf.* Neal E. Devins, *In Search of the Lost Chord: Reflections on the 1996 Item Veto Act*, 47 CASE W. RESV. L. REV. 1605, 1629–31 (1997) (arguing that the line-item veto enables legislators to shift blame for contentious spending decisions to the chief executive).

⁵⁴ See Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court’s Political Theory*, 73 HASTINGS L.J. 371, 402–08 (2022) (describing competing claims of “legislative democracy” and “executive democracy” in contemporary U.S. public law). Compare, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2335 (2001) (arguing that the president is more likely than members of Congress to consider “the preferences of the general public, rather than merely parochial interests”), with Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1222 (2006) (arguing that “[a]s a collective institution, Congress is subject to a wider range of pluralist voices and interest groups than any other political actor (including the president)”).

⁵⁵ Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 526 (2003); see also *id.* (describing the federal line-item veto as “affording the President a mechanism to control federal spending”); *Item Veto Constitutional Amendment: Hearing on H.J. Res. 9 Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 106th Cong. 18 (2000) (statement of Martin Regalia, Vice President of Economic Policy and Chief Economist, U.S. Chamber of Commerce) (describing the line-item veto as “a necessary fiscal tool to reign [sic] in excessive spending”).

⁵⁶ Interestingly, there is limited evidence for such an effect. See Shanna Rose, *Institutions and Fiscal Sustainability*, 63 NAT’L TAX J. 807, 817–19 (2010) (summarizing empirical research).

⁵⁷ See Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 961–65 (2018) (reviewing evidence of a partisan divide on government spending and the size of government); *How Republicans and Democrats View Federal Spending*, PEW RSCH. CTR. (Apr. 11, 2019), <https://pewresearch.org/politics/2019/04/11/how-republicans-and-democrats-view-federal-spending> [<https://perma.cc/BP59-QKS8>] (documenting disparate partisan views on federal spending).

members of Congress reintroduced a version of the line-item veto in the 2000s, a large majority of Republicans supported the effort and a large majority of Democrats opposed it.⁵⁸ The line-item veto shows how a structural bias can exist without raising the democratic concerns that animate much of the normative scholarship on structural constitutional arrangements.

More generally, appeals to abstract, apolitical ideals such as democracy can shed only so much light on questions of institutional design. There are many different ways of organizing government that are plausibly compatible with democracy, not to mention many different ways of conceptualizing democracy itself.⁵⁹ Often, the strongest argument against a contentious constitutional arrangement will not be that it is undemocratic in some sense all could agree on, but rather that the arrangement makes it harder to achieve certain policy goals. This charge can be devastating when the disfavored goals are extremely valuable. It is not, however, a charge that can purport to be neutral among policy programs or ideological worldviews. A focus on structural bias provides resources for evaluating many constitutional arrangements—from separation-of-powers disputes to the federal budget process to preemption doctrine—about which democratic theory does not yield a clear verdict.

C. *Prior Nonlegal Literature*

Outside of law, our inquiry is most consonant with scholarship in the fields of comparative political science and political economy exploring the impacts of various governance arrangements. This literature, which focuses largely on institutional determinants of public spending and economic redistribution, has identified a number of persistent policy biases. “Majoritarian elections,” for instance, “are associated with a smaller overall size of government, smaller welfare

⁵⁸ See *H.R. 4890 (109th): Legislative Line Item Veto Act of 2006*, GOVTRACK (June 22, 2006, 6:01 PM), <https://govtrack.us/congress/votes/109-2006/h317> [<https://perma.cc/JU72-4DNN>] (noting Republican support by a margin of 212 to 15 and Democratic opposition by a margin of 156 to 35).

⁵⁹ Cf. David E. Pozen, *The Shrinking Constitution of Settlement*, 68 *DRAKE L. REV.* 335, 349 (2020) (“[A]ppeals to ‘democracy’ . . . will not tell us which elements in our constitutional system deserve to be celebrated and which deserve to be overhauled without an account of democracy’s purposes, preconditions, and normative priority. Different conceptions of democracy may point toward different problems and solutions.”). On competing theories of democracy, see generally ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (3d ed. 2006); DAVID HELD, *MODELS OF DEMOCRACY* (1987). In an important recent article, Nicholas Bagley makes a similar argument about the limited utility of analyzing administrative law “with reference to broadly shared commitments” rather than “contested ideological visions.” Nicholas Bagley, *The Procedure Fetish*, 118 *MICH. L. REV.* 345, 360 (2019).

spending, and larger budget surpluses . . . than proportional and mixed systems.”⁶⁰ Nations that employ proportional representation (PR), on the other hand, “have developed larger public sectors, more generous social expenditure, [and] higher levels of redistribution.”⁶¹ Presidential systems are associated with less government spending⁶² and more economic inequality⁶³ as compared to parliamentary systems. So, too, “[t]he vast literature on fiscal federalism points to decentralization as a force that reduces the size of government and the provision of public goods.”⁶⁴ Parallel dynamics exist at the local level: Some types of municipal governments are more conducive to public spending than others.⁶⁵ And beyond public spending, the structure of government has been found to be related to legislative outcomes in areas such as trade⁶⁶ and environmental policy.⁶⁷

⁶⁰ TORSTEN PERSSON & GUIDO TABELLINI, *THE ECONOMIC EFFECTS OF CONSTITUTIONS* 105 (2003) (acronyms omitted); *see also* ALBERTO ALESINA & EDWARD L. GLAESER, *FIGHTING POVERTY IN THE US AND EUROPE: A WORLD OF DIFFERENCE* 85 (2004) (“[F]or OECD countries, a measure of proportionality of the electoral system is highly correlated with the amount of government transfers.”). Mandatory voting laws are sometimes found to move policy leftward by raising turnout among low-income groups. *See, e.g.*, Alberto Chong & Mauricio Olivera, *Does Compulsory Voting Help Equalize Incomes?*, 20 *ECON. & POL.* 391 (2008). *But see* Bertrall L. Ross II, *Addressing Inequality in the Age of Citizens United*, 93 *N.Y.U. L. REV.* 1120, 1188–89 (2018) (reviewing contrary evidence).

⁶¹ JONATHAN RODDEN, *WHY CITIES LOSE: THE DEEP ROOTS OF THE URBAN-RURAL POLITICAL DIVIDE* 228 (2019); *see also* John Carey & Simon Hix, *Policy Consequences of Electoral Rules*, in *POLITICAL SCIENCE, ELECTORAL RULES, AND DEMOCRATIC GOVERNANCE* 46, 53 (Mala Htun & G. Bingham Powell, Jr. eds., 2013) (discussing evidence that single-member-district systems “tend to produce lower government spending, lower public deficits, and less government rent-seeking than PR systems”).

⁶² *See, e.g.*, PERSSON & TABELLINI, *supra* note 60, at 107 (tracking government spending and finding that “parliamentary governments grow about twice as much as presidential governments in the entire sample period” of 1960 to 1998); *cf.* Nolan M. McCarty, *Presidential Pork: Executive Veto Power and Distributive Politics*, 94 *AM. POL. SCI. REV.* 117 (2000) (modeling the efficiency and distributional effects of the executive veto on legislative spending decisions).

⁶³ *See, e.g.*, Richard McManus & F. Gulcin Ozkan, *Who Does Better for the Economy? Presidents Versus Parliamentary Democracies*, 176 *PUB. CHOICE* 361, 379 (2018) (finding that income inequality is 12% to 24% greater under presidential systems as compared to parliamentary systems).

⁶⁴ ALESINA & GLAESER, *supra* note 60, at 87–88.

⁶⁵ *See, e.g.*, Stephen Coate & Brian Knight, *Government Form and Public Spending: Theory and Evidence from US Municipalities*, 3 *AM. ECON. J.: ECON. POL’Y* 82 (2011) (showing that public spending is lower under mayor-council as compared to council-manager forms of government in U.S. cities).

⁶⁶ Majoritarian politics is biased toward more protectionist trade policy relative to proportional systems. *See, e.g.*, Gene M. Grossman & Elhanan Helpman, *A Protectionist Bias in Majoritarian Politics*, 120 *Q.J. ECON.* 1239 (2005) (modeling the relationship); Carolyn L. Evans, *A Protectionist Bias in Majoritarian Politics: An Empirical Investigation*, 21 *ECON. & POL.* 278 (2009) (providing empirical evidence through analysis of tariffs); Stephanie J. Rickard, *A Non-Tariff Protectionist Bias in Majoritarian Politics: Government*

The effects of institutional arrangements are not limited to policy; structural choices are also closely linked to electoral outcomes. Cross-nationally, “[r]ight-wing governments are more likely to form under majoritarian rules, whereas left-wing governments are more frequent with proportional representation.”⁶⁸ Within the United States, votes for Republican legislative candidates translate into legislative seats more readily than do votes for Democrats. This is most apparent in the Senate, given the political geography of rural America.⁶⁹ But it also holds in the House of Representatives and in the overwhelming majority of state legislatures that use single-member districts, which manifest a pro-rural (and thus pro-Republican) bias.⁷⁰ Similarly, the Electoral College is now widely understood to be tilted against Democrats. Consistent with recent electoral outcomes, empirical evidence suggests that national-popular-vote losers who win the Electoral College are far more likely to be Republicans.⁷¹

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

Subsidies and Electoral Institutions, 56 INT’L STUD. Q. 777 (2012) (providing empirical evidence through analysis of subsidies).

⁶⁷ See, e.g., RODDEN, *supra* note 61, at 228 (explaining that PR systems are associated with “more stringent efforts at environmental protection”); Nathan J. Madden, *Green Means Stop: Veto Players and Their Impact on Climate-Change Policy Outputs*, 23 ENV’T POL. 570 (2014) (finding that higher numbers of “political institutions” in a state are associated with lower rates of climate policy adoption).

⁶⁸ Holger Döring & Philip Manow, *Is Proportional Representation More Favourable to the Left? Electoral Rules and Their Impact on Elections, Parliaments and the Formation of Cabinets*, 47 BRIT. J. POL. SCI. 149, 149 (2015); see also *id.* at 149–54 (discussing possible explanations for this finding); Torben Iversen & David Soskice, *Electoral Institutions and the Politics of Coalitions: Why Some Democracies Redistribute More Than Others*, 100 AM. POL. SCI. REV. 165, 166 (2006) (showing theoretically and empirically “that in a two-party majoritarian system the center-right party is more likely to win government power, and redistribute less, than in a multiparty PR system”).

⁶⁹ See *infra* notes 121, 292–94 and accompanying text.

⁷⁰ See *infra* notes 123–25 and accompanying text.

⁷¹ See *infra* note 296 and accompanying text.

II

POLARIZATION AND STRUCTURAL CONSTITUTIONAL CONFLICT

Today's most significant constitutional fights, as one of us has described elsewhere,⁷² increasingly concern not the substance of judicially enforced constitutional rights but rather the structure of constitutional governance. Seemingly settled practices of organizing politics are becoming unsettled. After first sketching earlier episodes of structural constitutional conflict, this Part investigates its recent revival and argues that this trend is best explained by the iterated interaction between structural biases and multiple forms of partisan polarization.

A. *A Return to Structural Struggle*

The story of American constitutional politics could be told, in significant part, as a story of struggle over structural bias. From the Founding to the present, constitutional designers and reformers have fought to create structural biases that benefit their agendas while preventing their opponents from doing the same. Large congressional districts, to take just one example, were preferred by the framers not only to dilute the influence of "factions" and promote civic-minded representatives,⁷³ but also to secure the dominance of large property holders whose resources and connections would put them in the best position to win geographically dispersed elections.⁷⁴ Critics then and ever since have charged that this design feature, among many others, stacked the deck in favor of private property rights and against economic redistribution.⁷⁵ Critics have further charged that the original constitutional framework bolstered chattel slavery through interlocking structural protections for slaveowners, slave states, and the foreign slave trade.⁷⁶

⁷² See David E. Pozen, *Hardball and/as Anti-Hardball*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 949 (2019); Pozen, *supra* note 59.

⁷³ See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 506–18 (1969) (discussing framers' arguments to this effect).

⁷⁴ See MICHAEL J. KLARMAN, *THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 171* (2016).

⁷⁵ The "Beardian" (or "neo-Beardian") literature advancing such arguments is vast. Leading works include CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913); KLARMAN, *supra* note 74; JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* (1990).

⁷⁶ See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 90–91, 255–59, 292–95 (2005) (discussing pro-slavery implications of, inter alia, the Three-Fifths Clause, the Fugitive Slave Clause, Article V's limitations on constitutional amendment, and the slave-importation provisions of Article I, Section 9); GEORGE WILLIAM VAN CLEVE, *A SLAVEHOLDERS' UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY*

The intensity of such criticism has waxed and waned over time, but concerns about structural biases have never gone away. Contestation involving race is one particularly persistent through line. Ever since the Founding, issues of race have explicitly motivated or lurked just beneath the surface of foundational fights over structural arrangements, from antebellum debates about nullification and admission of new states;⁷⁷ to Reconstruction Era debates about voting rights and the scope of federal power;⁷⁸ to Civil Rights Era debates about, once again, voting rights and the scope of federal power;⁷⁹ to contemporary debates about, once again, voting rights and admission of new states;⁸⁰ to recurrent debates about the Electoral College.⁸¹ Reflecting on this

AMERICAN REPUBLIC 9 (2010) (arguing that the original Constitution distributed political power between North and South in ways that “materially advanced the creation of a slaveholders’ union” and “laid the groundwork for expansion of the slave state economies and of slavery itself”). Vigorous debates continue to this day over whether and to what extent the original constitutional design was “pro-slavery.” See, e.g., Nicholas Guyatt, *How Proslavery Was the Constitution?*, N.Y. REV. BOOKS (June 6, 2019), <https://nybooks.com/articles/2019/06/06/how-proslavery-was-the-constitution> [<https://perma.cc/7HMX-6GG5>] (reviewing SEAN WILENTZ, *NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION’S FOUNDING* (2018)).

⁷⁷ The nullification crisis was formally about whether a state may ignore a federal law that the state legislature deems contrary to the U.S. Constitution, but it was closely linked to fights over slavery as well as tariff policy. See EDWARD MCPHERSON, *THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA, DURING THE GREAT REBELLION* 409 (4th ed. 1882) (quoting a letter by Andrew Jackson stating that “the tariff was only a pretext, and disunion and a southern confederacy the real object”); David P. Currie, *The Constitution in Congress: The Public Lands, 1829–1861*, 70 U. CHI. L. REV. 783, 785 (2003) (noting that John C. Calhoun “maintained that the great Nullification crisis of 1832–33 was really about slavery”). See generally RICHARD E. ELLIS, *THE UNION AT RISK: JACKSONIAN DEMOCRACY, STATES’ RIGHTS, AND THE NULLIFICATION CRISIS* (1987). As the nation expanded westward, every possible admission of a new state risked upsetting the balance of free and slave states, leading states to be admitted in pairs—one slave and one free—for much of the antebellum period. *But cf.* Paul Finkelman, *The Cost of Compromise and the Covenant with Death*, 38 PEPP. L. REV. 845, 863–67 (2011) (discussing complications with this narrative).

⁷⁸ See generally ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019) (analyzing the Reconstruction Amendments as a “second founding”).

⁷⁹ See generally 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014) (arguing that the civil rights revolution of the 1960s effected a fundamental transformation of the constitutional order).

⁸⁰ See Paul Frymer, *The Politics of D.C. Statehood Follow a Well-Worn Path. Here’s Why.*, WASH. POST: MONKEY CAGE (July 6, 2020), <https://washingtonpost.com/politics/2020/07/06/politics-dc-statehood-follow-well-worn-path-heres-why> [<https://perma.cc/C6YT-RFF8>] (placing current debates over the status of the District of Columbia and Puerto Rico in the context of a “long historical pattern” of racism and racial conflict underlying statehood disputes).

⁸¹ See generally ALEXANDER KEYSSAR, *WHY DO WE STILL HAVE THE ELECTORAL COLLEGE?* (2020) (tracing the history of the Electoral College and attributing its persistence, in part, to successful efforts by Southern states to block reforms as a means of preserving white supremacy).

pattern, a noted scholar asserted in 1964 that “if in the United States one disapproves of racism, one should disapprove of federalism.”⁸² The fact that the term “states’ rights” still functions as a racial dog whistle shows the lasting power of structural biases to shape constitutional politics.⁸³

In light of this history, late twentieth-century debates over structural bias seem tame. The few serious legislative attempts at structural reform were unsuccessful, as with the line-item veto⁸⁴ and right-wing pushes in the 1990s for a balanced budget amendment and term limits for members of Congress.⁸⁵ The Rehnquist Court issued several high-profile decisions appearing to rein in congressional power⁸⁶ but failed, in the view of most, to transform the federal-state balance.⁸⁷ The Article V amendment process fell into disuse.⁸⁸ Constitution worship prevailed in public discourse,⁸⁹ along with a corresponding quietism about constitutional institutions.⁹⁰ By the early 2000s, scholars who

⁸² WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 155 (1964). By the late twentieth century, Riker came to view federalism as finally decoupled from its racially inflected roots. See John Dinan, *Relations Between State and National Governments*, in *THE OXFORD HANDBOOK OF STATE AND LOCAL GOVERNMENT* 7, 18–19 (Donald P. Haider-Markel ed., 2014).

⁸³ See IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* 16–17 (2014) (discussing the legacy of George Wallace’s efforts to defend white supremacy in a “language of state-federal relations”); TALÍ MENDELBERG, *THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY* 72–81 (2001) (describing “states’ rights” rhetoric as part of a post-1950s shift from explicit to implicit racial appeals).

⁸⁴ See *supra* notes 51–58 and accompanying text.

⁸⁵ See Mark Tushnet, *Living in a Constitutional Moment?: Lopez and Constitutional Theory*, 46 *CASE W. RESV. L. REV.* 845, 849–50 (1996) (discussing these efforts as part of “a series of proposals aimed at reducing the national government’s scope” in congressional Republicans’ “Contract with America”).

⁸⁶ See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Lopez*, 514 U.S. 549 (1995).

⁸⁷ See, e.g., Heather K. Gerken, *Federalism and Nationalism: Time for a Détente?*, 59 *ST. LOUIS U. L.J.* 997, 1006 (2015) (“[T]he Rehnquist Court’s federalism revolution has been a failure. Despite many skirmishes and some genuine defeats . . . the traditional nationalists are winning the war over constraints on federal power.”); see also David Fontana, *The Current Generation of Constitutional Law*, 93 *GEO. L.J.* 1061, 1068 n.55 (2005) (book review) (collecting sources taking this view).

⁸⁸ The only formal constitutional amendment since 1971, on congressional compensation, is widely seen as “fluky” and having “no significant effect.” David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 *HARV. L. REV.* 1457, 1486–87 (2001).

⁸⁹ See generally AZIZ RANA, *THE CONSTITUTIONAL BIND: HOW EMPIRE SHAPED AN AMERICAN ROMANCE* (forthcoming 2023) (charting the twentieth-century rise of constitutional veneration and its consolidation in the late 1970s and early 1980s).

⁹⁰ Sandy Levinson has documented and lamented such quietism in numerous works, perhaps most poignantly in Sanford Levinson, *How I Lost My Constitutional Faith*, 71 *MD. L. REV.* 956 (2012).

had detected the possible emergence of a new constitutional order following the presidential election of Ronald Reagan came to emphasize the era's "chastened" constitutional ambitions and how little change occurred in any of the branches.⁹¹ The rules of the political game remained relatively stable.

Recent years, however, have witnessed a resurgence of conflict over structural constitutional arrangements. This is true even if one brackets President Trump's behaviors during his four years in the White House as anomalous in their degree of disregard for constitutional norms.⁹² On the political right, for instance, opposition to the authority and independence of the administrative state persisted during President Trump's term of office and continues to mount;⁹³ support for the Voting Rights Act has evaporated;⁹⁴ and opposition to undocumented immigration has led to repeated efforts to change the census and, with it, congressional representation.⁹⁵ On the political left, a growing chorus of voices has called for eliminating the filibuster for legislation, transferring authority to draw legislative districts from state legislatures to independent commissions, reforming the Supreme Court, reconfiguring or circumventing the Electoral College, and

⁹¹ See generally MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (2003).

⁹² See Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 *UCLA L. REV.* 1430, 1450–56 (2018) (listing examples).

⁹³ See generally Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 *HARV. L. REV.* 1, 8–51 (2017) (describing conservative attacks on the administrative state by contemporary executive branch officials, judges, and academics).

⁹⁴ In 2006, the Voting Rights Act reauthorization was passed overwhelmingly in the House, passed unanimously in the Senate, and signed by a Republican President. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577. Less than two decades later, Republican appointees on the Court have invalidated a key part of the Act, see *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013), federal voting rights statutes no longer command bipartisan support, see, e.g., Carl Hulse, *Republicans Block a Second Voting Rights Bill in the Senate*, *N.Y. TIMES* (Nov. 4, 2021), <https://www.nytimes.com/2021/11/03/us/politics/senate-republicans-voting-rights-act.html> [<https://perma.cc/AA36-E4GA>], and red state legislatures have taken to enacting new restrictions on ballot access, see *Voting Laws Roundup: October 2021*, *BRENNAN CTR. FOR JUST.* (Oct. 4, 2021), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-october-2021> [<https://perma.cc/S5GN-RTEK>].

