Coalitional Constitutionalism:

Congress as a Forum of PRinciple

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# Abstract

As scholars, commentators, and the American public question the Supreme Court’s ability and willingness to protect core rights, we are witnessing a renewed interest in “legislative constitutionalism” – the study of how legislatures generally and Congress specifically address constitutional questions. This paper rejects the conventional wisdom that legislative constitutionalism is a contradiction in terms and claims that members of Congress develop constitutional ideas in a manner that is principled and potentially protective of minority rights. In doing so, it presents a model of legislative behavior that lays bare the inner logic of legislative constitutionalism.

Specifically, the paper advances three claims. First, it argues that Congress should be seen as a “forum of principle,” in the sense that its members develop abstract rules to govern their actions as lawmakers, that they follow these rules, and that these rules evolve in a way that is itself principled. Second, it argues that members of Congress face strong incentives to defend their principles even when they conflict with majority preferences. Finally, it argues that the principles developed by members of Congress will often reflect large-C Constitutional principles of the type associated with courts. And importantly, members of Congress act on principle, including constitutional principle, not in spite of the political incentives they face but precisely because of them.

# Introduction

It was one of the most expensive and controversial advertisements of the 2024 election and, according to some estimates, one of the most effective.[[2]](#footnote-3) In the ad, Kamala Harris speaks to an interviewer against the backdrop of a candidate forum logo. The clip begins with Harris mid-sentence: “surgery, for prisoners . . . every transgender inmate in the prison system would have access.” After flashing on the screen quotes from several news outlets supporting the ad’s claims, the ad concludes with the tag line “Kamala Harris is for they/them; Donald Trump is for you.”[[3]](#footnote-4)

Among the ad’s consequences has been a public debate among Democratic Party allies over a nebulous collection of institutions collectively known as “the Groups.”[[4]](#footnote-5) As a former Senate attorney, I remember well the experience of facing some tricky legal policy question and being asked how “the Groups” felt about it. The groups in question differed depending on the policy issue being discussed. Questions about civil rights were referred to organizations like the National Association for the Advancement of Colored People (NAACP) and the Leadership Conference on Civil and Human Rights. Abortion questions went to NARAL Pro-Choice America (now Reproductive Freedom for All) and Planned Parenthood. Often, I would consult less-known organizations staffed by particularly thoughtful individuals.

Most of the commentary on the Groups has been negative. Commentators see them as overly powerful and unrepresentative not just of the broader public but even of the constituencies they claim to represent.[[5]](#footnote-6) Even if they were not the only cause of Harris’s loss, they are an impediment to the Democratic Party achieving the durable majority it needs and deserves.

At a glance, this year’s discussion of the Groups provides a stark contrast to a debate from the early Biden years. Faced with a conservative Supreme Court – and, in the eyes of many, an illegitimate one[[6]](#footnote-7) – commentators questioned whether progressives could continue to view the Court as an important protector of individual rights and other constitutional protections.[[7]](#footnote-8) Building on a body of ideas that goes back to the Founding, scholars asked whether the political branches should play a larger role in rights protection. If the Court will not protect abortion, perhaps Congress can.[[8]](#footnote-9) If it will not protect vulnerable minorities, perhaps Congress will.[[9]](#footnote-10) If the Constitution, or at least the progressive vision of it, is dead in the Court, perhaps it can achieve a second life in the legislature.

This paper treats the two conversations – the debate over the Groups and the discussion of political actors’ role in defending the Constitution[[10]](#footnote-11) – as one and the same. Generations of scholarship have contrasted the majoritarian political branches with the countermajoritarian courts.[[11]](#footnote-12) And while legal scholars have questioned whether the courts are truly countermajoritarian,[[12]](#footnote-13) they rarely ask whether the political branches may in fact be forums of constitutional principle. Moreover, those scholars who have searched for principled constitutionalism in Congress[[13]](#footnote-14) have not offered an account of the relationship between politics and principle. While some historical accounts suggest that Congress outperforms expectations when it comes to protecting constitutional values,[[14]](#footnote-15) we lack a theory of how Congress’s political incentives produce or fail to produce constitutional principle. The recent attention to the Groups highlights a mechanism that has apparently (and, in the eyes of many, excessively) pulled politicians away from majority preferences towards aggressive defenses of individual rights, a mechanism that has gotten no attention from constitutional scholars looking for evidence that Congress can protect minority rights.

This paper argues that politicians can be expected to defend individual rights even when they conflict with majority preferences – and that the reason has a lot to do with “the Groups.” The paper sketches a model of political behavior, which I call “coalitional constitutionalism,” in which politicians’ incentives to win reelection and shape policy push them to develop constitutional principles and defend those principles against hostile majorities.

Coalitional constitutionalism is a response to critics of the political branches who contrast them with judicial “forums of principle” and question their willingness to defend the rights of unpopular minorities.[[15]](#footnote-16) But it is also a tool for determining what the political branches do well and what they do poorly. By revealing the inner logic of political constitutionalism – much as law scholars have long done for the inner logic of judicial constitutionalism – coalitional constitutionalism suggests what political actors can and cannot do to protect constitutional values. In doing so, it provides new insights into both constitutional politics and constitutional law.

