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GUEST ESSAY

The Constitution Is Broken and Should Not Be Reclaimed

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When liberals lose in the Supreme Court — as they increasingly have over the past half-century — they usually say that the justices got the Constitution wrong. But struggling over the Constitution has proved a dead end. The real need is not to reclaim the Constitution, as many would have it, but instead to reclaim America from constitutionalism.

The idea of constitutionalism is that there needs to be some higher law that is more difficult to change than the rest of the legal order. Having a constitution is about setting more sacrosanct rules than the ones the legislature can pass day to day. Our Constitution's guarantee of two senators to each state is an example. And ever since the American founders were forced to add a Bill of Rights to get their handiwork passed, national constitutions have been associated with some set of basic freedoms and values that transient majorities might otherwise trample.

But constitutions — especially the broken one we have now — inevitably orient us to the past and misdirect the present into a dispute over what people agreed on once upon a time, not on what the present and future demand for and from those who live now. This aids the right, which insists on sticking with what it claims to be the original meaning of the past.

Arming for war over the Constitution concedes in advance that the left must translate its politics into something consistent with the past. But liberals have been attempting to reclaim the Constitution for 50 years — with agonizingly little to show for it. It's time for them to radically alter the basic rules of the game.

In making calls to regain ownership of our founding charter, progressives have disagreed about strategy and tactics more than about this crucial goal. Proposals to increase the number of justices, strip the Supreme Court's jurisdiction to invalidate federal law or otherwise soften the blow of judicial review frequently come together with the assurance

that the problem is not the Constitution; only the Supreme Court's hijacking of it is. And even when progressives concede that the Constitution is at the root of our situation, typically the call is for some new constitutionalism.

Since the Supreme Court began to drift right in the 1970s, liberals have proposed better ways of reading the Constitution. The conservative Federalist Society engaged in a successful attempt to remake constitutional law by brainstorming ideas, creating networks of potential judges and eventually helping to guide the selection of President Donald Trump's nominees. It was revealing that liberals responded by founding (in 2001) an organization called the American Constitution Society, which produced the book "Keeping Faith With the Constitution." And when liberal law professors got together in the mid-2000s to dream of a different America, that yielded the book "The Constitution in 2020." But since then — with the death of Ruth Bader Ginsburg, the consolidation of right-wing control of constitutional law and the overturning of Roe and other disasters this term — the damage has only worsened.

One reason for these woeful outcomes is that our current Constitution is inadequate, which is why it serves reactionaries so well. Starting with a text that is famously undemocratic, progressives are forced to navigate hard-wired features, like the Electoral College and the Senate, designed as impediments to redistributive change while drawing on much vaguer and more malleable resources like commitments to due process and equal protection — resources that a conservative Supreme Court has used over the years to invalidate things like abortion rights and child labor laws and might use in the coming term to prohibit affirmative action.

Sometimes reclaiming the Constitution is presented as a much-needed step toward empowering the people and their elected representatives. In a new book, the law professors Joseph Fishkin and William Forbath urge progressives to stop treating constitutional law as an "autonomous" domain, "separate from politics." In contrast with earlier efforts among liberals, which, as Jedediah Purdy put it in a 2018 Times guest essay, put forward a "vivid picture of what judges should do with the power of the courts," such exercises in progressive constitutionalism call on Congress and other nonjudicial actors to claim some amount of authority to interpret the Constitution for themselves.

It is a breath of fresh air to witness progressives offering bold new proposals to reform courts and shift power to elected officials. But even such proposals raise the question: Why justify our politics by the Constitution or by calls for some renovated constitutional tradition? It has exacted a terrible price in distortion and distraction to transform our national life into a contest over reinterpreting our founding charter consistently with what majorities believe now.

No matter how openly political it may purport to be, reclaiming the Constitution remains a kind of antipolitics. It requires the substitution of claims about the best reading of some centuries-old text or about promises said to be already in our traditions for direct arguments about what fairness or justice demands.

It's difficult to find a constitutional basis for abortion or labor unions in a document written by largely affluent men more than two centuries ago. It would be far better if liberal legislators could simply make a case for abortion and labor rights on their own merits without having to bother with the Constitution.

By leaving democracy hostage to constraints that are harder to change than the rest of the legal order, constitutionalism of any sort demands extraordinary consensus for meaningful progress. It conditions democracy in which majority rule always must matter most on surviving vetoes from powerful minorities that invoke the constitutional past to obstruct a new future.

After failing to get the Constitution interpreted in an egalitarian way for so long, the way to seek real freedom will be to use procedures consistent with popular rule. It will not be easy, but a new way of fighting within American democracy must start with a more open politics of altering our fundamental law, perhaps in the first place by making the Constitution more amendable than it is now.

In a second stage, though, Americans could learn simply to do politics through ordinary statute rather than staging constant wars over who controls the heavy weaponry of constitutional law from the past. If legislatures just passed rules and protected values majorities believe in, the distinction between "higher law" and everyday politics effectively disappears.

One way to get to this more democratic world is to pack the Union with new states. Doing so would allow Americans to then use the formal amendment process to alter the basic rules of the politics and break the false deadlock that the Constitution imposes through the Electoral College and Senate on the country, in which substantial majorities are foiled on issue after issue.

More aggressively, Congress could simply pass a Congress Act, reorganizing our legislature in ways that are more fairly representative of where people actually live and vote, and perhaps even reducing the Senate to a mere "council of revision" (a term Jamelle Bouie used to describe the Canadian Senate), without the power to obstruct laws.

In so doing, Congress would be pretty openly defying the Constitution to get to a more democratic order — and for that reason would need to insulate the law from judicial review. Fundamental values like racial equality or environmental justice would be protected not by

law that stands apart from politics but — as they typically are — by ordinary expressions of popular will. And the basic structure of government, like whether to elect the president by majority vote or to limit judges to fixed terms, would be decided by the present electorate, as opposed to one from some foggy past.

A politics of the American future like this would make clear our ability to engage in the constant reinvention of our society under our own power, without the illusion that the past stands in the way.

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