⁹⁵ The Trump Administration tried unsuccessfully to add a citizenship question to the 2020 census and to generate census data that would enable the exclusion of undocumented immigrants from congressional apportionment. See Tierney Sneed, *Trump Admin Pulls the Plug on Hail Mary Anti-Immigrant Census Gambit*, *TALKING POINTS MEMO* (Jan. 13, 2021, 10:53 AM), <https://talkingpointsmemo.com/news/census-bureau-apportionment-immigrant-project-ceased> [<https://perma.cc/7K2D-V5HL>]; Michael Wines, *2020 Census Won't Have Citizenship Question as Trump Administration Drops Effort*, *N.Y. TIMES* (July 2, 2019), <https://nytimes.com/2019/07/02/us/trump-census-citizenship-question.html> [<https://perma.cc/K6HU-5FS9>].

admitting new states into the Union.⁹⁶ In Congress, the White House, and state capitals, Democratic and Republican officeholders have been engaging in new forms of constitutional hardball.⁹⁷ Across area after area, “previously taken-for-granted constitutional institutions and distributions are increasingly subject to revision” either formally or informally,⁹⁸ not for the most part through bargaining and compromise so much as through the unilateral initiative of one side.

Why?

B. Ideological, Geographic, and Demographic Polarization

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

It will surprise no one that partisan polarization has something to do with constitutional conflict. Yet the connections between the two still have not been fully mapped and, in particular, the key role of structural biases in motivating and predicting constitutional conflict has not been explored.⁹⁹ Our account of the dialectical interaction between partisan polarization and structural bias does not capture all relevant variables of course,¹⁰⁰ but it supplies a parsimonious, unified framework for understanding the renewed interest in constitutional governance.

First, Democrats’ and Republicans’ *ideological polarization* increases the expected frequency and intensity of partisan conflict over structural arrangements. It is by now familiar that the Democratic Party has moved significantly to the left and the

⁹⁶ See Pozen, *supra* note 59, at 338–45 (cataloging these and other examples of “ways in which the Constitution of Settlement is becoming unsettled”).

⁹⁷ See generally Fishkin & Pozen, *supra* note 57 (exploring possible drivers of escalating constitutional hardball, especially but not only on the Republican side, since the mid-1990s).

⁹⁸ Pozen, *supra* note 59, at 350.

⁹⁹ Many different works have discussed the arguable electoral or policy biases (not necessarily by that label) of individual constitutional arrangements, with reference to recent conflicts over them. We are not aware of any prior work that explores the relationship between such biases and such conflicts at a wholesale rather than a retail level.

¹⁰⁰ Cf. *infra* notes 363–74 and accompanying text (discussing cultural and material variables that our account largely brackets).

Republican Party significantly to the right over the past half-century.¹⁰¹ This pattern is generally understood to be asymmetric, with Republicans having tacked further rightward than Democrats have leftward.¹⁰² Earlier in the twentieth century, the parties' platforms overlapped to a greater degree, so much so that a 1950 report by a task force of the American Political Science Association described the central problem of our party system as one of insufficient polarization.¹⁰³ Political scientists debate the sources of the growing divide between the parties since the 1970s. Some emphasize ways in which mass public opinion has polarized,¹⁰⁴ while others stress the extent to which liberals have sorted into the Democratic camp and conservatives into the Republican camp.¹⁰⁵ Whatever its ultimate causes, ideological polarization is an unmistakable feature of contemporary U.S. politics, and "the parties are now chiefly distinguished from each other by their contrasting agendas and worldviews."¹⁰⁶

Ideological polarization shapes politics on many levels, one of which is that it makes structural biases both more likely to emerge and more potent when they exist. The basic reason is simple. Ideological polarization means that whenever a structural constitutional arrangement systematically favors one sort of policy outcome over another, it will be more likely to favor one political party over the other *for that very reason*. As the parties have developed increasingly differentiated

¹⁰¹ Important works documenting this trend include NOLAN McCARTY, KEITH T. POOLE & HOWARD ROSENTHAL, *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* (2d ed. 2016); POLITICAL POLARIZATION IN AMERICAN POLITICS (Daniel J. Hopkins & John Sides eds., 2015); SAM ROSENFELD, *THE POLARIZERS: POSTWAR ARCHITECTS OF OUR PARTISAN ERA* (2018); BARBARA SINCLAIR, *PARTY WARS: POLARIZATION AND THE POLITICS OF NATIONAL POLICY MAKING* (2006).

¹⁰² See Nolan McCarty, *What We Know and Do Not Know About Our Polarized Politics* (noting a "major partisan asymmetry in polarization," with "movement of the Republican Party to the right account[ing] for most of the divergence between the two parties"), in POLITICAL POLARIZATION IN AMERICAN POLITICS, *supra* note 101, at 1, 3.

¹⁰³ See Comm. on Pol. Parties, *Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties*, 44 AM. POL. SCI. REV. 1, 3–4 (Supp. 1950) ("Alternatives between the parties are defined so badly that it is often difficult to determine what the election has decided even in broadest terms."). Similar dynamics held in certain earlier periods. In the decades leading up to the Civil War, for instance, the major parties were not neatly polarized even on issues as fundamental as slavery. See DESMOND S. KING & ROGERS M. SMITH, *STILL A HOUSE DIVIDED: RACE AND POLITICS IN OBAMA'S AMERICA* 38–42 (2011) (describing cross-party coalitions in support of and in opposition to slavery during the antebellum period).

¹⁰⁴ See, e.g., ALAN I. ABRAMOWITZ, *THE GREAT ALIGNMENT: RACE, PARTY TRANSFORMATION, AND THE RISE OF DONALD TRUMP 2* (2018).

¹⁰⁵ See, e.g., MORRIS P. FIORINA, *UNSTABLE MAJORITIES: POLARIZATION, PARTY SORTING, AND POLITICAL STALEMATE*, at xv (2017).

¹⁰⁶ ROSENFELD, *supra* note 101, at 3; see also *id.* ("The parties' increasing internal cohesion makes them more disciplined and oppositional, and the forces of ideological zeal and partisan team spirit now reinforce each other.").

policy programs, the space for “neutral” institutional design has narrowed. Rising levels of intraparty cohesion and unity, meanwhile, make it easier for partisans to organize against arrangements that thwart their goals.¹⁰⁷

As we detail in the next Part, contemporary Democratic officeholders are more likely than their Republican counterparts to seek to enact policy changes through nontax legislation and regulation.¹⁰⁸ Structural barriers to enacting and administering ambitious new laws have, in consequence, assumed an increasingly anti-Democratic valence. Prominent voices in the Democratic coalition have called for weakening some of these barriers, as by eliminating the Senate filibuster¹⁰⁹ or curtailing judicial review.¹¹⁰ On the flip side, Republicans who recognize that Democrats need powerful agencies to pursue ambitious regulatory agendas with aging statutes have turned against agency power. This turn is reflected in executive branch efforts to weaken the capacity of the bureaucracy,¹¹¹ along with judicial efforts to revitalize the nondelegation doctrine¹¹² and to limit or repudiate *Chevron* deference.¹¹³

These conflicts over structural constitutional law not only follow from but also help fuel polarization. The growing perception that a certain constitutional arrangement is systematically biased against one side generates new forms of argument and activism by that side’s sup-

¹⁰⁷ The party coalitions are not now, nor have they ever been, ideological monoliths. But when agreement about distinct policy goals exists within each coalition at some (perhaps high) level of generality, partisans will generally be able to identify and unify in support of structural arrangements that advance their goals and against arrangements that stand in the way.

¹⁰⁸ See *infra* Sections III.A.1–2.

¹⁰⁹ See Ronald Brownstein, *The End of the Filibuster—No, Really*, ATLANTIC (July 30, 2020, 2:45 PM), <https://theatlantic.com/politics/archive/2020/07/why-senate-filibuster-could-be-gone-2021/614278> [<https://perma.cc/5KPR-RM6F>] (discussing support among many Democrats for eliminating the filibuster).

¹¹⁰ See, e.g., Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021) (reviewing recent Court-reform proposals offered by progressives and arguing in favor of approaches that would limit the Court’s power).

¹¹¹ For a detailed account of such efforts in recent Republican administrations, see Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585 (2021) (discussing initiatives related to agency staffing, resource allocation, expert capacity, independent oversight, workflow, and reputation).

¹¹² See Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 279 (2021) (explaining that “[f]or the first time in modern history, a working majority on the Supreme Court”—composed entirely of Republican appointees—“may be poised to give the nondelegation doctrine real teeth”).

¹¹³ See Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. (forthcoming 2022), <https://ssrn.com/abstract=3889828> [<https://perma.cc/2RU5-BM26>] (tracing the evolution of the politics of *Chevron* deference over the past four decades).

porters, which in turn generates countermoves by opponents, in a manner that can exacerbate confirmation bias and deepen preexisting divides. Skepticism toward the administrative state and the constitutional norms that protect its independence, for example, has become a constitutive commitment for many Republican legal elites—one that helps define their social identity in contradistinction to the proregulatory posture of Democratic elites.¹¹⁴ Among Democrats, calls for “structural change” have become shibboleths that help distinguish the party’s left from its center.¹¹⁵ To some unmeasurable but potentially significant extent, structural biases and ideological polarization reinforce each other through the grievances and cleavages they engender.

Biased features of the constitutional order may contribute to ideological polarization in more discrete ways as well. Some political scientists have argued, for instance, that economic inequality and polarization are mutually reinforcing.¹¹⁶ As the next Part explains, a raft of veto points in the federal lawmaking process can be seen as tilting that process against redistributive agendas.¹¹⁷ Insofar as economic inequality tends to foster social and political division and hardwired features of the constitutional system tend to insulate such inequality from policy response, those features serve to perpetuate polarization. A structurally biased lawmaking process, economic inequality, and ideological polarization, on this account, feed one another in a vicious circle.

Second, *geographic polarization* can similarly generate and exacerbate structural biases. As with ideological polarization, it is familiar that Democrats and Republicans are now geographically polarized. “While the two major parties once fiercely battled each other for popular supremacy across wide swaths of the continent, Republicans and Democrats today both maintain sizable regional bastions” of sup-

¹¹⁴ See Metzger, *supra* note 93, at 2–46 (describing the rise of conservative “anti-administrativism” in the courts, Congress, the executive branch, and the academy). In an amusing but telling episode, after Justice Neil Gorsuch embraced the “anti-administrativist” label in a Federalist Society speech, a conservative nonprofit began to manufacture and sell coffee mugs with that label. See Christopher J. Walker, *Sunstein & Vermeule on Administrative Law’s Morality (and 2017 AdLaw Year in Review)*, YALE J. ON REG.: NOTICE & COMMENT (Dec. 29, 2017), <https://yalejreg.com/nc/sunstein-vermeule-on-administrative-laws-morality-and-2017-adlaw-year-in-review> [<https://perma.cc/ZQE8-58E8>].

¹¹⁵ For mainstream media discussions of this phenomenon, see Neil Gross, *Why Do the Democrats Keep Saying “Structural”?*, N.Y. TIMES (July 31, 2019), <https://nytimes.com/2019/07/31/opinion/2020-democrats-change-structural.html> [<https://perma.cc/7GED-BW8Q>]; Carl Hulse, *Countering G.O.P. on Courts, Democrats Will Call for “Structural” Change*, N.Y. TIMES (July 31, 2020), <https://nytimes.com/2020/07/31/us/democrats-judiciary-reform.html> [<https://perma.cc/VJ2Y-WKTB>].

¹¹⁶ See, e.g., MCCARTY ET AL., *supra* note 101, at 3–4.

¹¹⁷ See *infra* Sections III.A.1–3.

port.¹¹⁸ Geographic polarization is evidenced across states, many of which are reliably “red” or “blue” in presidential elections. Within states, Democrats are electorally dominant in urban cores and competitive in inner-ring suburbs, while Republicans win in exurban and rural areas.¹¹⁹ This sort of geographic polarization was not the norm for much of the twentieth century,¹²⁰ but its existence in contemporary politics is undeniable.

Geographic polarization of the electorate gives rise to structural biases throughout the constitutional order. The most obvious examples are institutions such as the Senate and the Electoral College that inflate the power of less populated states relative to a population-based apportionment scheme. These institutions currently manifest a significant pro-Republican bias, in virtue of Republican electoral dominance in such states.¹²¹ Because of the president’s and Senate’s role in selecting and confirming Supreme Court Justices and other officials, this bias ramifies throughout the federal government. Justice Brett Kavanaugh, for instance, was confirmed on a nearly party-line vote of senators representing only forty-four percent of the U.S. population—a historic low.¹²²

Less obviously, single-member, plurality-winner congressional districts also hurt contemporary Democrats. Such districts are not required by the text of the Constitution, but they have been mandated

¹¹⁸ DAVID A. HOPKINS, RED FIGHTING BLUE: HOW GEOGRAPHY AND ELECTORAL RULES POLARIZE AMERICAN POLITICS 3 (2017).

¹¹⁹ RODDEN, *supra* note 61, at 106; cf. Ganesh Sitaraman, Morgan Ricks & Christopher Serkin, *Regulation and the Geography of Inequality*, 70 DUKE L.J. 1763 (2021) (discussing the concomitant rise of geography-based economic inequality).

¹²⁰ See, e.g., RODDEN, *supra* note 61, at 4 (noting no correlation between a county’s population density and Democratic Party vote share in the 1916 presidential election, some correlation in the 1960 presidential election, and an “astounding” correlation in the 2016 presidential election).

¹²¹ See, e.g., ADAM JENTLESON, KILL SWITCH: THE RISE OF THE MODERN SENATE AND THE CRIPPLING OF AMERICAN DEMOCRACY 10 (2021) (noting that “Senate Democrats have represented a majority of the American population at every moment in the twenty-first century so far, regardless of whether they controlled the majority of the seats in the Senate”).

¹²² Joshua Tauberer, *With Kavanaugh Vote, the Senate Reaches a Historic Low in Democratic Metric*, GOVTRACK.US (Oct. 7, 2018), <https://govtrackinsider.com/with-kavanaugh-vote-the-senate-reaches-a-historic-low-in-democratic-metric-dfb0f5fa7fa> [<https://perma.cc/NSV4-VRK5>]; see also Joshua P. Zoffer & David Singh Grewal, *The Counter-Majoritarian Difficulty of a Minoritarian Judiciary*, 11 CALIF. L. REV. ONLINE 437, 454–58 (2020) (documenting the dramatic rise in “minoritarian judges” appointed by Republican presidents who failed to win the national popular vote, confirmed by Republican Senate majorities representing less than half of the national population, or both).

by statute at the federal level since 1842.¹²³ The overwhelming majority of state legislators are likewise elected in single-member districts.¹²⁴ Jonathan Rodden has documented the ways in which this districting arrangement has come to favor Republicans over Democrats, given the latter's concentration in urban areas. He provides a wealth of empirical evidence that "when winner-take-all districts are drawn on top of this geography, Democrats end up with a distribution of support across districts that is highly inefficient" because "they win by excessive margins in the districts they win and fall short by relatively narrow margins in the districts they lose."¹²⁵

The result, Rodden concludes, is that "in the early twenty-first century, the Democratic Party has a political geography problem."¹²⁶ This problem is itself a function of a *political institutions* problem: The geographic distribution of partisans matters not for any a priori reason, but because of its intersection with the design of electoral structures.¹²⁷ Recent political science research suggests that the current geographic distribution of partisans may, in addition, create asymmetric opportunities for Republicans to use anti-democratic tactics in the areas of gerrymandering and voter suppression.¹²⁸

Beyond the electoral sphere, various legal tools and policy choices have partisan valences that they would not have had in a less geographically polarized environment. For instance, as noted above,¹²⁹ a new wave of state preemption laws that "clearly, intentionally, extensively, and at times punitively bar local efforts to address a host of local problems" is closely linked to "the interacting polariza-

¹²³ Act of June 25, 1842, ch. 47, 5 Stat. 491 (codified as amended at 2 U.S.C. § 2c); cf. Sanford Levinson & Jack M. Balkin, *Democracy and Dysfunction: An Exchange*, 50 IND. L. REV. 281, 304 (2016) (describing "the requirement of single-member [House] districts" as a "constitutionalized statute[]").

¹²⁴ See *State Legislative Chambers That Use Multi-Member Districts*, BALLOTPEdia, https://ballotpedia.org/State_legislative_chambers_that_use_multi-member_districts [<https://perma.cc/583X-2JVY>] ("Of the 7,383 seats in the 50 state legislatures, 1,015 are elected from districts with more than one member, a total of 13.7%.")

¹²⁵ RODDEN, *supra* note 61, at 133; see also Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. POL. SCI. 239, 239 (2013) ("We show that in many states, Democrats are inefficiently concentrated in large cities and smaller industrial agglomerations such that they can expect to win fewer than 50% of the seats when they win 50% of the votes.").

¹²⁶ RODDEN, *supra* note 61, at 188.

¹²⁷ Cf. *id.* at 230 ("In highly proportional systems with large districts, like those in Northern Europe, the geography of a party's support is largely irrelevant for the transformation of votes into seats.").

¹²⁸ See Gretchen Helmke, Mary Kroeger & Jack Paine, *Democracy by Deterrence: Norms, Constitutions, and Electoral Tilting*, AM. J. POL. SCI. (forthcoming), <https://onlinelibrary.wiley.com/doi/10.1111/ajps.12668> [<https://perma.cc/RN2B-FRUI>].

¹²⁹ See *supra* notes 41–43 and accompanying text.

tions of Republican and Democrat, conservative and liberal, and nonurban and urban.”¹³⁰ The widespread practice of “prison gerrymandering”—counting incarcerated individuals at their places of confinement instead of their home addresses for purposes of the census¹³¹—advantages Republicans by inflating representation of the rural conservative areas where prisons tend to be located.¹³² The organization of most district attorney elections at the level of counties, rather than cities, gives whiter and more conservative suburbanites a larger say in criminal justice policies that primarily affect the lives of racial minorities in urban locales.¹³³

Third, *demographic polarization* can support structural bias as well. Throughout U.S. history, contestation over the right to vote and legal regulation of voting has been closely tied to the parties’ quests for electoral supremacy.¹³⁴ If voters’ ascriptive characteristics make it increasingly easy to predict which party they will support, the parties will find it increasingly easy to draw ostensibly nonpartisan districts or to fashion ostensibly nonpartisan ballot-access rules in ways that afford a partisan edge. Once in place, moreover, such arrangements may strengthen partisan identities and solidarities through the voting patterns and grievances they generate—as suggested, for example, by Republican politicians’ complaints about voter fraud¹³⁵ and Democratic politicians’ calls to combat voter suppression.¹³⁶

¹³⁰ Briffault, *supra* note 41, at 1997; see also Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361, 1364 (2020) (explaining that Republican-led “structural preemption,” whereby states displace not just local governments’ specific policies but their “structural authority” to design institutions, has also been on the rise).

¹³¹ For overviews of prison gerrymandering and its consequences, see Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 STAN. L. & POL’Y REV. 355 (2011); Michael Skocpol, Note, *The Emerging Constitutional Law of Prison Gerrymandering*, 69 STAN. L. REV. 1473 (2017).

¹³² See Ho, *supra* note 131, at 360 (“[T]he distortion of the redistricting process [by prison gerrymandering] . . . has specific and identifiable effects, transferring political power from certain types of communities—namely, urban districts and communities of color—to others—generally rural and predominantly white areas.”).

¹³³ See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 7, 35–36, 191–95 (2011).

¹³⁴ See generally ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (rev. ed. 2009) (emphasizing this link with examples from the nineteenth and twentieth centuries).

¹³⁵ See, e.g., Kirby Goidel, Keith Gaddie & Spencer Goidel, *Rigged-Election Rhetoric: Coverage and Consequences*, 52 PS: POL. SCI. & POL. 229 (2019) (finding based on survey data that Donald Trump’s “rigged-election” claims during the 2016 presidential election mobilized Republican and Independent voters).

¹³⁶ See, e.g., Nicholas A. Valentino & Fabian G. Neuner, *Why the Sky Didn’t Fall: Mobilizing Anger in Reaction to Voter ID Laws*, 38 POL. PSYCH. 331 (2017) (providing observational and experimental evidence that “strong emotional reactions to the public

Structural biases, in other words, can have not only first-order effects on electoral outcomes but also second-order effects on partisan mobilization.

The demographic divides between the parties today are stark along the lines of race, age, gender, and education. The most notable divide is racial. Simply put, white voters favor Republicans decisively, and nonwhite voters favor Democrats even more decisively. In presidential elections since 2008, Republican candidates have won white voters by margins of 12% to 20%, while Democratic candidates have won Black voters by margins of 81% to 91%, Hispanic voters by margins of 36% to 44%, and Asian American voters by margins of 27% to 47%.¹³⁷ In recent decades, a parallel gap has opened up between increasingly Democratic-leaning younger voters and Republican-leaning senior citizens¹³⁸ and between increasingly Democratic-leaning women and Republican-leaning men.¹³⁹ The contemporary partisan gap with respect to education is especially striking—highly educated voters now tend to support Democrats and less educated voters to support Republicans—in that it represents an inversion of dynamics that prevailed as recently as the early 2000s.¹⁴⁰

These demographic divides set the stage for much of what Richard Hasen has described as the “voting wars” of the early twenty-first century.¹⁴¹ The key point, again, is that when many demographic groups predictably favor one party by wide margins, the parties can seek to change many electoral rules to their advantage. Of greatest consequence, Republican-controlled state governments have enacted a host of restrictions on ballot access that limit the vote of core

debate about [voter suppression] laws may mobilize Democrats,” thereby partially offsetting the suppressive effects of these laws).