After covering some preliminaries in Section I, in Section II I argue that Congress can be as much a forum of principle as the courts, as the political incentives of Members of Congress (MCs) drive them to articulate, uphold, and update constitutional principles. In Section III, I argue that the process of principled conduct described in Section II can lead MCs to withstand majoritarian pressures to compromise minority rights. However, the level of protection that MCs are likely to provide may not be optimal. Coalitional constitutionalism can help us to understand not just when MCs are likely to protect minorities, but when and how they are likely to fall short. Section IV considers *which* principles are likely to be best protected by Congress. Section V lays out the implications of the earlier sections for understanding contemporary politics, for doctrine, and for institutional design.

# I. Preliminaries

Before beginning, it is important to clarify two key concepts that play a major role throughout the paper: constitutionalism and Congress.

## What is Constitutionalism?

To understand the approach I take in this paper, it is helpful to distinguish between small-c and large-C constitutionalism.[[16]](#footnote-17) Think of the small-c constitution as the set of rules that decide which laws Congress can, which it must, and which it cannot adopt.[[17]](#footnote-18) These rules can include anything from a commitment not to infringe free speech to a commitment not to enlarge the federal government unduly to a commitment to do the greatest good for the greatest number. They may or may not relate to the large-C Constitution, defined as the set of rules traditionally associated with constitutional law and generally seen as derivable from the text of the U.S. Constitution, if often only indirectly. But note that the line between small-c and large-C constitutionalism is porous. The set of actions that Congress simply will not take is likely to be influenced by the limitations written into the large-C Constitution, as they have been interpreted over time.

A major difference between MCs and judges is that for judges to impose their small-c constitutional principles, they must claim that those principles are also large-C constitutional principles. MCs need not. An MC can, for example, say that they will never support laws that regulate speech, under any circumstances. If they are asked, they may say that this principle is derived from the First Amendment. Or they may not. And, importantly, they can adopt and apply such a principle without even considering whether the principle is derived from large-C constitutional law. As a result, MCs can enforce the Constitution without ever considering whether they are doing so.[[18]](#footnote-19) If we care about whether Congress enforces the Constitution, then, we should ask whether it enforces the Constitution, not whether it sets out to do so.

This leads me to a different approach than one would take when analyzing the judiciary. I begin by asking whether and how Congress develops small-c constitutional principles – principles that govern how its members will vote on policies. In this effort, I have two goals. First, I want to show, contrary to at least some conventional wisdom, that political incentives lead Congress to develop and follow small-c constitutional principles, and to update them in an intellectually consistent manner. And second, I want to provide an understanding of *how* Congress develops small-c constitutional principles that is sufficient to determine what kinds of limitations they impose on congressional action.

I will then consider whether the principles Congress develops can perform one of the key goals asserted for a constitutional system, protecting minority rights against majority opinion. I will argue that Congress’s principles can perform this feat, and that Congress’s incentives should lead to a significant amount of minority protection.

Finally, I will consider the degree to which we can expect Congress’s principles – its small-c constitution – to include rules derived from the large-C Constitution. I conclude that we should expect Congress frequently to protect principles derived from the large-C Constitution. It is true that Congress’s small-c constitution will include a great many principles that cannot be traced to the large-C Constitution. It is also true that Congress may derive principles from the large-C Constitution that are not in the constitutional text and that many do not believe should be read into it. In this, Congress is not unlike the judiciary. But this paper will argue that Congress has strong incentives to incorporate many large-C constitutional principles into its small-c constitution.

Ultimately, my claim is that Congress is not as different from the judiciary as either its supporters or its critics sometimes claim. It is a forum of principle and a forum where principle will frequently trump majoritarian politics, but only because its principles are themselves the product of political forces that are just as powerful as democratic majorities.

## What is Congress?

One key difference between Congress and the Supreme Court has to do with how Congress expresses its principles. Where the justices issue opinions laying out the opinion of the Court, Congress need not and often does not.[[19]](#footnote-20) Nonetheless, the absence of an official mechanism for articulating the principles of the Congress does not mean those principles do not exist. Just as Supreme Court justices and English judges once issued seriatim opinions, leaving readers to extrapolate the common core of their reasoning,[[20]](#footnote-21) MCs are free to explain themselves separately. Only by observing their conduct over time can we understand the principles that command a sufficient consensus to be considered binding on Congress as a body.

This paper seeks to show that Congress operates on a set of principles, even if it does not articulate those principles as an institution. I begin with the insight that Congress is a “they not an it.”[[21]](#footnote-22) To understand Congress’s principles we must start with the principles of individual MCs. Much of the paper will therefore attempt to establish that individual MCs have strong incentives to articulate and then follow general statements of principle. This individual-level behavior, in turn, shapes the key coalitions – generally, but not universally, associated with the dominant political parties. Finally, by focusing on the rules that aggregate opinion in Congress, we can make some general statements about Congress as an institution.

Crucially, when I talk about the incentives that operate on MCs, I will focus on the incentives that operate on them by virtue of their status as a politicians. I will therefore alternate back and forth between discussing MCs specifically and politicians generally. This is because my goal is to show how political incentives – generally seen as an impediment to principled reasoning – play a key role in making Congress a forum of principle. By focusing on MCs as politicians, I stack the deck against finding that they are also principled, and I keep the theory simple by abstracting away from the peculiarities of MCs as a particular type of political actor.[[22]](#footnote-23)

# I. Forums of Principle, Reconsidered [ctrl-alt-1]

Perhaps the most famous justification for the outsized role that judges play in answering policy questions in the United States is the claim that courts, unlike the political branches, offer “for[a] of principle.”[[23]](#footnote-24) While Americans might disagree with judges’ response to any particular constitutional question, the argument runs, they have clearly chosen to have those questions answered in a particular way: by judges who see in those questions transcendent moral issues and seek to resolve those issues consistently, regardless of whose ox is being gored.[[24]](#footnote-25)

By contrast, Congress is an ad hoc body, at least when it answers particular questions. When Congress answers policy questions, it is the principled decision maker *par excellence*; it issues general rules (statutes) designed to apply across all specified cases. But when it makes decisions about its own powers and their limitations, Congress makes case-by-case decisions, just like a court. But unlike a court, according to Dworkin and a good many others, Congress has nothing pushing it to answer the same question in the same way over time. If the essence of the rule of law is treating like cases alike, Congress is lawless.

When law scholars look for principled constitutional decisionmaking in Congress, they assume it will be found only where politics does not operate. In the 1980s, MC-turned-federal judge Abner Mikva famously challenged Congress’s ability to “preserve and defend the Constitution.”[[25]](#footnote-26) His argument, based on a close study of several debates in which he participated, was that MCs rarely honestly peruse the canonical sources of constitutional meaning or defer to experts on those sources. They are too busy campaigning or engaging in policy fights. Paul Brest, author of a classic primer for lawmakers seeking to interpret the Constitution,[[26]](#footnote-27) expressed concern that MCs generally have their minds made up before they seek expert guidance on constitutional doctrine, using such guidance like a drunk uses a lamppost, more for support than for illumination.[[27]](#footnote-28) Their constitutional views, if they can even be called that, are dictated by political incentives and shaped by interest groups, not developed through the careful study of extant doctrine.

Even Louis Fisher, a longtime defender of Congress who challenged Mikva’s skepticism and the judiciary’s monopoly on constitutional interpretation, made his Exhibit A Congress’s creation of a nonpolitical cadre of expert lawyers who could be tasked with identifying the correct answers to constitutional questions. Fisher’s argument has been broadly influential. It echoes today in recent debates over whether Congress should have[[28]](#footnote-29) – or once had[[29]](#footnote-30) – access to true constitutional experts motivated to advance congressional prerogatives in the separation of powers system. Under this way of thinking, Congress is authorized to interpret the Constitution for itself only because it can do so in an expert, neutral manner, putting aside its political incentives and policy goals. Politicians can answer constitutional questions only because, and to the degree to which, they can stop acting like politicians.

The search for apolitical constitutionalism in Congress – and among politicians more generally – faces two problems. First, it must confront understandable skepticism of the claim that politicians really engage in something like the neutral analysis of constitutional law. Scholars have struggled to find important instances in which MCs wanted (rejected) policy X but concluded reluctantly that it was unconstitutional (constitutionally required).[[30]](#footnote-31) Broadly, it is difficult to imagine MCs faced with an important policy problem quietly perusing a constitutional law treatise rather than polling their constituents (formally or informally) or discussing with their political advisors.

More importantly, it is not clear that we should *want* MCs to carefully extrapolate legal doctrine from sources produced by unelected judges or law professors. MCs get their jobs because they are politically astute, responsive to the public’s desires, and in tune with their constituents’ policy preferences. If we should trust their constitutional judgment, it is certainly not because we believe they will do a better job than judges at the tasks lawyers learn in law school. If constitutional law is what 1Ls learn, we already have experts in the judiciary to perform that role. Nobody fires Elvis just to hire an Elvis impersonator.

To be sure, scholars often loudly reject the idea that Congress does or should answer constitutional questions as judges (much less 1Ls) do. However, those scholars who reject the judicial model have more to say about what congressional constitutionalism does *not* look like than what it does. Donald Morgan,[[31]](#footnote-32) for example, urges Congress to take responsibility for answering constitutional questions rather than deferring to the answers provided by judges. But he provides little insight into how Congress should do this. If Congress is not meant to read judicial opinions to divine constitutional doctrine, it is unclear what they *are* meant to do. The same could be said of Paul Brest, who simultaneously encourages MCs not to defer to a flawed understanding of judicial doctrine[[32]](#footnote-33) while suggesting that judicial doctrine, properly understood, is the prime source of constitutional meaning.[[33]](#footnote-34) More recent scholars have emphasized the need for Congress to speak in its own voice when discussing the Constitution, but without articulating either what that voice does, or what it should, sound like.[[34]](#footnote-35)

In this Section, I argue that Congress is indeed a forum of principle. In fact, MCs should tend to develop, follow, and update principles in a manner that is strikingly similar to the approach of common law courts. In subsection A, I briefly summarize the basics of common lawmaking, with an eye to three attributes of the process that congressional action should display if it is comparably principled. In subsections B and C, I sketch a simple model of congressional action and argue that Congress’s approach to policymaking should be seen as every bit as principled as that of the courts.

## Common Lawmaking, in General

To paraphrase the words of a senator’s senator, Congress scholars concerned about the institution’s adherence to principle must compare it to the alternative, not the almighty.[[35]](#footnote-36) And when scholars argue that Congress is unprincipled, the alternative they have in mind is almost always the United States Supreme Court. This section asks whether Congress is as much a “forum of principle” as the Supreme Court.