¹³⁷ WILLIAM H. FREY, *DIVERSITY EXPLOSION: HOW NEW RACIAL DEMOGRAPHICS ARE REMAKING AMERICA* 222 fig.11-3 (rev. & updated ed. 2018).

¹³⁸ See, e.g., STELLA M. ROUSE & ASHLEY D. ROSS, *THE POLITICS OF MILLENNIALS: POLITICAL BELIEFS AND POLICY PREFERENCES OF AMERICA’S MOST DIVERSE GENERATION* 16 (2018) (explaining that Millennials voted for Democratic candidates at a higher rate than did older adults in the 2008, 2012, and 2016 elections).

¹³⁹ See, e.g., Elizabeth U. Cascio & Na’ama Shenhav, *A Century of the American Woman Voter: Sex Gaps in Political Participation, Preferences, and Partisanship Since Women’s Enfranchisement*, *J. ECON. PERSP.*, Spring 2020, at 24, 35 (“Following the 2016 election, women were almost 12 percentage points more likely than men to consider themselves Democrats, compared to a sex gap hovering around zero in the late 1940s and 1950s.”).

¹⁴⁰ See PEW RSCH. CTR., *WIDE GENDER GAP, GROWING EDUCATIONAL DIVIDE IN VOTERS’ PARTY IDENTIFICATION* 26–27 (2018), <https://pewresearch.org/politics/wp-content/uploads/sites/4/2018/03/03-20-18-Party-Identification-CORRECTED.pdf> [<https://perma.cc/3CXT-4DEB>].

¹⁴¹ See RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* (2012).

Democratic constituencies, most notably people of color.¹⁴² The mirror image of these efforts are Democratic efforts to reenfranchise felons¹⁴³ and provide for automatic voter registration.¹⁴⁴ “When party and race coincide,” as Hasen notes, “it is much harder to separate racial and partisan intent and effect” in evaluating electoral arrangements.¹⁴⁵

Predictable differences in how various demographic groups vote also help explain otherwise curious features of voter-identification laws, such as a Republican-sponsored measure in Texas that did not recognize university-issued ID cards.¹⁴⁶ While turnout-reducing tactics are manifestly more common and intensive among Republicans,¹⁴⁷ Democrats have sometimes used limited versions. State Democratic parties, for example, benefit from off-cycle school board elections that preserve the influence of teachers’ unions over those elections.¹⁴⁸

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

¹⁴² See TOVA ANDREA WANG, *THE POLITICS OF VOTER SUPPRESSION: DEFENDING AND EXPANDING AMERICANS’ RIGHT TO VOTE*, at xiv (2012) (“[C]ontemporary Republicans have made it a central part of their election strategy to enact laws and call for practices that will reduce turnout among those who tend to vote Democratic . . .”). See generally SPENCER OVERTON, *STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION* (2006); *VOTER SUPPRESSION IN U.S. ELECTIONS* (Jim Downs ed., 2020).

¹⁴³ See Daniel Nishanian, *The Voting Rights Manifesto: A State-by-State Plan to Defend Democracy*, VOX (Dec. 15, 2016, 8:50 AM), <https://vox.com/the-big-idea/2016/12/15/13957714/voting-rights-states-ballot-franchise-civil-rights> [<https://perma.cc/7MWT-DYUU>] (describing reenfranchisement efforts in several states with Democratic governors).

¹⁴⁴ See KEVIN MORRIS & PETER DUNPHY, BRENNAN CTR. FOR JUST., *AVR IMPACT ON STATE VOTER REGISTRATION* (2019), https://brennancenter.org/sites/default/files/2019-08/Report_AVR_Impact_State_Voter_Registration.pdf [<https://perma.cc/E698-7ZDX>] (reviewing recent automatic-voter-registration reforms).

¹⁴⁵ Richard L. Hasen, *Race or Party? How Courts Should Think About Republican Efforts to Make It Harder to Vote in North Carolina and Elsewhere*, 127 HARV. L. REV. F. 58, 61 (2014). By the same token, longstanding electoral arrangements designed to protect against racial discrimination may assume a new partisan valence. See, e.g., *id.* (“The Voting Rights Act, when passed, was not seen as a law that helped the Democratic Party—quite the opposite. But today, many Republicans view the Voting Rights Act as a law that favors Democrats . . .”).

¹⁴⁶ See *Veasey v. Perry*, 71 F. Supp. 3d 627, 632–33, 641 (S.D. Tex. 2014) (describing, and enjoining, this measure).

¹⁴⁷ See Michael J. Klarman, *The Supreme Court, 2019 Term—Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 45–66 (2020).

¹⁴⁸ See SARAH F. ANZIA, *TIMING AND TURNOUT: HOW OFF-CYCLE ELECTIONS FAVOR ORGANIZED GROUPS* 118–19 (2014).

while Republicans have pushed back.¹⁴⁹ More recently, Republicans sought to add a question on citizenship to the census, an effort that would have depressed Hispanic response rates¹⁵⁰ and thereby advantaged the Republican Party. Partisan contestation over the design and administration of the census makes sense when demographics and partisanship are tightly aligned.

C. Close Competition

On top of all these trends, the close competition between today's parties fuels constitutional conflict. Sharply contested presidential elections have replaced the landslides of prior generations, while the contemporary House and Senate have changed hands with greater frequency than at any point since the late nineteenth century.¹⁵¹ As Frances Lee has detailed, this electoral instability affects the behavior of officeholders on numerous levels. "Members of insecure parties worry more about partisan advantage and work harder to win it" than members of more dominant or more hopeless parties.¹⁵² Under closely divided electoral conditions, officeholders feel a greater need to "define and dramatize party differences in order to energize their supporters and to persuade undecided voters to prefer their party to the opposition," a dynamic that "stands in tension with successful legislating" for the general good.¹⁵³

This dynamic extends to structural constitutional arrangements. Intense competition between the parties encourages the seeking of any possible advantage, including the use of structural biases for purposes of entrenching one's own reforms or disrupting the other side's

¹⁴⁹ See, e.g., Thomas L. Brunell, *Using Statistical Sampling to Estimate the U.S. Population: The Methodological and Political Debate over Census 2000*, 33 PS: POL. SCI. & POL. 775, 776 (2000) ("A principal concern of the Republicans is that Democrats will gain seats if statistical methods are used to adjust the census counts to include more minorities, urban residents, and poor people and justify the creation of more electoral districts with a majority of likely Democratic voters.").

¹⁵⁰ See MATTHEW A. BAUM, BRYCE J. DIETRICH, REBECCA GOLDSTEIN & MAYA SEN, SHORENSTEIN CTR. ON MEDIA, POL. & PUB. POL'Y, ESTIMATING THE EFFECT OF ASKING ABOUT CITIZENSHIP ON THE U.S. CENSUS: RESULTS FROM A RANDOMIZED CONTROLLED TRIAL 9 (2019), <https://shorensteincenter.org/wp-content/uploads/2019/03/Census-Citizenship-March-2019.pdf> [<https://perma.cc/W5EZ-FX9X>] (estimating based on survey data that inclusion of the citizenship question would have reduced the number of Hispanics reported in the 2020 census by over twelve percent of the Hispanic population).

¹⁵¹ See FIORINA, *supra* note 105, at 10 (noting that from 1992 to 2014, "twelve elections . . . produced six different patterns of majority control of our three national elective institutions"—the highest level of "majoritarian instability" since the nineteenth century); FRANCES E. LEE, INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN 1–2 (2016) (describing greater stability in past periods of U.S. history).

¹⁵² LEE, *supra* note 151, at 4.

¹⁵³ See *id.* at 69–70.

agenda. Recent Republican calls to revive the nondelegation doctrine¹⁵⁴ make more strategic sense in light of the possibility that Democrats could control the White House with considerable frequency in the coming decades. Recent Democratic calls to eliminate the legislative filibuster¹⁵⁵ stem from the recognition of rare and brief windows of unified control in a period of insecure majorities. Biases in the electoral or lawmaking process matter little, in practice, if one party can comfortably win elections and garner large governing coalitions regardless. But these same biases may matter enormously when the parties compete roughly at parity.

Certain structural biases also become more countermajoritarian in closely divided partisan environments. The small-state bias of the Electoral College and the Senate, for instance, will continue to exist and to favor Republicans as long as the political geography of the United States looks as it does now. If one party were dominant, however, this bias would be less likely to yield presidents and Justices who lack majority popular support (as measured, in the Justices' case, by the proportion of the U.S. population represented by senators voting to confirm).¹⁵⁶

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

III MAPPING STRUCTURAL BIASES

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

¹⁵⁴ See *supra* note 112 and accompanying text.

¹⁵⁵ See *supra* note 109 and accompanying text.

¹⁵⁶ See *supra* note 122 and accompanying text.

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

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

A. A Typology

1. *Ex Ante Impediments to Lawmaking (Legislative Branch)*

All constitutional designers make choices that affect how easy or hard it will be to enact and amend statutes. These choices will not necessarily have clear partisan implications. If in a given period all political parties share similar general orientations toward statutory policymaking, then the rules governing the legislative process may not manifest any structural bias. Yet as discussed in Part I, if one party wishes to enact significantly more legislation than the other does across multiple policy domains and election cycles, then procedural barriers to lawmaking can have disparate consequences as between the two.¹⁵⁷

Such a partisan divide has opened up in the United States, and structural bias has followed. "No other advanced industrialized country has so many institutional veto points" as does the United States.¹⁵⁸ This longstanding feature of our constitutional order now

¹⁵⁷ See text following *supra* note 29.

¹⁵⁸ David Karol, *American Political Parties: Exceptional No More*, in *SOLUTIONS TO POLITICAL POLARIZATION IN AMERICA* 208, 212 (Nathaniel Persily ed., 2015); see also William N. Eskridge, Jr., *Vetogates and American Public Law*, 31 J.L. ECON. & ORG. 756,

impedes Democratic policy goals more than Republican policy goals because Democrats now have more ambitious legislative agendas. In the late twentieth and early twenty-first centuries, Congresses controlled by Democrats considered more bills, held more committee meetings, and passed more bills than Congresses controlled by Republicans,¹⁵⁹ while Democratic presidents tendered significantly more policy proposals than their Republican counterparts.¹⁶⁰

The first Congresses of recent presidencies illustrate this asymmetry. During the two years in which Democrats held unified control of the political branches under President Obama, Congress passed major economic,¹⁶¹ health care,¹⁶² financial regulatory,¹⁶³ and civil rights legislation¹⁶⁴ on party-line or near-party-line votes.¹⁶⁵ Democrats also mounted significant but ultimately unsuccessful legislative efforts to address climate change and immigration.¹⁶⁶ The Biden Administration, buoyed by a Democratic Congress, has begun by proposing a similarly aggressive legislative agenda on topics including

757–60 (2012) (describing nine “vetogates” in the U.S. lawmaking process); 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) (reporting that among longstanding democracies with advanced economies, only the United States has more than three “electorally generated veto players . . . who potentially can block social change, by blocking key bills or amendments”).

¹⁵⁹ GROSSMANN & HOPKINS, *supra* note 34, at 264–65 (data from 1961 to 2012).

¹⁶⁰ *Id.* at 267 (reporting that since 1945, “Democratic presidents made 39 percent more proposals than Republicans overall and 62 percent more domestic policy proposals”); see also *id.* at 260 (reporting that from 1945 to 2004, “policy changes” were more than three times as likely to be liberal than conservative across the federal government).

¹⁶¹ *E.g.*, American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115.

¹⁶² *E.g.*, Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

¹⁶³ *E.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

¹⁶⁴ *E.g.*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

¹⁶⁵ *E.g.*, Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

¹⁶⁶ For critical overviews of these efforts, see Meg Jacobs, *Obama’s Fight Against Global Warming*, in *THE PRESIDENCY OF BARACK OBAMA: A FIRST HISTORICAL ASSESSMENT* 62 (Julian E. Zelizer ed., 2018); Sarah R. Coleman, *A Promise Unfulfilled, an Imperfect Legacy: Obama and Immigration Policy*, in *id.* at 179.

immigration,¹⁶⁷ racial justice,¹⁶⁸ voting rights,¹⁶⁹ and COVID-19 relief.¹⁷⁰

The Trump Administration also enjoyed unified control on both sides of Pennsylvania Avenue during its first two years. Yet its “sole significant legislative accomplishment” during this period was a tax bill,¹⁷¹ and its only other high-profile legislative undertaking was its attempt to repeal the Affordable Care Act.¹⁷² Even in areas that were policy priorities for the Trump Administration, such as restricting immigration and relaxing regulation of business, it generally pursued its goals through executive action rather than legislation.¹⁷³

Multiple factors likely contribute to this asymmetry in legislative ambition. Some political scientists emphasize the parties’ different attitudes toward the role of government. “Elected Democrats tend to treat policymaking as an attempt to address a catalog of social problems,” Matt Grossmann and David Hopkins argue, “whereas Republicans view policy disputes as battlegrounds in a broader philo-

¹⁶⁷ See, e.g., U.S. Citizenship Act, H.R. 1177, 117th Cong. (2021).

¹⁶⁸ See, e.g., Commission to Study and Develop Reparation Proposals for African-Americans Act, H.R. 40, 117th Cong. (2021); see also Jacob M. Schlesinger, *Biden Offers Big Government Plan to Address Racial Inequality*, WALL ST. J. (July 13, 2020, 10:00 AM), <https://wsj.com/articles/biden-offers-big-government-plan-to-address-racial-inequality-11594648806> [<https://perma.cc/V6W6-9B5Q>] (contrasting Democratic support for “new spending and initiatives” with Republicans’ “market-oriented approach” to addressing racial inequality).

¹⁶⁹ See, e.g., For the People Act of 2021, H.R. 1, 117th Cong.

¹⁷⁰ See, e.g., American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4. See generally Matthew Yglesias, *Joe Biden Has a Plan for That*, VOX (May 26, 2020, 8:00 AM), <https://vox.com/2020/5/26/21257648/joe-biden-climate-economy-tax-plans> [<https://perma.cc/WGZ8-77MH>] (describing Joe Biden’s “transformative” policy agenda as of May 2020 and noting that much of it would require legislative action).

¹⁷¹ Charlie Cook, *A White House That Can’t Shoot Straight*, COOK POL. REP. (Jan. 8, 2018), <https://cookpolitical.com/index.php/analysis/national/national-politics/white-house-cant-shoot-straight> [<https://perma.cc/PRB4-XAVP>] (referring to the Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017)).

¹⁷² For discussions of this effort, see generally Jonathan Cohn, *The ACA, Repeal, and the Politics of Backlash*, HEALTH AFF. BLOG (Mar. 6, 2020), <https://healthaffairs.org/do/10.1377/hblog20200305.771008/full> [<https://perma.cc/F339-5MWF>]; Dylan Scott & Sarah Kliff, *Why Obamacare Repeal Failed*, VOX (July 31, 2017, 11:40 AM), <https://vox.com/policy-and-politics/2017/7/31/16055960/why-obamacare-repeal-failed> [<https://perma.cc/39RZ-9ALT>].

¹⁷³ See Toluse Olorunnipa & Ashley Parker, *Trump’s Familiar Routine After Failing to Cut Deals with Congress: Signing Legally Dubious Executive Actions*, WASH. POST (Aug. 9, 2020, 3:00 PM), https://washingtonpost.com/politics/trump-dealmaker-congress-coronavirus/2020/08/09/8a5b13c0-da52-11ea-809e-b8be57ba616e_story.html [<https://perma.cc/9RV6-C2KT>] (“It’s pretty striking that other than the December 2017 tax law, basically all of the major moves by the Trump administration have been via executive action, even though he had control of Congress [for two years]” (quoting Daniel Hemel)).

sophical conflict.”¹⁷⁴ Closely related, the Democratic Party has become a coalition of “social groups making specific programmatic demands on government,” whereas the Republican Party is largely “an ideological movement united by conservative values and skeptical of the assumption that government action can ameliorate social problems.”¹⁷⁵ Others contend that Democrats have been able to entrench key twentieth-century social welfare policies, such that it would be politically difficult for Republicans to pursue revisionist legislation even if they might wish to do so in principle.¹⁷⁶ In addition, as the next Subsection explains, Republicans looking to cut back on economic regulation have a wider range of nonstatutory tools at their disposal than do Democrats looking to expand regulation.

Whatever its causes, this asymmetry means that the rules governing the legislative process cannot be neutral as between the parties’ policy agendas, for today’s Democratic Party has significantly more to lose from veto points that increase the difficulty of enacting legislation. And as already mentioned, the U.S. constitutional order is awash in such veto points.¹⁷⁷ The written Constitution, of course, requires that to become law a bill must pass each house of Congress and be signed by the president,¹⁷⁸ unless supermajorities in both chambers override a presidential veto.¹⁷⁹ Cameral rules in the House and Senate establish numerous additional procedural hurdles beyond bicameralism and presentment—including a bevy of congressional committees that most bills must clear and from which many never emerge.¹⁸⁰ Some of these hurdles, in particular the Senate’s sixty-vote cloture

¹⁷⁴ GROSSMANN & HOPKINS, *supra* note 34, at 252; *see also id.* (“Democrats propose major legislation more often and are more amenable to practical compromises Republicans, in contrast, prefer a confrontational approach that relies more on procedural brinkmanship in pursuit of total victory—which is often defined as the successful blockade of Democratic initiatives.”).

¹⁷⁵ *Id.* at 255–56.

¹⁷⁶ *See, e.g.,* ANDREA LOUISE CAMPBELL, *HOW POLICIES MAKE CITIZENS: SENIOR POLITICAL ACTIVISM AND THE AMERICAN WELFARE STATE 2* (2011) (explaining that Social Security and Medicare have created a powerful constituency of senior citizens who “actively defend their programs” against legislative “tamper[ing]”).

¹⁷⁷ *See supra* note 158 and accompanying text.

¹⁷⁸ U.S. CONST. art. I, § 7, cl. 2.

¹⁷⁹ *Id.* cl. 3. Veto overrides are extremely rare. *See Vetoes, 1789 to Present*, U.S. SENATE, <https://senate.gov/legislative/vetoes/vetoCounts.htm> [<https://perma.cc/GBE9-DF7T>] (noting only 112 veto overrides since 1789).

¹⁸⁰ The standard process in both chambers requires that a bill clear one or more subcommittees and one or more committees, each with jurisdiction defined by subject matter. *See* WALTER J. OLESZEK, MARK J. OLESZEK, ELIZABETH RYBICKI & BILL HENIFF JR., *CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS* 99–143 (10th ed. 2016). In the House, the Rules Committee serves as an additional gatekeeper. *See id.* at 159–61. If different versions of a bill pass in the House and Senate, a conference committee typically crafts a final bill, which is then sent back to each chamber for a final vote. *See id.* at 330–75.

requirement,¹⁸¹ are especially onerous in an age when neither party enjoys political dominance.¹⁸²

None of these features of the U.S. constitutional order is intrinsic to any lawmaking process. Alternative arrangements are widely used both within the United States and abroad. Congress itself has deviated from its standard operating procedures for defined subject matter areas, most notably by easing the rules for passage of budget legislation and trade agreements.¹⁸³ State legislative procedures differ from congressional procedures in ways that make it both easier and harder to enact legislation. Most state legislatures do not have general supermajority requirements comparable to the Senate cloture rule,¹⁸⁴ although many erect other hurdles to legislation such as requiring that each bill concern a single subject¹⁸⁵ or allowing governors to exercise a line-item veto.¹⁸⁶ Meanwhile, every municipal legislature in the country is unicameral,¹⁸⁷ as is one state legislature.¹⁸⁸ Many constitutional systems around the world employ bicameralism, but without giving each chamber a “death lock over any legislation passed by the other” like the U.S. version does.¹⁸⁹

¹⁸¹ STANDING RULES OF THE SENATE R. XXII(2), S. DOC. NO. 113-18 (2013), <https://rules.senate.gov/imo/media/doc/CDOC-113sdoc18.pdf> [<https://perma.cc/3YKC-FF89>].

¹⁸² See JENTLESON, *supra* note 121, at 9 (arguing that the filibuster has made the Senate “a kill switch that cuts off broad-based solutions and shuts down our democratic process”); *id.* at 5 (explaining that “the filibuster has mainly served to empower a minority of predominately white conservatives”).

¹⁸³ See generally MOLLY E. REYNOLDS, EXCEPTIONS TO THE RULE: THE POLITICS OF FILIBUSTER LIMITATIONS IN THE U.S. SENATE (2017) (detailing “majoritarian exceptions” to the filibuster employed by the Senate in certain policy areas since the late 1960s).

¹⁸⁴ MEGHAN REILLY, CONN. OFF. LEGIS. RSCH., 2009-R-0249, STATES LIMITING LEGISLATIVE DEBATE (2009), <https://cga.ct.gov/2009/rpt/2009-R-0249.htm> [<https://perma.cc/ED6R-4M4Z>]; Niraj Chokshi, *In Many State Legislatures, It Wouldn't Take Much to Make Ted Cruz Stop Talking*, WASH. POST (Sept. 25, 2013), <https://washingtonpost.com/blogs/govbeat/wp/2013/09/25/in-many-state-legislatures-it-wouldnt-take-much-to-make-ted-cruz-stop-talking> [<https://perma.cc/5NQ4-CADN>].