To compare Congress to the Court, we must first understand what about the Court makes it principled. The Court clearly does not,[[36]](#footnote-37) and does not claim to,[[37]](#footnote-38) stick to a particular set of articulated principles come hell or high water. Rather, principled adjudication at the Court, as in most courts, is a matter of following the distinctive common law process for articulating, following, and occasionally changing legal rules. The Court is principled, then, in that it does three things. First, it provides justifications for its actions that are more general than the facts at bar in any given case.[[38]](#footnote-39) As a result, it articulates principles that can be used to decide future cases. Second, the Court is, at least to some degree, bound by the principles it has articulated.[[39]](#footnote-40) Of course, scholars disagree as to how much the Court is actually constrained by its own past decisions,[[40]](#footnote-41) and I will not attempt to resolve that debate. However, if we stipulate, for the sake of argument, that the Court’s future statements are shaped by its past, we can profitably compare the forces that bind the Court to past decisions to the forces that bind individual MCs and Congress as a whole. Finally, when the Court overrules past statements of principle or complicates them by adding caveats, it does so only after grappling with its own precedents.[[41]](#footnote-42) New rules, at least in theory, evolve from old rules.

This section identifies what might be called the congressional common law process, which I call “coalitional constitutionalism.” I argue, in short, that MCs’ incentives to build and maintain coalitions push them to make general statements of principle that indicate, with some specificity, how MCs will act when faced with questions they have never faced. Then, the coalitions they build constrain MCs to generally abide by the principles they have articulated. Finally, MCs update their principles in response to changed circumstances and new ways of thinking, just as judges do. But they do so only in limited and predictable ways. Just as with common law judges, MCs produce “new corn,” but they get it from “old feldes.”[[42]](#footnote-43)

## Common Lawmaking and Coalitions

Like all models, the one presented here is an oversimplification.[[43]](#footnote-44) Specifically, I ask how political actors – a category that includes MCs, as well as a wide variety of individuals in and out of government – would behave if they were motivated solely by either or both of two goals: (1) securing and/or retaining power and (2) changing policy.[[44]](#footnote-45) This question stacks the deck against finding that political actors behave in a principled manner.

### Articulating Principles

Even the most casual observer of American politics will notice that politicians like to build coalitions. Despite the apparent views of the Framers, political parties developed almost immediately in the nascent American Republic.[[45]](#footnote-46) Today, MCs have not only party affiliations but a wide array of caucuses.[[46]](#footnote-47) And even in the absence of caucuses, MCs affiliate with intra- or cross-partisan factions. It is not hard to see why. To shape policy in the American system, politicians need allies.

Moreover, political scientists have long recognized the value of building not just coalitions, but “long” coalitions – factions designed to stick together over time. Thomas Schwartz has shown how game theoretic considerations should lead politicians to form groups that vote together on multiple issues.[[47]](#footnote-48) These considerations are buttressed by two others. First, politicians will frequently want their allies to spend resources today in order to win policy fights tomorrow. Politicians may feel like they are more likely to succeed in policy fights if, rather than building a new coalition for each fight, they invest today in staff, office space, and relationships that will pay off over time. Corporations do not build a new production infrastructure for every product. We should not expect politicians to do so either. Second, politicians want to get reelected. They therefore have incentives to mate for life, or at least until the next election. They need voters, donors, and activists to invest resources in winning elections, knowing that the payoff will come only later.

To build long coalitions, politicians need to help potential coalition partners predict the future. They need to show that time, effort, and money invested today will pay off tomorrow. How do they do this?

It should be clear by now that I think they will begin by articulating principles. More importantly, they should articulate principles that govern future cases, because their allies need to know how they will act in the future. This puts politicians in something like the posture of common law judges. They cannot be content merely to act and let the public interpret their actions as it sees fit. Nor can they simply justify their actions by reference to the specific facts they faced – the exact provisions in legislation they supported or the exact conditions that made those provisions reasonable. They must speak generally enough so that their principles will apply in future cases and specifically enough such that their potential allies can predict how the speaker will act in those cases.

Before continuing, I should address one concern that may seem obvious. When political actors engage in coalitional constitutionalism, they articulate principles that they may not themselves believe to be true.[[48]](#footnote-49) The Communist who says, “all speech should be free,” by assumption of the model, speaks those words because they serve her interests, not because she believes them. This criticism assumes a definition of truth that does not fit the legal context. In the legal context, “true” is best understood as synonymous with “the correct answer given the rules of the game.” Imagine a judge says to herself, “I believe the best principle is X, but given that the game I am playing involves synthesizing case law, the ‘correct’ principle is Y.” We do not conclude the judge is lying. We conclude she is doing exactly the right thing, provided the system of case law synthesis produces good outcomes. Similarly, a political actor who articulates principle X as a means of building a coalition is asserting that she thinks it is the right answer given the game she is playing. The question should be not whether she is being sincere, but whether she is playing the right game.

A statement of constitutional principle, once made, may produce results that transcend its origins in political strategy.

*Coalitions*.—First and foremost, it may begin to produce a coalition. In the 1940s and 1950s, policy entrepreneurs repeatedly assembled sets of organizations to focus on achieving one of the many goals associated with what could broadly be called the civil rights movement. The National Committee to Abolish the Poll Tax (NCAPT) was established in 1941 and made up of a variety of Black, union, and faith-based organizations.[[49]](#footnote-50) Two years later the National Coalition for a Permanent Federal Employment Practices Commission (NCPFEPC) was established by a similar set of organizations.[[50]](#footnote-51) Three years after that, the National Emergency Committee Against Mob Violence (NECAMV) came together to focus on lynching.[[51]](#footnote-52) Coalitions like these reduced the costs of bringing together a diverse set of organizations for collective action. Having already agreed, at least to some degree, on goals and methods, and having built relationships in previous fights, the members of these ad hoc task forces found it easier to collaborate wherever they saw an opportunity to advance their common goals. However, these organizations tended to last only for a limited time.[[52]](#footnote-53)

As member organizations developed a track record of collaboration, they sought to unite around a more general goal, obviating the need to assemble a new coalition for every new policy fight. In January of 1950, veterans of many of these ad hoc coalitions met for a planning conference.[[53]](#footnote-54) While the history is not perfectly clear, this conference has been heralded as the origin of the Leadership Conference or Civil Rights (LCCR),[[54]](#footnote-55) today a massive and powerful civil rights organization in its own right.[[55]](#footnote-56) Having hashed out a more general zone of agreement than its various single-issue predecessors, LCCR could adjust to focus its energies wherever its members saw a window of opportunity. In turn, LCCR helped to build and sustain a broader network of organizations whose aims reached beyond policies traditionally associated with civil rights, a coalition known by its supporters simply as the “liberal lobby.”[[56]](#footnote-57)

Coalitions may represent only one side (and possibly the losing side) of a hotly contested fight, as the LCCR did at its inception. But they may also be large, even universal. When lawmakers and civil society organizations came together to pass the Religious Freedom Restoration Act (RFRA), they articulated the constitutional principle that burdens on free expression should be subject to strict judicial scrutiny.[[57]](#footnote-58) In doing so, they sought to build, and largely succeeded in building, a coalition that included leaders of both parties and MCs across the political spectrum.[[58]](#footnote-59) A similarly broad coalition came together to pass the Americans with Disabilities Act of 1990,[[59]](#footnote-60) at least implicitly endorsing the view that the Fourteenth Amendment protects the disabled.[[60]](#footnote-61)

*Ideas*.—In addition to coalitions, coalitional constitutionalism produces ideas, identities, and institutions. A coalition’s ideas are the political doctrine that one can glean from reading the various political opinions of coalition members. These ideas are a synthesis in two senses. First, at any given moment in time, the political doctrine of coalition members is the common set of principles the members can generally agree to. That common denominator may be only a small subset of the full set of beliefs held by at least one of the coalition members.[[61]](#footnote-62)

In the early 20th Century, for example, free speech advocates often had more areas of disagreement than agreement. The leadership of the American Civil Liberties Union openly sympathized with the radical elements of organized labor,[[62]](#footnote-63) and groups like the Free Speech League partnered with divisive figures like anarchist Emma Goldman.[[63]](#footnote-64) Yet in his 1921 magnum opus, *Freedom of Speech*, Zechariah Chafee, frequent ACLU collaborator[[64]](#footnote-65) and a hero to many in the movement, used “picketing and boycotting in private business”—key tools of the labor movement—as examples of the type of speech that could be criminally punished.[[65]](#footnote-66) He also announced that his “sympathies and interests [were] on the side of the employer.”[[66]](#footnote-67) In a 1941 update to the book, he used Goldman as an example of the kind of “undoubtedly turbulent persons” understandably deported under Wilson-era legislation.[[67]](#footnote-68) Even as the free speech coalition contained members with strong feelings about which views should prevail in the marketplace of ideas, the coalition could come together on a common ground, a doctrine that emphasized neutral rules protecting all speakers, rules that had nothing to say about the economic battles that formed the background for so much of the coalition’s work.[[68]](#footnote-69)

There are two crucial rules that govern a coalition’s relationship with its animating ideas. First, as Hans Noel has put it, “where you stand depends on who you sit with.” In other words, a coalition’s animating ideas will depend on the coalition’s members. At the organization’s inception, LCCR members hoped to include an attack on the 1952 McCarran-Walter Immigration Act, with its race-based quotas, on its advocacy agenda. The Japanese American Citizens League, a member organization, objected. Compared to current policy banning Asian-American immigration, the Act was a step in the right direction. LCCR eliminated immigration policy from its agenda.[[69]](#footnote-70) It later eliminated D.C. home rule from one policy proposal because members questioned whether it was truly a civil rights issue.[[70]](#footnote-71) By contrast, LCCR members deemed a wide variety of other issues to be part of the civil rights agenda. The group later lobbied on policies related to education funding,[[71]](#footnote-72) farm worker organizing,[[72]](#footnote-73) and criminal justice.[[73]](#footnote-74) As they hashed out their priorities, LCCR member organizations debated what constitutes a “civil rights issue,” developing the concept in light of new circumstances and its members evolving views.[[74]](#footnote-75)

On the other hand, who you sit with also depends on where you stand. In the leadup to the creation of LCCR, the organizations that would become its key members made a crucial decision on priorities. Led by organized labor and the labor-friendly NAACP,[[75]](#footnote-76) they put the creation of a permanent Fair Employment Practices Commission at the top of their priorities list, with the American Federation of Labor arguing that it would be better to fight and lose on the FEPC than to win an easier fight.[[76]](#footnote-77) This decision had important implications for the future shape of the civil rights movement. As David Karol has shown, while Northern Republicans in the mid-20th Century were generally just as racially liberal as Northern Democrats and far more so than Southern Democrats, their liberalism slipped when it came time to vote on additional authority for the FEPC.[[77]](#footnote-78) Beholden to business interests, while the Democrats sided with labor, GOP congressmen could support a wide variety of civil rights measures, but not a robust FEPC. Long before the Democrats became the party of civil rights in the mid-1960s,[[78]](#footnote-79) movement leaders were defining civil rights priorities in a way that would ensure they would fight alongside Democrats and not Republicans in the battles to come.