¹⁸⁵ See generally Richard Briffault, *The Single-Subject Rule: A State Constitutional Dilemma*, 82 ALBANY L. REV. 1629 (2019) (noting that forty-three state constitutions have some sort of single-subject rule); Michael D. Gilbert, *Single Subject Rules and the Legislative Process*, 67 U. PITT. L. REV. 803 (2006) (evaluating the effects of single-subject rules).

¹⁸⁶ See *supra* notes 51–58 and accompanying text.

¹⁸⁷ See Noah M. Kazis, *American Unicameralism: The Structure of Local Legislatures*, 69 HASTINGS L.J. 1147, 1149 (2018) (“There are more than 90,000 local governments in the United States. Each and every one has a single legislative chamber.” (footnote omitted)).

¹⁸⁸ See CHARLYNE BERENS, ONE HOUSE: THE UNICAMERAL'S PROGRESSIVE VISION FOR NEBRASKA 1 (2d ed. 2013) (“[Nebraska] is the only state in the nation with a one-house, nonpartisan legislature.”). For making treaties, the federal Constitution requires Senate supermajorities rather than bicameralism. U.S. CONST. art. II, § 2, cl. 2.

¹⁸⁹ LEVINSON, *supra* note 6, at 47. In most of these other systems, the “lower” house is given the power to break deadlocks. *Id.* at 134.

A number of other procedural rules also manifest bias by making lawmaking more difficult, either as a general matter or on particular topics with an ideological valence. Consider special procedural rules governing tax legislation. Because the parties are polarized on tax policy, rules that make it harder to raise taxes or easier to cut them favor Republican agendas, while rules with the opposite effects favor Democrats. The Constitution's Origination Clause creates a special hurdle to imposing taxes,¹⁹⁰ although in practice it is easily circumvented.¹⁹¹ The budget reconciliation process once incorporated a bias in the opposite direction (allowing tax increases but not tax cuts to circumvent Senate cloture rules), but Congress has treated reconciliation as neutral as between tax cuts and tax increases since the 1990s.¹⁹² More generally, even relatively obscure rules that do not put a thumb on the scale in favor of a specific outcome, such as rules restricting earmarks and mandating public access to deliberations, have created conditions in Congress increasingly inhospitable to legislative dealmaking.¹⁹³

Some state-level legislative procedural rules are even more overt in the asymmetries they create between the two parties. Roughly a third of the states, for instance, impose special supermajority requirements on proposed tax increases,¹⁹⁴ which predictably aid small-government Republicans. David Super has detailed how many features of states' "fiscal constitutions," from balanced budget requirements to accounting methods that encourage borrowing for large

¹⁹⁰ U.S. CONST. art. I, § 7, cl. 1 ("All Bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.").

¹⁹¹ See Aziz Z. Huq, *The Constitutional Law of Agenda Control*, 104 CALIF. L. REV. 1401, 1448–49 (2016).

¹⁹² See Gould, *supra* note 18, at 1996–97.

¹⁹³ On earmarks, see DIANA EVANS, *GREASING THE WHEELS: USING PORK BARREL PROJECTS TO BUILD MAJORITY COALITIONS* 223 (2004) (arguing that "vote buying with pork barrel projects is useful, even essential, . . . for passing general interest legislation" in a body like the U.S. Congress whose majority leaders have limited ability to enforce party discipline); John Hudak, *Congress in 2019: Why the First Branch Should Bring Back Earmarks*, BROOKINGS (Dec. 27, 2018), <https://brookings.edu/blog/fixgov/2018/12/27/congress-in-2019-why-the-first-branch-should-bring-back-earmarks> [<https://perma.cc/K6ZU-ZP7J>] (explaining that congressional Republicans "effectively banned" earmarks—"individual provisions inserted into legislation . . . to direct benefits for specific projects in specific places"—in 2011, with deleterious effects on legislative capacity). On transparency, see David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 130–33 (2018) (reviewing an extensive body of evidence indicating that 1970s reforms opening up committee meetings and the House floor "made it more difficult for members of Congress to negotiate with each other in candid, creative, and productive ways").

¹⁹⁴ See *Supermajority Vote Requirements to Pass the Budget*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 9, 2018), <https://ncsl.org/research/fiscal-policy/supermajority-vote-requirements-to-pass-the-budget635542510.aspx> [<https://perma.cc/TA2S-VU2D>].

capital projects, work against programs serving low- and moderate-income people—and, by extension, against the Democratic lawmakers who seek to enact such programs and the communities who benefit from them.¹⁹⁵

In sum, taking account of the parties' mismatched legislative ambitions casts congressional procedure in a new light. The many institutional features that make lawmaking difficult at the federal level have come to impede the policy aspirations of Democrats more than those of Republicans—again, not just cyclically or episodically but systematically. When similar features exist in state or foreign legislative bodies, those features can be understood as structurally biased against legislatively ambitious parties in much the same way. Procedural rules that treat certain types of legislation differently can create additional asymmetric partisan effects. Biases in the legislative process are critically important in themselves, but they also put pressure on other institutions. Rules that hamstring Congress will tend to channel policymaking elsewhere, including the administrative state, the courts, and subnational governments. We turn next to structural biases in these venues.

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

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

Biases arising from veto points in the regulatory process parallel those arising from veto points in the legislative process. The two parties have different general orientations toward implementing and enforcing federal law. Crudely put, executive branch agencies that administer programs and regulate industries are often viewed by Democrats as critical to promoting the public interest, while many Republicans would prefer to constrain or outright abolish these agencies. In recent years, Republican elected officials and opinion leaders have called for eliminating the Environmental Protection Agency (EPA), the Internal Revenue Service, and the Departments of Agriculture, Commerce, Education, Energy, Housing and Urban Development, the Interior, and Transportation, as well as a host of

¹⁹⁵ See David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2605–40 (2005).

smaller boards and programs.¹⁹⁶ Even if some of these calls are more rhetorical than substantive, they demonstrate the extent of Republican hostility to the regulatory state. The political dynamics are reversed for a small number of agencies, with Republicans rather than Democrats favoring greater agency authority.¹⁹⁷ But the overall asymmetry is plain. Democrats for the most part want more active and empowered agencies. Republicans want the opposite.

This asymmetry means that structural arrangements that make it harder for agencies to take initiative, relative to alternative arrangements employed in prior periods or endorsed by reformers, may be biased against the contemporary Democratic Party. Nicholas Bagley has documented how the “proceduralism” of administrative law—the proliferation since the 1960s of procedural hurdles that agencies must clear before acting—has had just this effect.¹⁹⁸ Agencies seeking to regulate in new or intensified ways face constraints of limited policy windows and overstretched senior personnel, along with well-resourced and mobilized opponents in the private sector.¹⁹⁹ More procedural requirements make it more likely that any of these forces will thwart agency action. Using the notice-and-comment process to issue a rule, as critics of administrative-law “ossification” have emphasized, takes “a long time and an extensive commitment of agency resources.”²⁰⁰ A growing set of transparency requirements, meanwhile, impose relatively modest obligations on the national security agencies preferred by Republicans “while hobbling relatively visible efforts to regulate health, safety, the economy, the environment, and

¹⁹⁶ See, e.g., Ted Cruz, *Five for Freedom*, NAT'L REV. (Nov. 11, 2015, 1:30 AM), <https://nationalreview.com/2015/11/ted-cruz-five-freedom> [<https://perma.cc/88Z6-G96D>]; Jason Plautz, *How to Eliminate Almost Every Federal Agency*, ATLANTIC (Aug. 13, 2014), <https://theatlantic.com/politics/archive/2014/08/how-to-eliminate-almost-every-federal-agency/452961> [<https://perma.cc/UU9K-FFGM>]; Brett Samuels, *The 22 Agencies and Programs Trump's Budget Would Eliminate*, THE HILL (Feb. 12, 2018, 1:28 PM), <https://thehill.com/homenews/administration/373441-the-federal-programs-trump-proposes-cutting-in-2019-budget> [<https://perma.cc/8XU7-RZFD>].

¹⁹⁷ See, e.g., Rachel Levinson-Waldman & Haley Hinkle, *The Abolish ICE Movement Explained*, BRENNAN CTR. FOR JUST. (July 30, 2018), <https://brennancenter.org/our-work/analysis-opinion/abolish-ice-movement-explained> [<https://perma.cc/KGL5-4ZAU>].

¹⁹⁸ See Bagley, *supra* note 59, at 358–69.

¹⁹⁹ See *id.* at 361. On business power and regulation, see generally DAVID VOGEL, *FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA* (1989); BENJAMIN C. WATERHOUSE, *LOBBYING AMERICA: THE POLITICS OF BUSINESS FROM NIXON TO NAFTA* (2015); *WHAT'S GOOD FOR BUSINESS: BUSINESS AND AMERICAN POLITICS SINCE WORLD WAR II* (Kim Phillips-Fein & Julian E. Zelizer eds., 2012).

²⁰⁰ Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1493 (2012).

civil rights.”²⁰¹ The current structure of administrative procedure, Bagley concludes, favors “inaction over action, deregulation over regulation, and nonenforcement over enforcement.”²⁰²

Executive branch regulatory review embodies a similar deregulatory bias. Since the 1980s, the Office of Information and Regulatory Affairs (OIRA), which sits within the Office of Management and Budget (OMB), has reviewed proposed regulations prior to their taking effect.²⁰³ In theory, such an arrangement need not be biased for or against regulation. But in practice, it has typically served to impede or dilute rather than to generate or strengthen regulatory initiatives. As Bagley and Richard Revesz have noted, “many of the features of OMB review create a profound institutional bias against regulation—a bias which is inexplicable except with reference to the implicit Reagan-era belief that agencies will systematically overregulate.”²⁰⁴ This holds true even in “pro-regulatory presidential administrations.”²⁰⁵ Despite a fleeting experiment with “prompt letters” as a tool to encourage agencies to act,²⁰⁶ OMB review has consistently favored the Republican Party’s deregulatory agenda.

Beyond veto points, more specific rules governing executive branch policymaking can be structurally biased. For instance, a fierce controversy from a prior generation suggests at least one respect in which today’s budget rules are structurally biased in favor of higher

²⁰¹ David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1111 (2017); see also Pozen, *supra* note 193, at 156 (explaining that U.S. transparency laws have evolved since the 1960s in ways that make them “harder to square with the progressive commitment to energetic, egalitarian government than with a libertarian vision of a minimalist state authorized primarily to protect citizens against violent threats”).

²⁰² Bagley, *supra* note 59, at 368–69.

²⁰³ See Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1845–63 (2013).

²⁰⁴ Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1262 (2006); see also David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1112 (2008) (observing that “OIRA review . . . is much more deregulatory in orientation because of the substantive inquiry that it requires OIRA analysts to undertake”); Lisa Schultz Bressman & Michael P. Vandenberg, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 72–73 (2006) (reporting interview results in which former EPA officials of both parties who served from 1989 to 2001 overwhelmingly characterize OIRA as a deregulatory force).

²⁰⁵ Barron, *supra* note 204, at 1114 (“OIRA review has a consistent deregulatory influence even in pro-regulatory presidential administrations.”).

²⁰⁶ See Curtis W. Copeland, *The Role of the Office of Information and Regulatory Affairs in Federal Rulemaking*, 33 FORDHAM URB. L.J. 1257, 1289–90 (2006) (noting a small number of prompt letters during President George W. Bush’s first term); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1381 (2013) (observing that “the practice of prompt letters was always ad hoc” and was not “continued by the Obama Administration”).

spending and thus the contemporary Democratic Party. For nearly two centuries, presidents held the power of impoundment, which allowed them to decline to spend funds appropriated by Congress.²⁰⁷ Impoundment was used by presidents of both parties.²⁰⁸ But like the line-item veto, impoundment is a one-way ratchet, in that it allows a president unilaterally to reduce federal spending but not to increase it. The different attitudes of the two parties toward federal spending²⁰⁹ came to lend that feature a partisan cast. A Republican president could use impoundment authority to target various social welfare programs, especially less popular programs benefiting the poor, while a Democratic president with this authority would find fewer politically plausible uses for it. A prohibition on impoundment is accordingly biased toward Democrats, relative to rules that allow the practice. Consistent with this analysis, when Congress ultimately banned impoundment in 1974, the ban was passed by Democratic congressional majorities reacting to aggressive use of impoundment authority by a Republican chief executive.²¹⁰

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

Turning from the second branch to the third, the organization of judicial power can also be structurally biased in multiple respects. Here, we consider possible biases arising from the two central ways in which federal courts interact with Congress and the executive: strong-form constitutional review of laws and regulations, and judicial review of agency decisionmaking.²¹¹

²⁰⁷ See Ralph S. Abascal & John R. Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 GEO. L.J. 1549, 1577–618 (1974) (documenting the history of impoundment); Christopher Wlezien, *The Politics of Impoundments*, 47 POL. RSCH. Q. 59, 60 (1994) (noting that “the bulk of the impoundments [prior to the 1970s] tended to be noncontroversial”).

²⁰⁸ See Gerald A. Figurski, *Presidential Impoundment of Funds: A Constitutional Crisis*, 7 AKRON L. REV. 107, 111 (1973) (describing how “Presidents from FDR on impounded various programs and irritated Congress in the process”).

²⁰⁹ See *supra* note 57 and accompanying text.

²¹⁰ Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297; see CHAFETZ, *supra* note 18, at 64–66 (discussing this episode).

²¹¹ Many other ostensibly neutral features of judicial practice might be considered part of structural constitutional law, at least on some accounts, and give rise to structural bias—from substantive rules governing judicial review of actions taken by state and local officials, to procedural rules governing access to court, to remedial rules governing plaintiffs’ ability to obtain monetary or injunctive relief from different sorts of defendants. Investigation of possible structural biases caused by these features is an important and complex task that we reserve for future work. Restrictive standing rules, for instance, could cut in a liberal direction insofar as they insulate social welfare and regulatory policies from industry challenges, while at the same time cutting in a conservative direction insofar as

The U.S. federal judiciary exercises a paradigmatic version of “strong-form” judicial review, in which “the courts have general authority to determine what the Constitution means” and “the courts’ constitutional interpretations are authoritative and binding on the other branches,” including Congress.²¹² While the legal literature on judicial review often focuses on its complex relationship to democracy,²¹³ judicial review can also be understood more simply as an additional veto point in the legislative process.²¹⁴ Even if a statute manages to satisfy bicameralism and presentment, courts can still prevent it from taking effect by deeming it incompatible with the Constitution. A veto-point perspective becomes all the more resonant at a time when the federal courts are increasingly polarized along the same left-right axis as the rest of government.²¹⁵

Understanding constitutional judicial review as a veto point raises the possibility that, like other veto points, it might be structurally biased. Given the asymmetry in the legislative agendas of the two parties, contemporary Democrats have more to lose from strong-form judicial review of federal statutes than do contemporary Republicans, just as they have more to lose from analogous veto points in Congress and the executive branch. It is easy to imagine a conservative Supreme Court overturning future progressive legislation on constitutional grounds.²¹⁶ By contrast, if a liberal Supreme Court were to exist

they stymie challenges to race discrimination, environmental misconduct, or the like. Which effect dominates, and with what consequences for the policy goals of the two major political parties, is an empirical question not well illuminated by the formal content of the rules themselves.

²¹² Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2784 (2003); see also Walter Sinnott-Armstrong, *Weak and Strong Judicial Review*, 22 LAW & PHIL. 381, 381 (2003) (“Strong judicial review finds its paradigm in the United States . . .”).

²¹³ See, e.g., ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952).

²¹⁴ See, e.g., Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1535 (2000) (“[C]ourts can add an additional veto to rights-restricting government action . . .”); David Watkins & Scott Lemieux, *Compared to What? Judicial Review and Other Veto Points in Contemporary Democratic Theory*, 13 PERSP. ON POL. 312, 312 (2015) (“In modern democratic political systems, judicial review is one of many potential veto points.”).

²¹⁵ See, e.g., Christopher Sundby & Suzanna Sherry, *Term Limits and Turmoil: Roe v. Wade’s Whiplash*, 98 TEX. L. REV. 121, 133–34 & nn.55–60 (2019) (summarizing evidence that “the Court increasingly votes along ideological lines that are predictable and closely aligned with the views and preferences of political parties”).

²¹⁶ See Doerfler & Moyn, *supra* note 110, at 1719 (noting that “the single most important driver of Supreme Court reform debate” in recent years has been Democrats’ fear that the judiciary will become “a stronghold of resistance against progressive legislative ambition”); see also Robin West, *The Aspirational Constitution*, 88 NW. U. L. REV. 241, 251 (1993) (arguing that judicial review has a conservative slant because

during a future period of Republican control of the political branches, those branches may not produce as much ambitious domestic legislation that could be challenged in court.²¹⁷

A cursory glance at U.S. history provides support for the proposition that judicial review of federal statutes tends to be biased against left-leaning political programs—a proposition that early twentieth-century progressives took as given.²¹⁸ The Supreme Court has struck down or severely narrowed significant parts of Reconstruction Era,²¹⁹ Progressive Era,²²⁰ and New Deal statutes.²²¹ In recent decades, the Court has struck down progressive legislative achievements including the Affordable Care Act's Medicaid expansion,²²² the Voting Rights Act's coverage formula,²²³ the Brady Handgun Violence Prevention Act's background-check provision,²²⁴ and the Violence Against Women Act's civil remedy.²²⁵ To be sure, counterexamples exist; the Democratic coalition includes civil libertarians who are more skeptical of state power than those on its left flank; collecting prominent cases cannot in itself prove a conservative bias; and this bias has waned if not disappeared in certain eras, in particular the Warren Court years of 1953 to 1969. Yet all that said, any number of more systematic studies support the conclusion that judicial review of federal legislation “has been overwhelmingly conservative through the history of the Court.”²²⁶

“progressive gains require a degree of legislative experimentalism that judicially imposed constitutional constraints inhibit”).

²¹⁷ See *supra* notes 165–76 and accompanying text.

²¹⁸ See, e.g., Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1965 (2018) (explaining that these progressives saw federal courts as “the inveterate guardians of private property and persecutors of organized labor”); Laura M. Weinrib, *Civil Liberties Outside the Courts*, 2014 SUP. CT. REV. 297, 304 (explaining that New Deal reformers generally sought to implement their economic-reform “vision in spite of, rather than through, the courts”).

²¹⁹ E.g., *The Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Reese*, 92 U.S. 214 (1876).

²²⁰ E.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *United States v. E.C. Knight*, 156 U.S. 1 (1895).

²²¹ E.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *United States v. Butler*, 297 U.S. 1 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

²²² *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

²²³ *Shelby Cnty v. Holder*, 570 U.S. 529 (2013).

²²⁴ *Printz v. United States*, 521 U.S. 898 (1997).

²²⁵ *United States v. Morrison*, 529 U.S. 598 (2000).

²²⁶ Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 896 n.19 (2003); see also ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 6 (2015) (arguing that throughout U.S. history, the Supreme Court “often has upheld discrimination and even egregious violations of basic liberties,” “has been far more likely to rule in favor of corporations than workers or consumers,” and “has been far more likely to uphold government abuses of power than to

The argument that strong-form judicial review is biased toward small-government conservatism might lose much of its force in a system where the constitutional courts were inclined and able to spur the legislature into taking action to promote social rights or social welfare. This is not our system, at least at the federal level. Unlike most written constitutions in effect today, the U.S. Constitution is generally viewed as “a charter of negative rather than positive liberties.”²²⁷ Other constitutional courts recognize doctrines such as “legislative omission” that they can employ to force legislatures to regulate in the service of social and economic entitlements.²²⁸ No such doctrine exists in the United States, and “even at the high tide of their political ascendancy, liberals couldn’t get the Supreme Court to commit to distributive entitlements of any kind.”²²⁹ While the libertarian tilt of constitutional judicial review may be especially acute in this country,

stop them”). On the historical aberrance of the Warren Court’s liberalism relative to the generally conservative character of U.S. judicial review, see MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 3 (1998) (describing the Warren Court as being “increasingly recognized as having initiated a unique and revolutionary chapter in American constitutional history”); David Luban, *The Warren Court and the Concept of a Right*, 34 HARV. C.R.-C.L. L. REV. 7, 7 (1999) (“The Warren Court, after all, was not just the most liberal Supreme Court in American history, but arguably the *only* liberal Supreme Court in American history.”). For a comprehensive history of judicial review of federal legislation, see KEITH E. WHITTINGTON, *REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT* (2019).

²²⁷ *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.); *see also, e.g., DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 196 (1989) (“[O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.”); *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) (“As a general matter, a State is under no constitutional duty to provide substantive services for those within its border.”); David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 806–07 (2012) (describing the U.S. Constitution as “rooted in a libertarian constitutional tradition that is inherently antithetical to the notion of positive rights” and demonstrating that it is increasingly a global outlier in not expressly providing for such rights). Within the United States, judicial enforcement of positive constitutional rights is far more prevalent at the state level. *See* EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA’S POSITIVE RIGHTS* (2013).