Indeed, movement leaders self-consciously crafted their principles in order not only to invite additional partners but to exclude partners who would shape their movement in ways they did not want. After its success in securing the Civil Rights Act of 1964, LCCR faced, in the late 1960s, a request for membership from Associated Community Teams (ACT), a self-described “revolutionary” organization devoted to “abolition of those institutions which inherently foster oppression and exploitation.”[[79]](#footnote-80) LCCR responded with its first-ever official by-laws, laying out a vision of a racially inclusive movement committed to “mutual acceptance” through “peaceful, democratic means.”[[80]](#footnote-81) Groups like ACT were now officially out of step with LCCR’s principles.[[81]](#footnote-82) By defining where it stood, LCCR could control who it would sit with.

*Identities*.—The next product of coalitional constitutionalism, after ideas, is new and changed identities. And this can change everything. As Walter Lippmann observed in 1922, before an individual can make a political decision, she must decide who she is. “[W]hile it is so true as to be mere tautology that ‘self-interest’ determines opinion,” Lippmann wrote, “the statement is not illuminating, until we know which self out of many selects and directs the interests so conceived.”[[82]](#footnote-83) An analogous point has been made by scholars of “self-categorization theory,” who show that individuals tend to adopt the beliefs and other characteristics that they associate with the groups to which they belong.[[83]](#footnote-84) If somebody’s group identity changes, the “she” that makes political decisions changes as well.

Coalitional constitutionalism changes our identities in two ways. On the one hand, membership in a coalition defined by a statement of constitutional principle can become an important source of identity in its own right. If a constitutional principle becomes the banner under which a coalition fights, that fight can encourage the process of identity-formation.[[84]](#footnote-85) Perhaps some free speech advocates continue to think of themselves as, say, Communists who are using free speech rhetoric strategically. But the more they fight for free speech, the more they are likely to think of themselves as free speech advocates, full stop. This identity can come to be every bit as important as an identity based on membership (union member) or ascriptive characteristics (White person). If anything, many political scientists believe, the most powerful identity in American politics is partisan allegiance,[[85]](#footnote-86) an abstraction far more nebulous than “free speech advocate” or “civil libertarian.” Constitutional principles can provide a fighting faith just as well as any more concrete group membership.

On the other hand, membership in a constitutional coalition can merge into a broader identity, as the broader identity becomes associated, by those who adopt it and the broader public, with the ideas of the constitutional coalition. David Karol has documented how what it means to be a Democrat or a Republican has changed over time.[[86]](#footnote-87) To take a classic example, the association of the Democratic Party with racial progressivism came only relatively recently, as egalitarians sorted into one party while their opponents sorted into the other.[[87]](#footnote-88) Even categories like “liberal,” “progressive,” or “left-wing” change over time. During the early New Deal, there was no perceived conflict between “liberalism” and opposition to civil rights.[[88]](#footnote-89) As late as World War II, supporting minimum wage laws did not make somebody liberal.[[89]](#footnote-90)

As constitutional coalitions grow, they can come to make up such a large proportion of a political party or persuasion that they define what it means to belong to that party or persuasion.[[90]](#footnote-91) And once a political group (Democrat or Republican, liberal or conservative) becomes associated with a set of ideas, its members will tend to adopt those ideas as their own, even if they had never thought of them before.[[91]](#footnote-92) Democrats can come to believe that their party membership means they should take a particular view of the First Amendment, just as early Democrats (and later Nixonian Republicans) defined themselves as the party of “strict construction.”[[92]](#footnote-93) Liberals can redefine their interests to value civil rights. As the group changes, so do its individual members.

*Institutions*.–Finally, coalitional constitutionalism produces and reshapes institutions. These institutions give concrete form to the coalitions, ideas, and identities produced by coalitional constitutionalism. The individuals who oversee and staff these organizations can interpret and apply those ideas to new fights. They help to ensure that the perspectives that produced the initial coalition compromise – the least common denominator principles to which all coalition members could ascribe – continue to be represented in the coalition’s work.

The ACLU initially reflected its roots among opponents of World War I, but it quickly came to represent the diverse interests and values that made up the early free speech coalition.[[93]](#footnote-94) Today, the ACLU’s Board of Directors represents the various members of the constitutional coalition associated with civil liberties. Its president worked at the NAACP and served as dean for equity and inclusion at New York Law School.[[94]](#footnote-95) Another member litigates for the Navajo Nation Department of Justice Water Rights Unit.[[95]](#footnote-96) Others work to protect immigrants,[[96]](#footnote-97) people with disabilities,[[97]](#footnote-98) and commercial clients.[[98]](#footnote-99) Similarly, LCCR (now the Leadership Conference on Civil and Human Rights) gives organizational form to the set of groups invested in civil rights protections. Its members include racial justice organizations like the NAACP, along with groups organized to protect members of various religious groups, Native Americans, LGBTQ Americans, and others.[[99]](#footnote-100)

The ideas, identities, and institutions shaped by coalitional constitutionalism reflect and reinforce each other. The content of the ideas built by a coalition determine who identifies with that coalition and shape the institutions that coalition creates. And in turn, those identifiers and institutions define and redefine the core ideas of the coalition.

### Constraint

Articulating principles, alone, does not make politicians like common law judges. Politicians must also be constrained by the principles they articulate. Neither judges nor politicians are, or should be, fully bound to their articulated principles. However, politicians face a variety of constraints that limit their ability, and their desire, to deviate from the principles they articulate.

Before discussing those constraints, however, I must offer one caveat. Like judges, politicians articulate both holdings – principles intended to bind in future cases – and dicta – principles that do not serve this role. Not every statement of principle is intended to be the basis for a long coalition, and statements that are not so intended may not act as a constraint. In this section, I argue only that statements intended to facilitate coalition building or maintenance bind the politicians who make them. Below I will consider at greater length which principles constitute holdings – intended to become the basis for coalitions and therefore binding on those who articulate them – and which constitute dicta.

While it is limited, the quantitative evidence we have suggests that coalitional principles bind MCs. One way to see this is to consider what happens when new constitutional principles are established. David Karol looks at periods when Democrats and Republicans were developing coalitional principles on abortion, gun control, and civil rights, after being associated with neither side of those debates. Initially, senators’ voting patterns follow public opinion among their constituents, as we would expect when there is no principle to constrain. However, as the political parties become associated with one side of the three debates Karol studies, party members begin to vote on their party’s principle, not their home-district politics.[[100]](#footnote-101)

Is this evidence consistent with what we know about the forces that produce intellectual consistency among judges and politicians? It is helpful to tackle the question in parts, considering the various ways in which decision makers betray their previously articulated principles. They may, of course, forthrightly announce that they have changed their minds. I consider this form of betrayal – which might be considered less a violation than an updating of principles – below, when I discuss position changes. Two other forms of betrayal will be considered here. First, decision makers may simply ignore previously articulated principles. Second, they may reinterpret their principles in a way that makes those principles effectively meaningless. I will consider each category in turn.

*Ignoring principles*.—Both judges and politicians can ignore the principles that they, or their institution, have previously articulated. When judges do so, they may be criticized in law reviews or by other judges. When politicians do so, they may face similar criticism in the popular press or at the hands of political opponents.[[101]](#footnote-102)

But three conditions distinguish politicians from judges. First, by assumption, politicians have built coalitions around their principles, with the goal of assembling a powerful combination of political actors who agree on the principle in question. These coalitions can be expected to highlight departures from principle, particularly by their fellow coalition members. A sense of betrayal can be a powerful spur to political action, and it would be surprising if political coalitions did not respond to it.[[102]](#footnote-103) The second condition that distinguishes politicians reinforces the first: politicians face reelection. This means both that coalition partners who feel jilted by a politician have an incentive to act – they may be able to replace the Benedict Arnold with somebody more attractive – and that politicians have an incentive not to deviate in the first place.

Finally, politicians, but generally not judges, may need to expand or restructure their coalitions in the future. As discussed above, those principles are a crucial tool for adding members to a political coalition. MCs who develop a reputation for ignoring their articulated principles may find it difficult to use statements of principle to expand and adjust their coalitions.

For these reasons, we should expect to see outright and unjustified betrayal only rarely. Rather, politicians should be expected to attempt to explain their actions in terms either of other principles or of ambiguities in the principles they have violated. This may explain why politicians who change parties tend to claim that they did not leave their parties, the parties left them.[[103]](#footnote-104) Even politicians intent on switching teams wish to avoid the impression they have switched ideals.

*Open texture*.— Another way for a decision maker to flip-flop, aside from merely ignoring a previously articulated principle, is for the decision maker to find some ambiguity in their articulated principles that justifies their new position. I will call this the problem of “open texture.”[[104]](#footnote-105) The principles embodied in precedent will often admit of more than one answer to whatever question a court must answer.[[105]](#footnote-106) This allows decision makers to interpret existing precedents in ways that change the law substantially without anybody having to admit that a precedent has been overturned. It also allows them to conclude that a competing principle supersedes whatever principle they wish to ignore, on the theory that the superseded principle simply is not clear about all implied exceptions.[[106]](#footnote-107)

So, do MCs or judges face less open texture?[[107]](#footnote-108)

The most obvious argument that judges face less open texture stems from the fact that they write long opinions, which might be expected to spell out their principles with more clarity and specificity than a congressional press release. But it is not clear that all of those additional words eliminate open texture rather than multiplying it. It may be that any position can find some support in all of those multifarious arguments, where simpler rules might have given competing interpreters less to work with. Philip Bobbitt has documented the many different “modalities,” or types of reasoning, that judges can use to make legitimate legal arguments.[[108]](#footnote-109) He has also noted that (1) judges often use more than one modality in a single opinion[[109]](#footnote-110) and (2) the existence of multiple modalities makes it possible to reach very different conclusions on contested questions.[[110]](#footnote-111) If justices show their skill by relying on a variety of complicated methodologies, they may only be increasing the law’s uncertainty. Indeed, Stefanie Lundquist and Frank Cross have shown that, in the federal circuit courts, the accumulation of relevant precedent first constrains judges from acting on their ideological priors and then liberates them to do so more freely.[[111]](#footnote-112) At some point, adding more words may add more open texture than it eliminates.