²²⁸ *See generally* VENICE COMM’N, *GENERAL REPORT OF THE XIVTH CONGRESS OF THE CONFERENCE OF EUROPEAN CONSTITUTIONAL COURTS ON PROBLEMS OF LEGISLATIVE OMISSION IN CONSTITUTIONAL JURISPRUDENCE* (Sc. R. Dürr, T. Gerwien, D. Jones, A. Gorey & M.-L. Wigishoff eds., 2008), <https://www.venice.coe.int/files/Bulletin/SpecBull-legislative-omission-e.pdf> [<https://perma.cc/6AXE-7ZX5>] (reviewing this doctrine in European constitutional jurisprudence); David Landau & Rosalind Dixon, *Abusive Judicial Review: Courts Against Democracy*, 53 U.C. DAVIS L. REV. 1313, 1368–70 (2020) (reviewing this doctrine in Latin American constitutional jurisprudence).

²²⁹ Samuel Moyn, *The Court Is Not Your Friend*, *DISSSENT* (Winter 2020), <https://www.dissentmagazine.org/article/the-court-is-not-your-friend> [<https://perma.cc/6ZK3-SSXR>]; *see also* David E. Pozen & Kim Lane Scheppele, *Executive Underreach, in Pandemics and Otherwise*, 114 AM. J. INT’L L. 608, 615–16 (2020) (reviewing ways in which

given our negative-rights-oriented text and tradition, there is some evidence that it generalizes broadly. One leading comparative study, for instance, provides a political and cultural account of why judicial enforcement of constitutional rights has been less effective at fostering egalitarianism than at “shielding the economic sphere from attempts to reduce socioeconomic disparity through regulatory and redistributive means.”²³⁰

Judicial review of agency action can be structurally biased in much the same way as strong-form constitutional judicial review of statutes. A critical threshold issue is which sorts of agency behaviors will be subject to judicial scrutiny in the first instance. Whereas U.S. agencies seeking to initiate enforcement proceedings must be prepared to defend their actions in court, under *Heckler v. Chaney*²³¹ and associated cases no such burden attends most decisions to decline to enforce. “Agencies can thus gut existing rules by enforcing them less vigorously—without observing any procedural niceties at all.”²³² Whichever party does not hold the presidency is apt to decry nonenforcement decisions.²³³ But this sort of flip-flopping should not obscure the deeper dynamic. Subjecting agency enforcement action to regular judicial review, while sparing agency nonenforcement, results in a structural bias toward nonenforcement of regulatory statutes and

the U.S. constitutional system “is especially inhospitable to legal challenges” to government “underreach”).

²³⁰ RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 218 (2004); *see also* *JUDICIAL POWER AND THE LEFT: NOTES ON A SKEPTICAL TRADITION* (Richard Ekins & Graham Gee eds., 2017) (collecting essays from European and American authors emphasizing the longstanding tension between judicial review and progressive politics). Specifying the conditions under which constitutional judicial review of statutes will not have a rightward tilt is well beyond the scope of this Article; the claim here is that the traditional U.S. model has such a tilt.

²³¹ 470 U.S. 821 (1985) (holding that executive nonenforcement decisions are presumptively unreviewable).

²³² Bagley, *supra* note 59, at 365; *see also id.* at 366 (“On occasion, the courts will rebuke agencies for adopting categorical nonenforcement policies, but agencies face virtually no litigation risk if they don’t publicly codify those policies (and little risk even if they do).” (footnotes omitted)). While *Heckler* sets out the contemporary administrative law framework, nonenforcement has long been a means for opponents of a federal statute’s goals to blunt its impact without judicial remedy. *See, e.g.,* PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* 28 (2011) (“[A] pattern materialized and spread in the wake of the [civil rights] acts of 1866 and 1867: the local and systematic refusal to punish Klan violence and intimidation aimed at blacks, white Republicans, and Freedmen’s Bureau agents.”).

²³³ *See* Zachary S. Price, *Politics of Nonenforcement*, 65 *CASE W. RESV. L. REV.* 1119, 1123–36 (2015) (describing criticisms leveled against Presidents Reagan, Bush II, and Obama).

toward parties that have a consistently stronger interest in such nonenforcement.²³⁴

A similar, if slightly milder, asymmetry exists with respect to judicial review of agency rulemakings. Plaintiffs routinely bring lawsuits alleging that rulemakings exceeded an agency's statutory authority or were arbitrary and capricious. Courts will sometimes review decisions not to engage in rulemaking, as exemplified by *Massachusetts v. EPA*.²³⁵ But in the main, courts have invoked "agency resource allocation and the limits of judicial capacity to carve out a thoroughly deferential approach to review of agency denials of rulemaking petitions."²³⁶ Whereas regulated entities can almost always challenge agency rulemakings, those who might benefit from new, never-issued rules have fewer opportunities to seek judicial relief.

Limits on more searching judicial review can serve as a partial counterweight to this bias. Consider the practice of courts deferring to reasonable agency interpretations of ambiguous or silent statutes under *Chevron*, rather than reviewing those interpretations de novo.²³⁷ Whichever party controls the White House can benefit from *Chevron* deference, but again there is an asymmetric effect that transcends the rotation of power. Recent Democratic administrations have relied heavily on agency rulemaking to implement new statutes²³⁸ and to help adapt old statutes to new policy challenges in the

²³⁴ While a number of Trump Administration deregulatory actions were enjoined by the courts, 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/N3FF-E8WV>] (collecting cases), most of those decisions rested on agency failures to follow the procedural requirements of the Administrative Procedure Act or to provide a reasoned explanation for policy changes—leaving intact the underlying asymmetry created by *Heckler*. But cf. Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1795–98 (2021) (suggesting that a nascent "accountability-forcing" approach to rationality review could lead to expanded judicial review of nonenforcement policies in the future).

²³⁵ 549 U.S. 497 (2007); see *id.* at 532–34 (finding that the EPA had denied a rulemaking petition based on impermissible considerations and failed to provide a "reasoned explanation for its refusal to decide whether greenhouse gases cause or contribute to climate change").

²³⁶ Daniel E. Walters, *Symmetry's Mandate: Constraining the Politicization of American Administrative Law*, 119 MICH. L. REV. 455, 495 (2020).

²³⁷ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

²³⁸ Implementing the Dodd–Frank Act, for instance, "require[d] the development of some 250 new regulatory rules and various mandated studies." Douglas D. Evanoff & William F. Moeller, *Dodd–Frank: Content, Purpose, Implementation Status, and Issues*, 36 ECON. PERSPS. 75, 75 (2012); see also *Implementing the Dodd–Frank Wall Street Reform and Consumer Protection Act*, U.S. SEC. & EXCHANGE COMM'N (last modified Dec. 23, 2020), <https://sec.gov/spotlight/dodd-frank.shtml> [<https://perma.cc/KK7P-WD6D>] (compiling rules, reports, and studies issued by the Securities and Exchange Commission under Dodd–Frank).

face of congressional gridlock, perhaps most notably in the environmental context.²³⁹ *Chevron* plays a crucial role in safeguarding these efforts from industry attack.²⁴⁰ While Republican administrations sometimes rely on *Chevron* in pursuit of deregulatory aims, they have many other deregulatory tools at their disposal: They can decline to enforce regulatory statutes, grant waivers to regulated entities, refuse to appoint or confirm regulators, or seek to limit agencies' resources.²⁴¹ Once the full panoply of pro- and anti-regulatory tools available to the parties is taken into account, it becomes apparent that *Chevron* deference is more valuable to contemporary Democrats than to contemporary Republicans.²⁴²

4. Executive Branch Organization and Personnel

We have focused thus far on the policymaking process, where a plethora of veto points in all three branches broadly favor those who would prefer to see government do less. Conservatives, however, have recently argued that a different set of structural biases, arising from the composition of the federal bureaucracy and from legal limits on the president's control of it, prevent them from accomplishing their policy goals.

These arguments have some force, but the overall story of structural bias in this area is mixed. The U.S. federal bureaucracy is staffed predominantly by civil servants, who are protected by law from politically motivated coercion²⁴³ and retaliation for whistleblowing.²⁴⁴ These sorts of protections can have a partisan or ideological bias, rela-

²³⁹ See JAMES E. MCCARTHY & CLAUDIA COPELAND, CONG. RSCH. SERV., R41561, EPA REGULATIONS: TOO MUCH, TOO LITTLE, OR ON TRACK? (2016) (providing a detailed overview of EPA rulemaking during the Obama Administration); Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 17–63 (2014) (describing EPA and Federal Energy Regulatory Commission efforts to adapt old statutes to modern challenges, primarily under the Obama Administration).

²⁴⁰ Cf. Freeman & Spence, *supra* note 239, at 69 n.299 (noting that judicial review of every agency decision discussed in their article would “invoke the *Chevron* doctrine”).

²⁴¹ See Elinson & Gould, *supra* note 113 (manuscript at 7, 53–55).

²⁴² See *id.* at 46–52 (explicitating this bias and the various reasons for it); see also MARK TUSHNET, TAKING BACK THE CONSTITUTION: ACTIVIST JUDGES AND THE NEXT AGE OF AMERICAN LAW 162 (2020) (arguing that *Chevron* is “a major benefit” to agencies seeking to regulate (or “re-regulate”) under conditions of congressional gridlock and only “a small benefit” to agencies seeking to deregulate, such that abandoning the doctrine would on balance serve the cause of “deconstruct[ing] the administrative state”).

²⁴³ See, e.g., Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended throughout 5 U.S.C.) (establishing various legal protections and remedies for federal civil servants).

²⁴⁴ See JON O. SHIMABUKURO, L. PAIGE WHITAKER & EMILY E. ROBERTS, CONG. RSCH. SERV., R43045, SURVEY OF FEDERAL WHISTLEBLOWER AND ANTI-RETALIATION LAWS (2013) (summarizing federal whistleblower statutes); see also Shawn Marie Boyne, *Whistleblowing*, 62 AM. J. COMPAR. L. 425, 428 (2014) (“Outside the national security

tive to at-will employment or other less politically insulated arrangements, if bureaucrats tend to hold either left- or right-of-center views.²⁴⁵ Federal employees in the aggregate lean Democratic,²⁴⁶ although their politics vary considerably across agencies. One prominent study found strong liberal leanings among employees at some agencies (most notably the EPA, Federal Trade Commission, and National Labor Relations Board) and strong conservative leanings among employees at others (most notably the Department of Defense and Department of Homeland Security).²⁴⁷ Republicans are therefore correct that rules insulating the bureaucracy from political control or otherwise empowering civil servants may be biased toward Democrats in the case of contemporary regulatory and social welfare agencies.²⁴⁸

employment sector, the breadth and depth of whistleblower protections in the United States has grown exponentially since the Watergate era.”).

²⁴⁵ Cf. Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 540–47 (2015) (characterizing the federal civil service as a potential “administrative counterweight” and “institutional rival” to “domineering” presidents and political appointees).

²⁴⁶ Federal employees have preferred Democratic candidates by significant margins in recent presidential elections. See Eric Katz, *Clinton Significantly Widens Lead over Trump Among Federal Employees, Poll Shows*, GOV’T EXEC. (Oct. 28, 2016), <https://govexec.com/management/2016/10/clinton-drastically-grows-lead-over-trump-among-federal-employees-poll-shows/132742> [<https://perma.cc/YUS9-4K6Y>]; Eric Katz, *Poll: Biden Leads Trump Among Federal Workforce by 28%*, GOV’T EXEC. (Sept. 18, 2020), <https://govexec.com/workforce/2020/09/poll-biden-leads-trump-among-federal-workforce-28/168581> [<https://perma.cc/TMN7-7XA8>]; Kellie Lunney, *Poll: Obama Leads Romney Among Government Workers*, GOV’T EXEC. (Aug. 21, 2012), [<https://perma.cc/ZHC6-EVRU>]. One recent empirical study found, based on several decades of campaign contribution data, that “civil servants cluster left-of-center.” Brian D. Feinstein & Abby K. Wood, *Divided Agencies*, 95 S. CAL. L. REV. (forthcoming 2022) (manuscript at 24), <https://ssrn.com/abstract=3925861> [<https://perma.cc/TMP3-H98H>].

²⁴⁷ Joshua D. Clinton, Anthony Bertelli, Christian R. Grose, David E. Lewis & David C. Nixon, *Separated Powers in the United States: The Ideology of Agencies, Presidents, and Congress*, 56 AM. J. POL. SCI. 341, 348–49 (2011) (reporting results of a large-scale survey of federal executive branch employees); see also Mark D. Richardson, Joshua D. Clinton & David E. Lewis, *Elite Perceptions of Agency Ideology and Workforce Skill*, 80 J. POL. 303, 306–08 (2017) (summarizing results from several prior studies). During the Trump Administration, science-focused entities within federal agencies were seen by many as especially liberal outposts. See, e.g., Sean Reilly, Kelsey Brugger, Maxine Joselow & Ariel Wittenberg, *EPA Science Advisers Slammed the Agency for Ignoring Science. Here Is What They Said*, SCIENCE (Jan. 2, 2020), <https://www.science.org/content/article/epa-science-advisers-slammed-agency-ignoring-science-here-what-they-said> [perma.cc/56FL-GQ9S] (describing efforts by the EPA’s Science Advisory Board to push back against actions taken by Trump political appointees).

²⁴⁸ Like most of the structural biases discussed in the Article, this bias is historically contingent. Any number of federal agencies now seen as liberal were, in prior periods, racially segregated in their composition and racially reactionary in their policymaking. On composition, see generally DESMOND KING, *SEPARATE AND UNEQUAL: BLACK AMERICANS AND THE U.S. FEDERAL GOVERNMENT* (1997); ERIC S. YELLIN, *RACISM IN THE NATION’S SERVICE: GOVERNMENT WORKERS AND THE COLOR LINE IN WOODROW WILSON’S AMERICA* (2013). On policymaking, see, for example, RICHARD ROTHSTEIN,

The upshot has been Republican efforts at the federal and state levels to limit civil service protections.²⁴⁹

Given the civil service's ideological profile, legal arrangements that allow for so-called independent agencies can likewise give rise to structural bias. Such arrangements have a long constitutional pedigree²⁵⁰ and are typically justified as necessary to shield "expert decisionmakers from the shifting winds of politics."²⁵¹ The past several decades, however, have witnessed the rise of a "unitary executive" theory that would give the president exclusive authority to "direct, control, and supervise inferior officers or agencies."²⁵² Consistent with the view that there is a liberal bias to the status quo of agency independence,²⁵³ these ideas have been developed and promoted almost entirely by conservative judges and scholars.²⁵⁴ While there is no clear empirical evidence that bureaucratic insulation has enabled Democratic civil servants to subvert Republican policy programs,²⁵⁵ there is also no evidence about the counterfactual: Who would benefit from greater presidential control over the administrative state?

THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

²⁴⁹ See, e.g., Erich Wagner, 'Stunning' Executive Order Would Politicize Civil Service, GOV'T EXEC. (Oct. 22, 2020), <https://www.govexec.com/management/2020/10/stunning-executive-order-would-politicize-civil-service/169479> [<https://perma.cc/K92Y-H3SQ>] (discussing an executive order signed by President Trump in late 2020 that would effectively convert thousands of federal civil servants into at-will employees); Jonathan Walters, *Life After Civil Service Reform: The Texas, Georgia, and Florida Experiences*, GOVERNING MAG., Oct. 2002, at 1, <https://sites.duke.edu/niou/files/2011/05/Walters-Life-after-Civil-Service-Reform-The-Texas-George-and-Florida-Experiences.pdf> [<https://perma.cc/Q4FW-GN37>] (providing case studies of civil service reform in three states).

²⁵⁰ See, e.g., *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935) ("The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted."); see also 44 U.S.C. § 3502(5) (2018) (listing independent agencies).

²⁵¹ Emily H. Mezell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1778 (2012); see also *id.* at 1779 ("Other reasons for creating independent agencies involve maintaining stability, providing insulation from interest-group capture, and protecting against bureaucratic drift.").

²⁵² Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165 (1992).

²⁵³ See, e.g., Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 25 n.137 (1994) (citing sources on such views during the Nixon and Reagan Administrations); see also JASON CHAFFETZ, *THE DEEP STATE: HOW AN ARMY OF BUREAUCRATS PROTECTED BARACK OBAMA AND IS WORKING TO DESTROY THE TRUMP AGENDA* (2018).

²⁵⁴ See Amanda Hollis-Brusky, *Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981–2000*, 89 DENV. U. L. REV. 197 (2011) (tracing the post-1970s rise of the unitary executive theory as a central project of the conservative legal movement); Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 375–89 (2020) (same).

²⁵⁵ Bagley & Revesz, *supra* note 204, at 1300.

Republican proponents of unitary executive theories may well be correct that they would profit from such a change.

A structural bias in the other direction may exist in rules governing appointments of agency leaders. Federal law requires presidential nomination and Senate confirmation for over a thousand executive branch officials.²⁵⁶ The rules are formally neutral as between the parties, but they have disparate impacts on the two. When Republicans control the White House, they can drag their feet on making appointments that would enable disfavored agencies to carry out their missions. “[I]n many cases,” as President Trump acknowledged in 2017, “we don’t want to fill [executive branch] jobs . . . because they’re unnecessary to have.”²⁵⁷

The dynamic is different when Democrats control the White House. During the Obama Administration, Senate Republicans attempted, often successfully, to block appointments as a means of undermining various agencies.²⁵⁸ Perhaps the most pointed example involved the Consumer Financial Protection Bureau (CFPB). After failing to prevent the creation of the CFPB in 2010, Republicans refused to hold an up-or-down vote on President Obama’s nominee to run the bureau in order to leverage changes in the bureau’s structure and disable it from bringing enforcement actions that required a confirmed director.²⁵⁹ Agencies that lack Senate-confirmed leadership have been found to be less productive and to have lower employee morale.²⁶⁰ Moreover, the confirmation process itself consumes valuable Senate floor time that could otherwise be devoted to legislative efforts. Democrats are more dependent on confirmed nominees for their policy agendas, and they incur greater opportunity costs for time spent on the confirmation process. The rules governing appointments

²⁵⁶ See MAEVE P. CAREY, CONG. RSCH. SERV., R41872, PRESIDENTIAL APPOINTMENTS, THE SENATE’S CONFIRMATION PROCESS, AND CHANGES MADE IN THE 112TH CONGRESS 7 (2012); Brad Plumer, *Does the Senate Really Need to Confirm 1,200 Executive Branch Jobs?*, WASH. POST (July 16, 2013), <https://washingtonpost.com/blogs/wonkblog/wp/2013/07/16/does-the-senate-really-need-to-confirm-1200-executive-branch-jobs> [<https://perma.cc/BK2V-Q5RA>].

²⁵⁷ Cody Derespina, *Trump: No Plans to Fill “Unnecessary” Appointed Positions*, FOX NEWS (Feb. 28, 2017), <https://foxnews.com/politics/trump-no-plans-to-fill-unnecessary-appointed-positions> [<https://perma.cc/X8YC-EEER>].

²⁵⁸ See Pozen, *supra* note 21, at 4–6; Jonathan Cohn, *The New Nullification: GOP v. Obama Nominees*, NEW REPUBLIC (July 19, 2011), <https://newrepublic.com/article/92167/cordray-warren-cfpb-obama-republicans-nomination> [<https://perma.cc/G4FA-252F>].

²⁵⁹ See Dave Clarke, *Republicans Block Obama’s Consumer Nominee*, REUTERS (Dec. 8, 2011, 12:26 AM), <https://reuters.com/article/us-financial-regulation-cordray/republicans-block-obamas-consumer-nominee-idUSTRE7B709R20111208> [<https://perma.cc/F5AD-9S4N>]. For a broad overview of Republican efforts to thwart the CFPB both before and after its creation, see Sitaraman, *supra* note 254, at 356–75.

²⁶⁰ See Anne Joseph O’Connell, *Actings*, 120 COLUM. L. REV. 613, 694–99 (2020).

of agency leaders can therefore be seen as biased toward Republicans relative to alternative arrangements, including those employed in virtually every other democracy, that subject fewer executive branch positions to any sort of legislative vote.²⁶¹

5. Federalism

The organization of the U.S. government into multiple layers—federal, state, and local—can also give rise to structural biases. This overarching organization has complex and cross-cutting effects, and many people’s views on federalism vary depending on which parties currently hold power at the state and national levels.²⁶² But certain features of U.S. federalism seem to have more persistent biases, and there are reasons to believe that federalism on the whole benefits the contemporary Republican Party.

As is well known, federalism can at times lead to a “race to the bottom,” wherein state officials compete against each other to attract business by lowering taxes, limiting liability, or reducing regulation. In Justice Louis Brandeis’s words, interstate regulatory competition can be “one not of diligence but of laxity.”²⁶³ South Dakota, for example, became a center of the national credit card industry in the early 1980s by eliminating its usury cap.²⁶⁴ Year in and year out, state and local

²⁶¹ See Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 935 (2009) (explaining that there are “far more political jobs in the American administrative state than in other developed countries”). Congress has taken modest steps in recent years to lower the number of appointees requiring Senate confirmation. See, e.g., Presidential Appointment Efficiency and Streamlining Act of 2011, Pub. L. No. 112-166, 126 Stat. 1283 (2012) (exempting certain presidential appointments from Senate approval). Separate from these steps, any pro-Republican structural bias arising from the difficulty of the confirmation process is smaller today than it was a decade ago, on account of the elimination in 2013 of the filibuster for executive branch nominees. See William G. Dauster, *The Senate in Transition or How I Learned to Stop Worrying and Love the Nuclear Option*, 19 N.Y.U. J. LEGIS. & PUB. POL’Y 631, 645–48 (2016). Prior to this rule change, nominees could be blocked by the minority party in the Senate even when the other party controlled both the White House and the Senate.

²⁶² See Bulman-Pozen, *supra* note 32, at 1078–122 (arguing that partisanship shapes Americans’ identification with states and state challenges to federal policy); Posner & Sunstein, *supra* note 3, at 488 (discussing federalism flip-flops, in which people alternately “promote or deride federalism based on their views of the substantive political outcomes at stake”); Louis Michael Seidman, *Substitute Arguments in Constitutional Law*, 31 J.L. & POL. 237, 285 (2016) (“Even a casual observer of American constitutional culture knows that federalism provides fertile turf for hypocritical [arguments].”).

²⁶³ *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 559 (1933) (Brandeis, J., dissenting in part).

²⁶⁴ See Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093, 1139–40 (2019).

governments offer businesses tens of billions of dollars in special tax incentives to relocate to or remain within their jurisdiction.²⁶⁵

Beyond the race-to-the-bottom risks that are endemic to federalist systems, specific doctrines associated with U.S. federalism can create more specific forms of deregulatory bias. Consider the Supreme Court's decision in *National Federation of Independent Businesses v. Sebelius*²⁶⁶ (*NFIB*), which struck down as impermissibly coercive the Affordable Care Act's use of funding conditions to induce states to expand Medicaid.²⁶⁷ Roughly half of the states declined to expand Medicaid in the aftermath of the Court's ruling, denying health insurance to millions of Americans,²⁶⁸ and at this writing a dozen states still have not expanded Medicaid.²⁶⁹ The Court's anti-coercion logic could in theory apply to a Republican-sponsored law just as to a Democratic-sponsored law. But the absence of any plausible real-world examples of the former points toward a structural bias. Because Democrats are more reliant on cooperative federalism programs in carrying out their policy agendas and strengthening social welfare regimes, judge-made limits on how the federal government may spur states to partner in administering such regimes have a conservative slant.

Judicial doctrine on federal preemption of state law manifests a similar bias.²⁷⁰ The basic principle of preemption seems politically neutral: “[A]ny state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.”²⁷¹ As a practical matter, however, most preemption cases

²⁶⁵ See, e.g., Evan Mast, *Race to the Bottom? Local Tax Break Competition and Business Location*, 12 AM. ECON. J. APPLIED ECON. 288, 288 (2020) (“State and local governments in the United States spend approximately \$45 billion each year on tax incentives that aim to attract businesses or encourage the growth of existing businesses.”).

²⁶⁶ 567 U.S. 519 (2012).

²⁶⁷ *Id.* at 575–88. For an illuminating analysis of this portion of the Court’s ruling, see Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause after NFIB*, 101 GEO. L.J. 861 (2013).

²⁶⁸ See Samuel L. Dickman, David U. Himmelstein, Danny McCormick & Steffie Woolhandler, *Health and Financial Consequences of 24 States’ Decision to Opt Out of Medicaid Expansion*, 45 INT’L J. HEALTH SERVS. 133, 136–37 (2015) (describing post-ACA uninsured populations and estimating loss of insurance and excess deaths from state opt-outs).

²⁶⁹ See *Status of State Medicaid Expansion Decisions: Interactive Map*, KAISER FAM. FOUND. (Nov. 2, 2020), <https://kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map> [<https://perma.cc/P34X-B8HH>].

²⁷⁰ We focus here on federal-state preemption, but state preemption of municipal law can also be structurally biased in favor of conservative outcomes. See *supra* notes 41–43 and accompanying text.

²⁷¹ *Felder v. Casey*, 487 U.S. 131, 138 (1988) (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)).

involve “claims by business entities that rigorous regulation at the state level must give way to . . . less rigorous regulation at the national level,” “ranging from oil tanker safety rules in Washington and air pollution standards in California, to tort standards in Tennessee and restrictions on tobacco ads in Massachusetts.”²⁷² The reason for this is an asymmetry between regulation and deregulation. If federal regulations are more demanding than state regulations on the same topic, regulated parties will have to comply with the stricter federal rules; preemption does not enter the conversation. But if federal regulations are less demanding, preemption can serve to sweep aside stricter state alternatives. The especially “expansive” approach to preemption taken by the Rehnquist and Roberts Courts, accordingly, has had a deregulatory effect.²⁷³

More familiar is federalism’s troubled relationship with issues of race and civil rights. As discussed in Part II,²⁷⁴ American progressives have long been “deeply skeptical of federalism”²⁷⁵ on account of its historical use by defenders of slavery²⁷⁶ and, later, Jim Crow²⁷⁷ to promote white supremacy in the name of constitutional structure. The racialized character of constitutional federalism doctrine persists to

²⁷² Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 133–34 (2004) (footnotes omitted); see also Ernest A. Young, “The Ordinary Diet of the Law”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 342 (“Federal preemption is generally deregulatory—that is, preemption cases typically arise only where a state government has regulated more strictly than has the national government.”).

²⁷³ Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2127–28 (2019) (citing empirical research on the Rehnquist Court’s embrace of preemption and noting that “[t]he Roberts Court has cheerfully continued this trend with expansive preemption rulings and even attempts to neuter abstention doctrines developed in the 1970s”).

²⁷⁴ See *supra* notes 77–83 and accompanying text.

²⁷⁵ Heather K. Gerken, *A New Progressive Federalism*, 24 DEMOCRACY J., Spring 2012, <https://democracyjournal.org/magazine/24/a-new-progressive-federalism> [<https://perma.cc/LJ47-QCJL>] [hereinafter Gerken, *Progressive Federalism*]. Gerken has been a leading proponent of the view that such skepticism is no longer warranted or productive. See, e.g., Heather K. Gerken, *Distinguished Scholar in Residence Lecture: A User’s Guide to Progressive Federalism*, 45 HOFSTRA L. REV. 1087 (2017).

²⁷⁶ See, e.g., *supra* note 77 (discussing the nullification crisis); PAMELA BRANDWEIN, RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH 36 (1999) (noting that an antebellum “consensus recognized that ‘state sovereignty’ protected Southern slavery from federal reach”).

²⁷⁷ See, e.g., MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 184 (2004) (describing Southern politicians’ appeals to state autonomy in resisting civil rights reforms); Harry N. Scheiber, *Redesigning the Architecture of Federalism—An American Tradition: Modern Devolution Policies in Perspective*, 14 YALE L. & POL’Y REV. 227, 234 (1996) (explaining that “for nearly another century” after slavery’s abolition, federalism “served as a reliable fortress for the perpetuation of systematic racial segregation and discrimination”).

some extent into the present. The Roberts Court in *Shelby County v. Holder*²⁷⁸ struck down the Voting Rights Act's coverage formula as inconsistent with "the fundamental principle of equal sovereignty" among states.²⁷⁹ This ruling "nullified the most important provision ever passed to combat racial vote denial (and racial vote dilution)"²⁸⁰ and predictably led to new restrictions on the franchise and reduced minority political participation in many of the same jurisdictions that once invoked states' rights to defend American apartheid.²⁸¹

These examples do not imply that federalism always leads to deregulatory spirals or diminishment of civil rights. On the contrary, large progressive states may set pro-regulatory baselines that end up being followed by smaller states²⁸² or federal regulators²⁸³ when Congress and the courts permit. Even when no such race to the top occurs, stringent state laws can have spillover effects across jurisdictional lines.²⁸⁴ So, too, can federalism doctrines that allocate valuable entitlements to the states have progressive distributional conse-

²⁷⁸ 570 U.S. 529 (2013).

²⁷⁹ *Id.* at 544 (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)); Ilya Somin, *Federalism and the Roberts Court*, 46 *PUBLIUS* 441, 447 (2016) (observing that "*NFIB* and *Shelby County* were easily the most consequential Supreme Court federalism decisions of the post-New Deal era").

²⁸⁰ Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 *SUP. CT. REV.* 111, 168.

²⁸¹ See Desmond Ang, *Do 40-Year-Old Facts Still Matter? Long-Run Effects of Federal Oversight Under the Voting Rights Act*, 11 *AM. ECON. J.: APPLIED ECON.* 1, 35 (2019) (finding that after *Shelby County*, "while white turnout remained unchanged, minority participation dropped by 2.1 percentage points" in previously covered jurisdictions); *New Voting Restrictions in America*, BRENNAN CTR. FOR JUST. (Nov. 19, 2019), <https://brennancenter.org/our-work/research-reports/new-voting-restrictions-america> [<https://perma.cc/BQV3-LSFP>] (collecting "hundreds of harsh measures making it harder to vote" enacted by states in recent years).

²⁸² See DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY* 6 (1995) (describing a "California effect," whereby "powerful and wealthy 'green' political jurisdictions [promote] a regulatory 'race to the top' among their trading partners"); see also Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 *N.Y.U. L. REV.* 1210 (1992) (challenging the validity of race-to-the-bottom arguments in the environmental context).

²⁸³ In perhaps the most famous modern example of this dynamic, federal law specifically permits California to set stricter motor-vehicle emissions standards, and both other states and the EPA have at times followed its lead. See VOGEL, *supra* note 282, at 259; Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 *YALE L.J.* 1256, 1277 (2009).

²⁸⁴ These spillovers interact with dormant commerce clause doctrine, under which, in the absence of congressional consent, any state "statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989). The ability of states to regulate in ways that may have spillover effects thus turns in part on if, when, and how courts deploy this extraterritoriality doctrine.

quences under certain conditions.²⁸⁵ And many state and local governments provide protections for civil rights well above the floors established by the federal Constitution and federal statutes.²⁸⁶

Yet even if “progressive federalism” is not an oxymoron and indeed was particularly vibrant during the Trump Administration, it remains fair to conclude that U.S. federalism is biased *on net* against the contemporary Democratic agenda, especially in the areas of economic regulation and social welfare policy. Interjurisdictional competition and a host of structural constitutional law doctrines—exemplified by preemption, anti-coercion, and equal sovereignty—have all significantly set back this agenda. Political scientists have explained, more broadly, how “federalism’s many venues generally disadvantage groups with comprehensive, progressive policy aims.”²⁸⁷ And a large body of work by political economists, referenced above, demonstrates that greater decentralization tends to lead to smaller welfare states and lower public spending.²⁸⁸ Because federalism can sometimes facilitate progressive electoral gains and policy outcomes, understanding the structural biases associated with it requires close examination of the details of particular arrangements.²⁸⁹ But it is equally important not to miss the forest for the trees. Relative to more centralized systems, the constitutional design of U.S. federalism has helped conservatives and harmed progressives in ways that modern developments have only partly unraveled.

6. *Geography, Demography, and the Electoral System*

The intersection of constitutional design and political geography can give rise to numerous structural biases. The prevailing political geography of the United States—in which Democrats predominate in urban areas and inner-ring suburbs while Republicans predominate in exurban and rural areas—tilts a host of longstanding structural

²⁸⁵ See Daniel J. Hemel, *Federalism as a Safeguard of Progressive Taxation*, 93 N.Y.U. L. REV. 1 (2018) (making this argument with regard to taxation).

²⁸⁶ See, e.g., Gerken, *Progressive Federalism*, *supra* note 275 (outlining ways in which federalism can promote racial equality and minority rights). Liberals have long recognized the rights-protecting potential of state constitutional law. See, e.g., William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

²⁸⁷ Lisa L. Miller, *Federalism Is Unlikely to Save Progressive Politics*, LAW & POL. ECON. (July 11, 2019), <https://lpeblog.org/2019/07/11/federalism-is-unlikely-to-save-progressive-politics> [<https://perma.cc/XME3-YXJM>].

²⁸⁸ See *supra* note 64 and accompanying text.

²⁸⁹ See, e.g., Scott L. Greer, *Introduction to FEDERALISM AND SOCIAL POLICY: PATTERNS OF REDISTRIBUTION IN 11 DEMOCRACIES* 1, 1 (Scott L. Greer & Heather Elliott eds., 2019) (arguing that the “relationship between social democracy and federalism is all in the rules”).

arrangements in Republicans' favor.²⁹⁰ We will be especially brief in reviewing examples here, both because Part II already discussed this intersection at length and because the examples are especially familiar.²⁹¹

Most obviously, constitutional rules that treat all states on equal terms regardless of population will be biased toward parties that are strongest in small states relative to rules that comply with some version of the one-person-one-vote principle. Today, the most sparsely populated states tend to have Republican majorities, and Republicans are far more likely than Democrats to be in the majority of more than half the states even if they are in the minority nationwide.²⁹² The structure of the Senate rewards this geographic distribution by allocating to each state two senators and to each senator one vote.²⁹³ Because of the concentration of Democrats in large and medium-sized states, Republicans can control the Senate even when Democrats win a majority of all Senate votes cast in a given cycle.²⁹⁴ The Electoral

²⁹⁰ See *supra* notes 118–33 and accompanying text.

²⁹¹ Our examples of biases in election law are illustrative rather than exhaustive. One significant swath that we bracket for present purposes is campaign finance law, which, “like other electoral laws, can obviously be a vehicle for . . . partisan advantage-seeking.” Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 130 (2004). We assume that certain rules governing campaign finance are biased toward one party or the other, and some empirical literature suggests as much. See, e.g., Nour Abdul-Razzak, Carlo Prato & Stephane Wolton, *After Citizens United: How Outside Spending Shapes American Democracy*, 67 ELECTORAL STUD. 1, 18–19 (2020) (finding, based on an analysis of state legislative races, that “*Citizens United* yielded an increase of approximately 11.5% in Republican seat shares”); Andrew B. Hall, *Systemic Effects of Campaign Spending: Evidence from Corporate Contribution Bans in US State Legislatures*, 4 POL. SCI. RSCH. & METHODS 343, 348 (2016) (showing a correlation between corporate campaign contribution bans and Democratic state legislative seats). But more generally, the empirical evidence on the relationship between campaign fundraising and electoral outcomes is mixed, see Yasmin Dawood, *Campaign Finance and American Democracy*, 18 ANN. REV. POL. SCI. 329, 340–42 (2015), and as far as we are aware, scholars have not demonstrated systematic partisan bias in the contemporary U.S. campaign finance regime relative to plausible alternative modes of financing campaigns in a two-party context.

²⁹² See *supra* notes 118–22 and accompanying text.

²⁹³ U.S. CONST. art. I, § 3, cl. 1.

²⁹⁴ See, e.g., John D. Griffin, *Senate Apportionment as a Source of Political Inequality*, 31 LEGIS. STUD. Q. 405, 420 (2006) (“[T]he residents of states with less-than-average voting weight [in the Senate] also tend to be more liberal and to identify with and vote for the candidates of the Democratic Party.”); Ben Highton, *How the Senate Is Biased Toward Republicans*, WASH. POST (Jan. 31, 2014, 2:44 PM), <https://washingtonpost.com/news/monkey-cage/wp/2014/01/31/how-the-senate-is-biased-toward-republicans> [<https://perma.cc/V77L-R8D5>] (documenting bias against Democrats in the Senate); Colin McAuliffe, *The Senate Is an Irredeemable Institution*, DATA FOR PROGRESS (Dec. 17, 2019), <https://dataforprogress.org/memos/the-senate-is-an-irredeemable-institution> [<https://perma.cc/6T5P-623R>] (documenting biases against Democrats and nonwhite Americans in the Senate).

College is not as biased as the Senate, given that it also takes into account the size of each state's House delegation, which is apportioned based on population.²⁹⁵ But by including each state's two senators in its calculation of electors, the Electoral College puts a thumb on the scale in favor of small states—which, again, in the contemporary United States are disproportionately conservative.²⁹⁶

While the Electoral College and the Senate are perennially relevant, more obscure features of our constitutional order are biased in related ways. Ratifying a constitutional amendment proposed by Congress requires the support of three-fourths of the states.²⁹⁷ The Twelfth Amendment provides that if no candidate wins an Electoral College majority, the election is settled in the House, with each state's House delegation casting one vote.²⁹⁸ Both of these provisions treat large states and small states on equal terms and, as a result, generate a conceptually similar (if less politically consequential) bias against contemporary Democrats.

The process for electing House members is also biased against contemporary Democrats, though to a lesser degree. As explained in Part II, the combination of single-member districts and the concentration of Democratic voters in urban areas means that Republicans consistently win an outsized percentage of House seats relative to the percentage of votes received.²⁹⁹ So long as House elections use single-member districts and partisans are geographically distributed as they are, these elections will continue to be biased toward the Republican Party relative to a system of proportional representation.³⁰⁰

²⁹⁵ See U.S. CONST. art. II, § 1, cl. 2 (allocating to each state “a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress”).

²⁹⁶ See, e.g., Michael Geruso, Dean Spears & Ishaana Talesara, *Inversions in US Presidential Elections: 1836–2016*, 14 AM. ECON. J.: APPLIED ECON. 327, 329–30 (2022) (showing that the probability of an “inversion,” or an Electoral College victory for a national-popular-vote loser, has been highly asymmetric across the parties in the past thirty to sixty years: “conditional on an inversion occurring, the ex ante probability that it would have been won by a Republican ranges from 62 percent to 93 percent across models we analyze (in contrast to the ex post realization of 100 percent)”; see also Ian Millhiser, *The Astounding Advantage the Electoral College Gives to Republicans*, in *One Chart*, VOX (Sept. 17, 2019, 7:50 AM), <https://www.vox.com/policy-and-politics/2019/9/17/20868790/republicans-lose-popular-vote-win-electoral-college> [<https://perma.cc/LZ8K-9J73>].

²⁹⁷ U.S. CONST. art. V.

²⁹⁸ *Id.* amend. XII, cl. 3.

²⁹⁹ See *supra* notes 123–28 and accompanying text.

³⁰⁰ In part to counteract this bias, congressional Democrats have recently introduced legislation that would eliminate single-member districts for House seats. See, e.g., Fair Representation Act, H.R. 3863, 117th Cong. §§ 201–202 (2021) (requiring the use of multimember districts in states with six or more House members and requiring smaller states to elect all representatives on an at-large basis).

The intersection of demographic voting patterns and ballot access rules also gives rise to structural bias. As explained in Part II, Democrats today dominate among young and Black voters, while older and white voters are core to the Republican base.³⁰¹ These electoral features tee up attempts to grow or shrink the electorate along demographic lines for partisan gain. Thus, Democrats rightly criticize voter ID laws as being anti-Democratic as well as anti-democratic, while Republicans plausibly fear that, for the foreseeable future, felon reenfranchisement and automatic voter registration could harm their electoral prospects relative to current voting rules.³⁰²

Finally, recent debates over ranked-choice voting (RCV) show how structural biases can manifest differently depending on contingent facts on the ground. Under prevailing election rules in nearly every U.S. jurisdiction, voters select one candidate and the winner is the candidate who receives the most votes. Under RCV, voters rank candidates from favorite to least favorite, the least popular candidates are sequentially eliminated, and votes for candidates who have been eliminated are reallocated based on voters' preference ordering.³⁰³ RCV proponents argue that, among other benefits, it prevents "spoiling," in which "a minor-party candidate siphons enough votes away from a major-party candidate to throw the race to the other major-party candidate."³⁰⁴ RCV could help Democrats in some races by preventing spoiling by Green Party or other left-wing candidates. In other races, where the would-be spoiler is instead a Libertarian or other right-wing candidate, RCV could help Republicans. It is not clear that either sort of race predominates today. But in the pre-New Deal era, spoilers were significantly more common on the political left,³⁰⁵ which meant that the prevailing first-past-the-post voting rules were structurally biased against Democrats relative to RCV. Partly because of this very phenomenon, the Democratic Party moved left to

³⁰¹ See *supra* notes 134–40 and accompanying text.

³⁰² Cf. Pozen, *supra* note 72, at 953 (noting that "at this moment in political time most proposals to make it easier to vote would advance not only 'small-d' democratic values but also 'big-D' Democratic interests").

³⁰³ See Richard H. Pildes & G. Michael Parsons, *The Legality of Ranked-Choice Voting*, 109 CALIF. L. REV. 1773, 1775 (2021).

³⁰⁴ *Id.* at 1781; see also Rob Richie, *Ranked Choice Voting May Affect Partisan Outcomes, but It Always Helps Voters*, FAIRVOTE (Nov. 9, 2018), https://fairvote.org/ranked_choice_voting_may_affect_partisan_outcomes_but_it_always_helps_voters [<https://perma.cc/5364-SQD3>] (providing examples of spoilers in U.S. Senate races from 1998 to 2016).

³⁰⁵ See Shigeo Hirano & James M. Snyder, Jr., *The Decline of Third-Party Voting in the United States*, 69 J. POL. 1, 2 (2007).

coopt support for such spoilers³⁰⁶—an excellent example of how structural biases can not only help or harm parties in specific periods but also dynamically reshape party platforms and coalitions over time.

7. *Constitutional Amendment Rules*

The U.S. Constitution is “unusually, and probably excessively, difficult to amend.”³⁰⁷ The rarity of amendment makes it hard to directly observe any bias associated with this feature: Neither party has made formal constitutional change central to its agenda in recent decades, and partisan-identified amendment proposals have been largely symbolic in nature.³⁰⁸ But at a minimum, even if the parties are not divided in their general approach to revising the constitutional text, the extraordinary difficulty of amending the U.S. Constitution serves to reinforce those structural biases that are created by the Constitution and that could be remedied only through amendment. To the extent that such biases favor one political party overall, Article V’s double-supermajoritarian process favors that party by functionally entrenching them. Given the advantages afforded to contemporary Republicans by the Senate, the Electoral College, and bicameralism, among other hard-wired features of the Constitution, the analysis here suggests that Article V can consequently be seen as biased toward Republicans as well.

B. Unbiased Arrangements?

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

³⁰⁶ See *id.* at 7–12. “The New Deal Democrats not only co-opted the progressive agenda,” Hirano and Snyder contend, but also the Socialist Party’s agenda as well. *Id.* at 7 n.33.

³⁰⁷ Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 237, 265 (Sanford Levinson ed., 1995); see *id.* at 261 tbl.11 (finding that the U.S. Constitution has the world’s second most difficult amendment process behind only the now-defunct Yugoslav Constitution).

³⁰⁸ See, e.g., H.R.J. Res. 65, 116th Cong. (2019) (Republican-sponsored amendment to allow Congress to ban desecration of the American flag); H.R.J. Res. 90, 112th Cong. (2011) (Democratic-sponsored amendment in response to the Supreme Court’s *Citizens United* decision).

First, a structural arrangement will not be structurally biased for or against one of the parties when it concerns an issue on which the parties are each internally riven or otherwise not straightforwardly polarized on ideological, geographic, or demographic grounds. Part I offered, in stylized form, the example of the special legislative rules governing trade agreements.³⁰⁹ Consider also the September 2001 Authorization for the Use of Military Force (AUMF).³¹⁰ Over the past two decades, presidents have broadly read this AUMF to justify use of military force in the Middle East and North Africa, including against groups that did not exist when the AUMF was passed.³¹¹ Relative to a more conflict-specific authorization model, such an expansive and unchecked arrangement is biased in favor of presidential power and military interventionism. But it is not biased for or against either Democrats or Republicans, given that each partisan camp contains substantial hawkish and dovish elements. Just as presidents from both parties have invoked the AUMF, skepticism of the AUMF has been bipartisan as well, with legislators from both parties supporting efforts to repeal³¹² or replace it.³¹³ The 2001 AUMF shows how when an issue crosscuts existing party coalitions, structural arrangements bearing on the issue will be unlikely to generate persistent partisan biases even if the arrangements do generate discernible policy biases.

Second, institutional arrangements typically will not generate structural biases with respect to the parties when the arrangements do not directly concern either policymaking or elections. As discussed in Part I, the U.S. Constitution's lack of a no-confidence mechanism may create short-term winners and losers, but it does not seem to have a

³⁰⁹ See *supra* note 37 and accompanying text.

³¹⁰ Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note) (authorizing the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons”).

³¹¹ See MATTHEW WEED, CONG. RSCH. SERV., PRESIDENTIAL REFERENCES TO THE 2001 AUTHORIZATION FOR USE OF MILITARY FORCE IN PUBLICLY AVAILABLE EXECUTIVE ACTIONS AND REPORTS TO CONGRESS (2018).

³¹² See, e.g., Andrew Desiderio, *House Committee Approves Repeal of 2001 Military Authorization*, DAILY BEAST (June 29, 2017, 4:55 PM), <https://thedailybeast.com/house-committee-approves-repeal-of-2001-military-authorization> [<https://perma.cc/W57T-H2JU>] (noting the near-unanimous vote of the House Appropriations Committee to repeal the AUMF in 2017).

³¹³ See, e.g., Press Release, Sen. Tim Kaine, Senators Propose Legislation to Update Authorities Used to Fight Terror Abroad (Apr. 16, 2018), <https://kaine.senate.gov/press-releases/senators-propose-legislation-to-update-authorities-used-to-fight-terror-abroad> [<https://perma.cc/XB5N-NRLU>] (noting bipartisan sponsorship of legislation to update the AUMF in 2018).

more persistent partisan valence.³¹⁴ Issues of executive privilege vis-à-vis Congress provide another example. The executive branch's ability to withhold information from Congress can benefit either party in particular conflicts, depending on who controls which institutions. Presidents of both parties want to conceal some matters,³¹⁵ and their political opponents want to expose damaging details. It is hard to see, however, why the degree of constitutional protection for such executive branch secret-keeping would have a systematic skew toward either liberal or conservative policy outcomes or toward either Democratic or Republican electoral victories.

Third, lack of sufficient information can cloud whether a bias exists and in which direction it points. Consider the controversial practice of federal district court judges issuing nationwide injunctions.³¹⁶ Nationwide injunctions can stymie policy objectives of both Democratic and Republican presidents, as is evident from high-profile injunctions issued during the Obama and Trump Administrations.³¹⁷ A self-described bipartisan pair of legal scholars has characterized nationwide injunctions as “equal-opportunity” threats to the parties.³¹⁸ This seems to be the case at present. But one could imagine more durable partisan patterns emerging in the years ahead if the trend toward greater use of this tool continues or accelerates. This would be especially true if judicial doctrine were to limit nationwide injunctions to certain types of plaintiffs or cases that themselves have a partisan cast. Even in the absence of such a doctrinal development, a partisan split might emerge simply as a result of growing experience with the practice and better evidence of its effects on Democratic and Republican policy agendas. At least for now, though, nationwide injunctions seem more or less neutral as between the two parties, and

³¹⁴ See *supra* notes 48–50 and accompanying text.

³¹⁵ See Mark J. Rozell, *Executive Privilege Revived? Secrecy and Conflict During the Bush Presidency*, 52 DUKE L.J. 403, 404 (2002) (explaining that “every president since George Washington has exercised some form of what is today called executive privilege”); Kimberly Breedon & A. Christopher Bryant, *Executive Privilege in a Hyper-Partisan Era*, 64 WAYNE L. REV. 63, 64 (2018) (recounting instances from the Nixon to Obama Administrations in which presidents have invoked executive privilege to justify withholding information from Congress).

³¹⁶ See generally Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction Article*, 131 HARV. L. REV. 417 (2017); Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. 920 (2020).

³¹⁷ See Bray, *supra* note 316, at 458–59; Sohoni, *supra* note 316, at 922–23; Nicholas Bagley & Samuel Bray, *Judges Shouldn't Have the Power to Halt Laws Nationwide*, ATLANTIC (Oct. 31, 2018), <https://theatlantic.com/ideas/archive/2018/10/end-nationwide-injunctions/574471> [<https://perma.cc/7BMA-9XTG>].

³¹⁸ Bagley & Bray, *supra* note 317.

the parties' positions on them can be expected to alternate based on which controls the executive branch.³¹⁹

IV

STRUCTURAL BIASES AND CONSTITUTIONAL ANALYSIS

A fundamental force shaping American constitutional politics today, we have argued, is the proliferation and intensification of structural biases against one party or the other throughout all three branches of government. Many seemingly disparate debates in public law come into clearer view—and reveal themselves to be variations on the *same* debate—once one grasps this point. In this final Part, we pan out to consider some broader implications of our analysis for constitutional conflict, constitutional reform, and constitutional scholarship, both here and abroad.

A. Aggregate and Cumulative Structural Biases—and Pathways for Debiasing

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

The conclusion is debatable, but we read the evidence we have assembled to suggest that the Republican Party currently enjoys such an aggregate edge. As Parts II and III explained, Democrats are at a structural disadvantage in winning control of the White House (owing to the Electoral College), the Senate (owing to its apportionment formula), and the House (owing to single-member districts, among other factors).³²⁰ When they do manage to control these institutions, Democrats face an extraordinary number of veto points across the legislative, executive, and judicial branches—more than exist in any other industrialized democracy—along with a suite of anti-secrecy and

³¹⁹ During the Trump Administration, proposed bills to prevent district courts from issuing nationwide injunctions were sponsored exclusively by Republicans. See Injunctive Authority Clarification Act, H.R. 77, 116th Cong. (2019); Injunctive Authority Clarification Act, H.R. 6730, 115th Cong. (2018).

³²⁰ See *supra* notes 69–71, 121–25 and accompanying text; *supra* Section III.A.6.

anti-earmark rules that inhibit dealmaking and impede their relatively ambitious policy agendas.³²¹

Moreover, many of these biases reinforce one another. Consider a stylized account of the interlinkages among some of the best-known structural biases we have discussed. The biases in the Electoral College and Senate apportionment give Republicans an edge in appointing and confirming Supreme Court Justices;³²² which leads to a more conservative Court; which is more likely to uphold Republican state legislatures' redistricting plans and voting restrictions while striking down or narrowing federal voting rights and campaign finance laws;³²³ which provides Republicans with further electoral advantages beyond those already provided by the Electoral College and Senate; and the cycle continues. While Part III presented each structural bias individually for ease of exposition, the interactions across such arrangements can help to shape, stabilize, and strengthen their asymmetric effects. Put simply, bias often builds upon bias.

A powerful underlying logic, then, helps explain why influential voices within the Democratic coalition have increasingly turned against longstanding features of the constitutional order and begun to emphasize the need for "structural" reform.³²⁴ If there is anything surprising in this turn, it is that it took so long to come about.³²⁵

A party disadvantaged by a particular structural bias or set of biases has two basic options. The party can either seek (1) to undo the bias through legal revision, reinterpretation, or both; or (2) to adapt to the bias by altering its agenda, its coalition, or both. The exceptional procedural difficulty of amending the U.S. Constitution through

³²¹ See *supra* Sections III.A.1–3.

³²² See Zoffer & Grewal, *supra* note 122, at 454–58.

³²³ See, e.g., *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021) (narrowly interpreting section 2 of the Voting Rights Act); *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018) (upholding a state law allowing individuals to be removed from the rolls for failing to vote); *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013) (striking down the preclearance provision of the Voting Rights Act); *Citizens United v. FEC*, 558 U.S. 310 (2010) (striking down a federal limit on corporations' electioneering expenditures); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (upholding a state voter identification law); see also TUSHNET, *supra* note 242, at 110 (suggesting that the first principle of the Roberts Court's constitutional jurisprudence is that "[s]tatutes, policies, and practices . . . that strengthen the Republican Party and weaken the Democratic Party are constitutionally permissible").

³²⁴ See *supra* notes 96–98, 115 and accompanying text.

³²⁵ Although many of the specific critiques and reform proposals are different, this Democratic turn marks a return to the Progressive Era in its willingness to rethink constitutional structures that limit state capacity and popular self-rule. See William E. Forbath, *The Will of the People? Pollsters, Elites, and Other Difficulties*, 78 GEO. WASH. L. REV. 1191, 1197 & n.32 (2010) (collecting sources on how "Progressives set out to remake the constitutional order, root and branch").

Article V,³²⁶ together with cultural factors that make many Americans hesitant to pursue revisions to the constitutional text,³²⁷ means that option (1) will not be a realistic near-term possibility for certain arrangements specified in the text, such as the Senate's apportionment formula. For all but the most rigidly entrenched arrangements, however, Democratic Party leaders have already started to explore reforms that would reduce the Party's disadvantage—both on their own and through their dynamic feedback effects on associated biases—such as by eliminating the legislative filibuster or establishing an interstate compact that would award the presidency to the candidate who receives the most votes nationwide.³²⁸

We have no special insight into whether Democrats will succeed in these institutional reform efforts. Many face steep odds. Yet even if these efforts do not succeed, or succeed only in part, option (2) remains available. Structural biases for or against the political parties, as we have shown, are contingent on what the parties look like, both in terms of their policy programs and their constituencies. And parties are not constants. The history of parties in the United States has been one of periodic realignments, in which various social groups decisively switch allegiance from one party to the other.³²⁹

³²⁶ See *supra* Section III.A.7.

³²⁷ See Vicki C. Jackson, *The (Myth of Un)amendability of the US Constitution and the Democratic Component of Constitutionalism*, 13 INT'L J. CONST. L. 575, 577–90 (2015) (arguing that the formal difficulty of amending the U.S. Constitution is often overstated and that cultural and ideological variables explain much of the United States' comparatively low amendment rate).

³²⁸ See Pozen, *supra* note 59, at 338–45. Another variant of option (1) is to create a countervailing institution with the goal of elevating the values or constituencies that are marginalized by an existing arrangement. Within the executive branch, what Margo Schlanger has called “Offices of Goodness” can be understood in this light. See generally Margo Schlanger, *Offices of Goodness: Influence Without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53 (2014) (providing an extended case study of the Department of Homeland Security's Office for Civil Rights and Civil Liberties). More ambitiously, Roberto Unger has proposed that countries create a “reconstructive branch,” a “branch of government responsible for localized intervention in organizations or practices corrupted by entrenched forms of social exclusion or subjugation.” ROBERTO MANGABEIRA UNGER, *DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE* 269 (1998). Although these sorts of reforms have evident debiasing potential, any new countervailing institutions established through the ordinary political process may lack the power to offset the most significant structural biases, see, e.g., Schlanger, *supra*, at 112 (“Offices of Goodness are inherently under siege; efforts to push them aside and render them irrelevant are part and parcel of their agency's mission focus.”), and may even end up reinforcing such biases unless designed and managed with care, see generally, e.g., PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT (Daniel Carpenter & David A. Moss eds., 2014) (discussing theories of regulatory capture, wherein government agencies come to serve the interests of the actors they were designed to regulate).

³²⁹ See generally JAMES L. SUNDQUIST, *DYNAMICS OF THE PARTY SYSTEM: ALIGNMENT AND REALIGNMENT OF POLITICAL PARTIES IN THE UNITED STATES* (1983).

When today's party dynamics change, the salience and severity of today's structural biases may recede, and new biases may emerge, even if institutional structures remain constant. Changes along any of the axes of polarization that we discuss could mitigate or even reverse existing biases. If, for instance, Democrats were to develop a significant base of rural support,³³⁰ the Senate and the Electoral College would become less tilted in Republicans' favor. The Electoral College's current bias is especially unstable: The "bluing" of Texas alone has the potential to negate it.³³¹ Likewise, if Republicans were to make headway with voters of color, rules making it easier or harder to cast a ballot would have less of a partisan valence. If the Republican Party platform were to call for more active government intervention in economic affairs, a trend that some commentators believe is already underway,³³² the myriad veto points in the policy process would no longer differentially disadvantage Democratic agendas to the same degree.

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

In short, because structural biases are co-produced by institutions and politics, changes to either could unsettle the biases. Most critical commentary in this area has focused on the institutional side of the ledger, and the ways in which certain constitutional features distribute power unevenly among various social blocs. But a more dialectical

³³⁰ For one of numerous emerging plans to do so, see JANE KLEEB, *HARVEST THE VOTE: HOW DEMOCRATS CAN WIN AGAIN IN RURAL AMERICA* (2020).

³³¹ Cf. Jonathan Bernstein, *Republicans Can't Count on Electoral College Edge in 2024*, BLOOMBERG (Nov. 22, 2020, 8:00 AM), <https://www.bloomberg.com/opinion/articles/2020-11-22/republican-electoral-college-edge-isn-t-built-in-to-the-u-s-voting-system> [<https://perma.cc/M625-BPZ6>] (outlining multiple scenarios that could yield "an electoral college with smaller biases that fluctuate between (slightly) helping Democrats and Republicans" as soon as 2024).

³³² See, e.g., Stephanie Slade, *Republicans Are Ripping Out "the Very Heart and Soul" of Their Party*, N.Y. TIMES (Aug. 25, 2020), <https://nytimes.com/2020/08/25/opinion/republicans-libertarians-economics.html> [<https://perma.cc/GJZ7-BB4V>] (contending that the "Republican Party seems to become more comfortable with top-down economic interventionism by the day").

understanding of structural bias casts these maldistributions in a somewhat different light. Descriptively speaking, if any given feature becomes biased against a political party, the reason lies as much with the party—and its ideological, geographic, and demographic composition—as with the Constitution.

B. *Constitutional Polarization and Contestation*

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

First, the account suggests a key mechanism by which partisan polarization translates into polarization over constitutional matters. Even though partisan polarization is a well-known and much-studied phenomenon, its constitutional analog remains a relatively obscure subject. The constitutional theory literature furnishes contradictory hypotheses as to whether constitutional polarization ought to be more extreme, less extreme, or essentially coterminous with partisan polarization.³³³ The empirical literature on this relationship is thin.³³⁴ Our account explains why it is rational for highly polarized, closely divided parties to develop divergent views on a growing list of constitutional arrangements: because under such conditions, more and more of these arrangements will have become more and more tilted against one party and in favor of the other. The concept of structural bias supplies the link between “low” partisan politicking and “high” constitutional contestation.³³⁵ If Americans increasingly have come to see the Constitution less “as a symbol of unity and common purpose” than as a source of “partisan strife,”³³⁶ this is in no small part because the

³³³ See David E. Pozen, Eric L. Talley & Julian Nyarko, *A Computational Analysis of Constitutional Polarization*, 105 CORNELL L. REV. 1, 8–9 (2019) (outlining the theoretical basis for these alternative hypotheses).

³³⁴ See *id.* at 12 (noting that “the nature, degree, and determinants of constitutional polarization [and] the relationship of constitutional polarization to nonconstitutional polarization” remain “untested in mainstream constitutional law scholarship” (punctuation omitted)).

³³⁵ Cf. Jack M. Balkin & Sanford V. Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1062 (2001) (distinguishing between “low politics,” involving struggles over who will hold power, and “high politics,” involving struggles over “larger political principles and ideological goals”).

³³⁶ David E. Pozen, Eric L. Talley & Julian Nyarko, *Republicans and Democrats Are Describing Two Different Constitutions*, ATLANTIC (June 2, 2019), <https://theatlantic.com/>

Constitution increasingly *invites* partisan strife through institutions that systematically undermine the electoral and policy goals of one or the other major party.

Second, and relatedly, our account suggests that partisan critiques of a constitutional order are likely to be lagging rather than leading indicators of polarization. Among other functions, structural constitutional arrangements serve as “‘focal point[s]’ for social coordination.”³³⁷ Political insiders will typically have strong incentives to leave such coordination devices intact. Only once a party has been persistently thwarted in achieving its goals will it be likely to turn against a structural arrangement in any concerted fashion. Consistent with this claim, the contemporary Democratic turn against the filibuster followed directly from the obstructionism of Senate Republicans during the Obama Administration,³³⁸ while contemporary Republican antipathy to *Chevron* grew out of the ways in which the Obama Administration used agency initiatives to accomplish progressive policy ends.³³⁹ Growing polarization about policy has been a feature of U.S. politics for decades, but it takes time for that polarization to catalyze structural constitutional conflict.

Third, if it is correct that structural constitutional biases motivate disadvantaged political actors to challenge the relevant arrangements, then cataloging the structural biases in any given system—as Part III does for the United States—may not only illuminate its current constitutional politics but also help forecast future constitutional conflicts. Some of the arrangements we have discussed are already the subject of legal and political contestation. But other structurally biased arrangements, from bicameralism to single-member legislative districting to various veto points in the administrative process, have not yet elicited any significant political opposition. A number of factors

ideas/archive/2019/06/democrats-and-republicans-have-different-constitutions/590005 [https://perma.cc/MXP8-8BES] (internal quotation marks omitted).

³³⁷ Akhil Reed Amar, *American Constitutionalism—Written, Unwritten, and Living*, 126 HARV. L. REV. F. 195, 197 (2013). For prominent accounts of constitutions as coordination devices, see RUSSELL HARDIN, *LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY* 16, 26–28, 87–88 (1999); RICHARD H. McADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* 71–76 (2015); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 910–19 (1996).

³³⁸ See Pozen, *supra* note 21, at 39–47; Brownstein, *supra* note 109; cf. Josh Chafetz, *Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past*, 131 HARV. L. REV. 96, 111–19 (2017) (tracing earlier cycles of rising legislative obstructionism leading to institutional reform). Over two-thirds of the 2020 Democratic presidential candidates either supported ending the legislative filibuster or expressed openness to the idea. See Kevin Uhrmacher, Kevin Schaul & Jeff Stein, *Where 2020 Democrats Stand on Democratic Changes*, WASH. POST (Apr. 8, 2020), <https://washingtonpost.com/graphics/politics/policy-2020/voting-changes> [https://perma.cc/HW2Z-RNTJ].

³³⁹ See Elinson & Gould, *supra* note 113 (manuscript at 45–52).

may explain why such arrangements go unchallenged. Disadvantaged actors may conclude that the benefits from reform are not worth the cost of its pursuit, adjusted for the (potentially very low) probability of success. Party leaders might be unable to rein in members who oppose reform for idiosyncratic philosophical or electoral reasons.³⁴⁰ In some instances, prevailing legal or political ideologies may make it difficult for partisans to imagine alternatives to institutions that are biased against them, or even to recognize that the bias exists.³⁴¹ All that said, the more biased any given constitutional arrangement becomes, the more rational it becomes for negatively affected parties to fight back. Part III's conceptual map of contemporary biases, accordingly, might also be seen as a kind of heatmap—both to existing sites of structural struggle and to possible constitutional conflicts in waiting.

Fourth, our account suggests that conflict over structural bias holds promise as well as peril for a mature democracy. The downside risks are straightforward and significant. Political fights over structural constitutional arrangements open the door to escalating forms of constitutional hardball, countermajoritarian practices, and institutional instability that together make effective governance increasingly difficult if not impossible.³⁴² When structural biases become so severe that they cause party leaders from one side or the other to despair of advancing their agenda through ordinary legal and political channels—when these elites no longer “believe they are better off within the current constitutional bargain than in taking a chance on, and expending resources in, negotiating a new one”³⁴³—they can undermine the functioning of a constitutional order writ large. In extremis, perceptions of structural bias can lead to political revolt and constitutional breakdown.

³⁴⁰ See, e.g., EVANS, *supra* note 193, at 223 (noting that majority party leaders in the U.S. Congress “lack powerful sanctions for enforcing party discipline”). Such intraparty divisions have impeded Democratic efforts to eliminate or modify the legislative filibuster during the current Congress. See, e.g., Jason Lemon, *Schumer Calls Out Manchin, Sinema over Filibuster, Voting Rights: ‘Get This Done,’* NEWSWEEK (July 22, 2021, 12:52 PM), <https://www.newsweek.com/schumer-calls-out-manchin-sinema-over-filibuster-voting-rights-get-this-done-1612278> [<https://perma.cc/Q3FR-93ZU>].

³⁴¹ Cf. Bagley, *supra* note 59, at 369–400 (suggesting that tropes of legitimacy and accountability have prevented the political left from turning against administrative procedure, despite its systematically anti-progressive effects).

³⁴² On the risks posed by such fights themselves, separate from the issues being fought over, see, for example, STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 215–17 (2018); Fishkin & Pozen, *supra* note 57, at 964–65.

³⁴³ ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 7 (2009) (identifying such a belief as the basic condition of constitutional endurance).

Yet at the same time, mounting conflict over structural bias of the sort that the United States has been experiencing is by no means a clear sign of constitutional retrogression or democratic decay. Such fights represent a maturation of our politics insofar as both parties have gained—or regained³⁴⁴—recognition of their fundamental interests in constitutional design and are arguing for change or stasis accordingly. Such fights also represent a revolt against dead-hand control insofar as participants seek to revise outworn terms of the constitutional order rather than maneuver within them. And any number of specific structural reforms, including removal of the Senate filibuster, may well create stable new equilibria in our political institutions rather than escalating cycles of partisan retribution.³⁴⁵

Constitutional changes motivated by structural bias could also have salutary effects from the standpoint of more general values. A tension between the value of democratic equality and, say, the constitutional status of the District of Columbia or the design of the Electoral College has existed since the Founding. But this tension alone has not been sufficient to prompt political reform.³⁴⁶ Now that the partisan tilt of these institutions has become clear, reform proposals have gained momentum.³⁴⁷ In this way, structural bias can lead partisans to identify and invest in structural constitutional reforms that are normatively desirable on principled grounds, independent of

³⁴⁴ See *supra* Section II.A (describing cycles of conflict over structural constitutional biases throughout U.S. history).

³⁴⁵ The Senate has been on a gradual slide toward majority rule since the 1970s. It has lowered the cloture threshold, created and then expanded exceptions to the cloture requirement (most notably the budget reconciliation process), and eliminated the filibuster for judicial and executive branch nominations. See GREGORY J. WAWRO & ERIC SCHICKLER, *FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE* 89 (2006) (discussing the move to a three-fifths cloture requirement); Dauster, *supra* note 261, at 645–56 (discussing nominations); *supra* note 192 and accompanying text (discussing reconciliation). Fully eliminating the legislative filibuster would result in the Senate operating as a majority-rule body, like most other U.S. legislative chambers, without creating obvious opportunities for additional strategic manipulation of voting rules. Cf. Doerfler & Moyn, *supra* note 110, at 1768–71 (comparing “spiraling” risks posed by Court-packing schemes with “the non-spiraling virtue” of other structural reforms).

³⁴⁶ *But cf.* JESSE WEGMAN, *LET THE PEOPLE PICK THE PRESIDENT: THE CASE FOR ABOLISHING THE ELECTORAL COLLEGE* 126–62 (2020) (explaining that Supreme Court decisions ratifying the ideal of “one person, one vote” helped catalyze the last major push to overhaul the Electoral College, in the late 1960s).

³⁴⁷ See Pozen, *supra* note 59, at 339 (“Proposals to grant statehood to the District of Columbia and Puerto Rico through federal legislation have moved from the margins to the mainstream of the Democratic Party.”); Edward B. Foley, *Want to Fix Presidential Elections? Here’s the Quickest Way.*, *POLITICO MAG.* (May 4, 2019), <https://politico.com/magazine/story/2019/05/04/electoral-college-reform-2020-226792> [<https://perma.cc/N66C-AJVZ>] (reviewing Electoral College reform proposals and workarounds currently “on the table”).

which party would benefit for the foreseeable future. The norms of constitutional argument, moreover, require advocates to defend most proposals in nonpartisan terms,³⁴⁸ thus ensuring that considerations of political morality animate the reform conversation regardless of what brings participants into it.

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

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

Constitutional designers are not benevolent social planners operating under a veil of ignorance but embedded political actors seeking to promote substantive ends. By making some electoral or policy outcomes more likely than others, the strategic creation of structural biases may serve these ends—all the more so if the strategy is made less salient by being located in a “relatively dry” structural arrangement rather than a rights guarantee.³⁴⁹ Constitutional designers might, for example, intentionally create institutions that over- or under-represent certain groups in the political process, relative to their numbers. As discussed briefly above, the framers of the U.S. Constitution were highly attentive to which sorts of Americans would be empowered and disempowered by various institutional arrangements, sometimes in subtle ways.³⁵⁰ Other nations’ constitutions have more explicitly augmented the voting rights of specified subpopulations—sometimes as a means of entrenching the clout of currently privileged groups,³⁵¹ sometimes as a means of empowering women or racial,

³⁴⁸ See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1350 (2006) (“American constitutional culture supplies practices of argument that channel the expression of disagreement into claims about the meaning of a shared tradition, teaching advocates to express claims of partisan conviction in the language of public value.”); see also Pozen & Samaha, *supra* note 5, at 753–56 (explaining that “partisan arguments” are seen as illegitimate in debates over constitutional meaning).

³⁴⁹ Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105, 118 (1988) (describing the Constitution’s structural provisions as “relatively dry” compared to its rights provisions).

³⁵⁰ See *supra* notes 73–76 and accompanying text.

³⁵¹ Nineteenth-century Belgium, for example, gave multiple votes to citizens with more property and education as a means of limiting the number of seats won by radical or

ethnic, or religious minorities.³⁵² Constitutional designers may also make certain sorts of policy change easier or harder to achieve, as by calibrating rules regarding voting thresholds or agenda-setting procedures.³⁵³ In other instances, constitutional designers may seek more directly to aid allies or undermine opponents. Chile's 1980 constitution, for instance, created "authoritarian enclaves" that allowed Pinochet regime loyalists in the armed forces to intervene in the political process, locking in a rightward bias that was only slowly chipped away by constitutional reformers in subsequent years.³⁵⁴

There is a limit to how effectively constitutional designers can engineer structural biases, however. As we have discussed throughout, these biases ebb and flow over time, and sometimes reverse directionality altogether. Institutional arrangements are created in the context of the politics of their era. Decades or centuries later, they may have very different welfare and distributional implications than they had at the outset. The contemporary partisan bias associated with the District of Columbia's lack of statehood, for example, arises from the fact that its residents overwhelmingly support Democrats.³⁵⁵ This particular bias could hardly have been anticipated at the Founding, long before anything like today's party system had emerged and Black Americans (the largest demographic group in the District) had been guaranteed the right to vote.³⁵⁶

For constitutional designers, this dynamic calls for a dose of humility. All constitutional drafters and reformers work from an

socialist parties. See PAUL E. STARR, *ENTRENCHMENT: WEALTH, POWER, AND THE CONSTITUTION OF DEMOCRATIC SOCIETIES* 112 (2019).

³⁵² Official quotas for women and minority groups, for instance, exist in dozens of national parliaments, sometimes by explicit constitutional guarantee. See Mona L. Krook & Diana Z. O'Brien, *The Politics of Group Representation: Quotas for Women and Minorities Worldwide*, 42 *COMPAR. POL.* 253, 256–58 (2010) (conducting a transnational survey of such quotas).

³⁵³ See generally Huq, *supra* note 191, at 1418–43 (cataloging "agenda-control instruments" in U.S. constitutional law).

³⁵⁴ See Claudio A. Fuentes, *Shifting the Status Quo: Constitutional Reforms in Chile*, 57 *LATIN AM. POL. & SOC'Y* 99, 105–10 (2015).

³⁵⁵ See John J. Hudak, *The Politics and History of the D.C. Statehood Vote*, BROOKINGS (June 25, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/25/the-politics-and-history-of-the-d-c-statehood-vote> [<https://perma.cc/8BXU-2QPB>] (highlighting that since the 2000 presidential election, the Democratic presidential nominee has captured eighty-nine percent of the vote in the District on average).

³⁵⁶ One might argue that the Founders could have predicted that residents of the federal district would tend to support the party that favors greater federal government expenditures and greater centralization of power in the capital. Even if this is indeed the case, many of the leading reasons why the District of Columbia consistently votes in favor of Democrats—namely, high support for today's Democratic Party among city dwellers, Black Americans, and persons of all races with high educational attainment—are not ones that could have been anticipated at the Founding.

understanding of society that is necessarily time-bounded to some degree. As a result, attempts to create structural biases are almost sure to have unintended consequences if a constitution endures. Still more humbling, attempts to avoid structural bias in pursuit of designs that will be neutral among political factions are likewise apt to prove quixotic. Older constitutions, such as those in the United States (1787), Belgium (1831), Argentina (1853), and Canada (1867), are especially susceptible to these shifts. But structural biases can come and go even in a short space of time. To take just one recent example, Armenia switched in 2015 to a parliamentary system in a manner that was intended to entrench that country's Republican Party but that, by 2018, had produced the opposite effect.³⁵⁷ Structural biases for or against a given party emerge on account of certain contingent social facts, and they last only as long as the relevant facts last.

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

Scholars could also extend the inquiry outward from the parties—investigating structural biases with regard to additional groups, such as political blocs that operate on the periphery of the party system and demographic groups of various kinds. Parts II and III consider disparate effects of structural arrangements on racial and other demographic groups indirectly, through the lens of partisan bias,³⁵⁸ but direct treatments could allow for significantly more nuance. Another extension of the project might look to how political actors

³⁵⁷ See Laurence Broers, *In Armenia, a Constitutional Power Grab Backfires*, CHATHAM HOUSE (Apr. 24, 2018), <https://chathamhouse.org/expert/comment/armenia-constitutional-power-grab-backfires> [<https://perma.cc/3PLA-XCN3>] (describing how the move to parliamentary elections, though intended to fracture opponents of the ruling Republican Party, precipitated mass nonviolent protests that led to the resignation of the Republican Party's leader).

³⁵⁸ See, e.g., *supra* notes 134–50 and accompanying text.

seek to use nonstructural legal rules to debilitate the opposition. Observers have noted, for example, that contemporary conservative initiatives to weaken private-sector unions³⁵⁹ and limit punitive damage awards and class action lawsuits³⁶⁰ may double as efforts to undermine the financial base of the Democratic Party. Moreover, while we have focused on biases that benefit one political party over the other, legal structures empower or disempower factions within the parties. Different modes of conducting primary elections or financing electoral campaigns, for instance, may favor either more moderate or more extreme party members.³⁶¹ And as with interparty biases, intraparty biases may lead disadvantaged factions to seek to change the rules of the larger political game; successful efforts in the 1970s by liberal congressional Democrats to reform the seniority system and other procedures that were benefiting more conservative Democratic committee chairs can be understood in precisely this light.³⁶²

Because structural biases arise not from constitutional design alone but from its interaction with broader political forces, questions of structural bias will often lie at the intersection of constitutional law and other fields, including history, political science, and sociology. Legal scholars are accustomed to thinking about the ideological drift of constitutional ideas, such as the notion of “colorblindness” in equal protection doctrine.³⁶³ The evolution of structural biases underscores the need to think about the ideological drift of constitutional institutions as well. Tracing the rise and fall of structural biases can be a useful metric both for measuring political change and for demarcating constitutional epochs.

As some of our earlier observations suggest,³⁶⁴ one particularly promising line of interdisciplinary inquiry concerns the influence of

³⁵⁹ See, e.g., Levinson & Sachs, *supra* note 27, at 402–03 (discussing political implications of Republican anti-union efforts).

³⁶⁰ See, e.g., TUSHNET, *supra* note 242, at 63 (explaining that plaintiff-side trial lawyers have historically been strong supporters of the Democratic Party and describing recent Supreme Court decisions on these subjects as amounting to a “program of defunding the left through constitutional interpretation”).

³⁶¹ See Jonathan S. Gould, *The Law of Legislative Representation*, 107 VA. L. REV. 765, 805–11 (2021); Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L.J. 804, 828–45 (2014).

³⁶² See Kenneth A. Shepsle, *The Changing Textbook Congress*, in *CAN THE GOVERNMENT GOVERN?* 238, 248–56 (John E. Chubb & Paul E. Peterson eds., 1989) (describing reforms during this period).

³⁶³ See, e.g., J.M. Balkin, *Ideological Drift and the Struggle over Meaning*, 25 CONN. L. REV. 869, 870–73 (1993) (discussing this example and defining ideological drift as change over time in the normative or political valence of “[s]tyles of legal argument, theories of jurisprudence, and theories of constitutional interpretation”); Pozen, *supra* note 193, at 106–07 (discussing this example and defining ideological drift with reference to “ideas”).

³⁶⁴ See, e.g., *supra* Section I.A, notes 114–17 and accompanying text.

structural biases on longer-term political development. Much of our descriptive analysis of contemporary U.S. constitutionalism has treated the parties and their coalitions as fixed, or as exogenous to constitutional design. But structure can shape the development of the parties and their coalitions over time. Without the potential for third-party “spoilers” created by first-past-the-post voting, the Democratic Party would not have felt so much pressure to move left during the New Deal Era.³⁶⁵ Conversely, without the advent of the “superdelegate” system, Democratic presidential candidates might have felt greater pressure to move left in recent decades.³⁶⁶ Meanwhile, without the advantages that come from the design of the Electoral College and the Senate, the Republican Party would have had no choice but to pursue policies and messages aimed at attracting more voters of color.³⁶⁷ Structural constitutional rules can affect what positions parties take, how they build their coalitions, and how political preferences are constructed in the first place. Extralegal forces matter too, of course; an individualistic culture is sometimes said to explain much of the path of American political development.³⁶⁸ Yet however important cultural variables might be, “the interaction of culture and institutions is to some extent self-reinforcing.”³⁶⁹ The idea that party evolution and competition could be understood without reference to structural constitutional law, and the biases this law produces, turns out to be every bit as fanciful as the idea that a commercial marketplace could be understood as “free” of the background legal rules that allow it to function.³⁷⁰

³⁶⁵ See *supra* notes 303–06 and accompanying text.

³⁶⁶ Supporters of socialist candidate Bernie Sanders advanced a particularly forceful version of this argument during the 2016 presidential primary. See Heather Gautney, *Dear Democratic Party: It's Time to Stop Rigging the Primaries*, GUARDIAN (June 11, 2018, 6:00 AM), <https://www.theguardian.com/commentisfree/2018/jun/11/democrat-primary-elections-need-reform> [<https://perma.cc/RTJ2-LAVN>] (“In 2016, the progressive grassroots wing of the Democratic party, which strongly supported Sanders, raised persistent alarms about the blatant structural bias of the primary system.”). We have not been able to find any systematic academic research on the ideological or factional biases that Democrats’ superdelegate rules, first adopted in the early 1980s, may have generated within the party.

³⁶⁷ See *supra* notes 118–50 and accompanying text.

³⁶⁸ See, e.g., LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* 9 (1955) (describing “dogmatic liberalism” as “the secret root from which have sprung many of the most puzzling of American cultural phenomena”); SEYMOUR M. LIPSET & GARY MARKS, *IT DIDN’T HAPPEN HERE: WHY SOCIALISM FAILED IN THE UNITED STATES* 97–98, 265–66 (2000) (discussing political culture as a reason for the failure of European-style socialism in the United States).

³⁶⁹ LIPSET & MARKS, *supra* note 368, at 265.

³⁷⁰ On the fancifulness of the latter idea, see generally BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* (2011).

Indeed, the most profound structural biases may be the least visible. Entrenched constitutional structures may be so deeply biased against certain political or policy positions that those positions essentially disappear from mainstream debate, with the result that few see the bias anymore. Many have suggested, for example, that the U.S. constitutional framework led more or less inexorably to a two-party system.³⁷¹ To the extent this is true, the central players in both the Democratic and Republican coalitions can be seen as beneficiaries of our constitutional design, while those at the fringes of the party system are harmed by existing constitutional structures relative to alternative arrangements such as proportional representation. Some of the same institutional features of U.S. constitutionalism may have likewise prevented socialism from gaining strength here as compared to in other nations.³⁷² Whether or not these features are themselves manifestations or epiphenomena of even deeper antisocialist biases in the very idea of constitutionalism or rule of law,³⁷³ structural constitutional rules have plainly played a role in channeling and constraining political-ideological formation. Furthermore, a two-party system in a large and diverse country tends to stimulate ongoing ideological conflict inside the necessarily heterogenous major parties.³⁷⁴ Fights over structural biases, as we have emphasized throughout, take place within a politics that is partially constructed by those biases.

Structural biases are also fertile ground for empirical scholars. As discussed in Part I, this Article is a close cousin of scholarship in comparative political science and political economy exploring the impacts of various governance arrangements.³⁷⁵ Most of that scholarship has been quantitative in approach, focused on national constitutions, and limited to macro-level design questions such as presidential versus parliamentary systems. Relaxing any of those constraints could yield fruitful research agendas oriented around qualitative methods, subna-

³⁷¹ See Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1419 (2007) (describing “a well-trodden path in political theory . . . explaining the propensity of single-seat, single-winner elections to produce two and only two relatively stable, relatively centrist parties”).

³⁷² See, e.g., LIPSET & MARKS, *supra* note 368, at 43–84 (providing a skeptical reconstruction of standard arguments about how the United States’ two-party system and federalist structure prevented the emergence of socialism).

³⁷³ See generally, e.g., GEORG LUKÁCS, *HISTORY AND CLASS CONSCIOUSNESS* (Rodney Livingstone trans., Merlin Press 1971) (1923); EVGENY B. PASHUKANIS, *LAW AND MARXISM: A GENERAL THEORY* (Barbara Einhorn trans., Pluto Publishing Ltd., 1989) (1924).

³⁷⁴ Cf. Gregory A. Elinson, *Divided Parties, Separated Powers* 16–30 (Feb. 15, 2021) (unpublished manuscript), https://ssrn.com/abstract_id=3751638 [<https://perma.cc/R94D-UDLY>] (reviewing literature on intraparty fragmentation).

³⁷⁵ See *supra* Section I.C.

tional constitutions, or meso-level arrangements, including arrangements governing the internal operation of institutions. To date, broad questions concerning the electoral and policy effects of constitutional design choices have largely been the domain of quantitative social scientists. This disciplinary division of labor has left legal scholars on the sidelines of some of the most important debates about how structural constitutional law affects their societies. Yet as this Article has demonstrated, no econometric pyrotechnics are needed. A lawyerly concern for institutional detail and careful counterfactual reasoning can identify structural biases arising from any number of complex constitutional rules.

Attention to structural bias can enrich normative analysis as well. In circumstances where a structural arrangement is strongly biased against one political party or against a desirable policy outcome, that bias may be reason alone to condemn the arrangement. More generally, in circumstances where every plausible specification of a constitutional institution is likely to be biased relative to competitors, the ideal of “neutrality” loses purchase. Some political bloc is going to be made better or worse off by any set of rules, relative to realistic alternatives. This observation counsels that we look beyond political neutrality and procedural fairness to more substantive normative criteria—whether keyed to democracy, equality, social welfare, or other values—for evaluating “the rules of the game by which politicians gain and use power.”³⁷⁶ Meanwhile, the observation that many structural biases are the product not just of strategic behavior but of unanticipated social and political developments should prompt us to interrogate how all such biases operate and whether they are justifiable. “Reflecting on the accidental quality of our institutions and practices,” Michael Dorf has noted, “can be a first step toward examining their efficacy relative to other possible arrangements.”³⁷⁷

In sum, a focus on structural bias facilitates politically grounded, mid-level work on the practical and distributional implications of constitutional institutions. Such work has been in short supply in the legal academy. A number of prominent U.S. constitutional scholars have called in recent years for a reorientation of the field toward “constitutional political economy,”³⁷⁸ or toward “law and political economy”

³⁷⁶ Myerson, *supra* note 22, at 927.

³⁷⁷ Michael C. Dorf, *Spandrel or Frankenstein's Monster? The Vices and Virtues of Retrofitting in American Law*, 54 WM. & MARY L. REV. 339, 342 (2012).

³⁷⁸ See, e.g., Joseph Fishkin & William Forbath, *Reclaiming Constitutional Political Economy: An Introduction to the Symposium on the Constitution and Economic Inequality*, 94 TEX. L. REV. 1287 (2016); Jeremy K. Kessler, *The Political Economy of “Constitutional Political Economy,”* 94 TEX. L. REV. 1527 (2016).

more broadly,³⁷⁹ while leaving open exactly what such a reorientation might entail. The concept of structural bias provides one means of organizing and advancing the constitutional-political-economy project across issue areas.

CONCLUSION

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

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

³⁷⁹ See, e.g., Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 *YALE L.J.* 1784 (2020).