Moreover, the “precedents” that bind MCs have something that judicial precedents lack. Both judicial and political precedents generally consist of statements made in the context of some previous controversy. They can be made to answer current questions only by some level of extrapolation. But MCs not only must contend with words written or spoken in the past; they must frequently contend with the individuals who spoke those words, or at least their institutional representatives. In 2006, Representative Lynn Westmoreland (R-GA) learned this lesson the hard way. In a floor speech, Westmoreland used a quote from John Lewis to suggest that the Voting Rights Act was no longer necessary. Not only did Lewis come to the House floor to rebut Westmoreland’s claim; he arrived with blown up photographs of himself being beaten at the famous Selma march for voting rights.[[112]](#footnote-113)

As Westmoreland tacitly acknowledged by quoting Lewis, the statements of men like Lewis have become political precedents on the meaning of equal protection. This episode may have cost Westmoreland no more than some embarrassment, but to the degree to which Westmoreland and Lewis shared a coalition and a constituency, it could have had more significant political ramifications. It is hard to imagine a Democrat consistently battling John Lewis on the meaning of equal protection and getting away with it. Rep. Emanuel Celler, longtime chairman of the House Judiciary Committee – a perch from which he helped lead the fight for the civil rights legislation of the 1960s[[113]](#footnote-114) – ultimately lost his seat after his opposition to the Equal Rights Amendment became an issue in the 1972 Democratic primary.[[114]](#footnote-115) Even a legend of equal protection, not to mention a senior party leader, could not get too out of step with his coalition’s constitutional doctrine.

Of course, John Lewis will rarely be waiting in the wings to define equal protection. Still, groups like the NAACP will often have an outsized ability to characterize constitutional principles and apply them to the day’s battles. Justices interpreting their own written opinions appear to get no such deference.[[115]](#footnote-116)

*Ideological constraint.—*The discussion thus far relies on a fairly straightforward conception of “constraint.” I have asked why politicians who wish to depart from their expressed principles might nonetheless decline to do so. However, there is another way to think about “constraint” that is also relevant to this discussion.

In a pioneering 1960 work, Philip Converse defined ideological constraint as a conventional understanding of “what goes with what” in the world of ideas.[[116]](#footnote-117) When a liberal assumes that they should support abortion rights because they support high marginal tax rates, they are responding to ideological constraint. A system of ideological constraints is not purely a product of logic. Logically, a liberal could support abortion rights and oppose taxes, both on libertarian grounds. The Republican Party of the 19th Century married support for civil rights with pro-business policies in a platform of “free soil, free labor, free men,”[[117]](#footnote-118) just as 20th Century Democrats married civil rights policies to an ideology skeptical of business.[[118]](#footnote-119) However, some combination of historical circumstance and intellectual effort may produce a system of ideological constraint that seems, to those bound by it, to be merely an expression of the state of the world. For citizens who care enough about politics, the view that certain policy preferences naturally go with others is simply the water in which we all swim.[[119]](#footnote-120) And it takes a very sophisticated fish to know it’s wet.

If we think of constraint in Converse’s sense, we can see a different mechanism for making Congress a forum of principle. Principle articulation by politicians, including MCs and their allies, helps to form the system of ideological constraint. When MCs explain their position on criminal justice reform as dictated by their support for civil rights, or when they explain their position against civil rights legislation in terms of their opposition to federal power, they are both shaping and reinforcing society’s sense of “what goes with what.” And when they decide how they want to act – not just how they feel compelled to act – they are likely to consult that same logic. In the end, their reasoning may be so shaped by “ideological constraint” that they act as if they are perfectly constrained without feeling constrained in the least. A Congress of MCs who think and act in this way will operate as a forum of principle – following the articulated values of its members – without any need for conflict or punishment.[[120]](#footnote-121)

## The Dynamics of Coalition Change

Just because principles bind does not mean that they cannot be changed. Judicial precedents certainly evolve over time, and I doubt anybody would like a system in which they did not.[[121]](#footnote-122) What makes this evolution of legal principles itself principled is the existence of a set of meta-principles that govern the evolution. Judges have a doctrine of “precedent on precedent”[[122]](#footnote-123) that theoretically governs changes in legal principles.[[123]](#footnote-124) Here I will argue that politicians’ incentives produce something similar. Politicians should be expected to update their principles only in a way that respects past principles and can be seen as itself largely principled.

Two ideas explain the evolution of political principles. First, just as in the initial development of principles, where you stand depends on who you sit with.[[124]](#footnote-125) At a glance, this may sound like an invitation to opportunism. If principles are really just a cover for group interests, then perhaps they have no force at all.

But this insight actually suggests a mechanism for ensuring the measurd and thoughtful evolution of principles. Under normal circumstances, existing coalitions will restrain changes in core principles. If the members have no reason to cast aside the hard work that went into finding common ground between them, then the overlapping consensus to which they all subscribe should remain more or less in place.

However, as David Karol has shown, circumstances will not always be normal. When conditions change, one or more coalition partners may change their views on a matter of principle. They may be convinced by new circumstances that their previous views were wrong. Or they may have their attention focused on a new set of circumstances, causing them to prioritize one of their principles over another. In this case, politicians will engage in what Karol calls “coalition maintenance.”[[125]](#footnote-126)

Coalitional maintenance occurs when at least one component of a coalition changes its views, causing the coalition to update its principles in order to retain the support of the relevant group or groups.[[126]](#footnote-127) An example is Northern Democrats’ shift to active support for civil rights legislation during the mid-20th Century, which contributed to the Democratic Party’s embrace of civil rights.[[127]](#footnote-128) In coalition maintenance situations, shifts in articulated principles “should be rapid, because [such shifts do] not require politicians to forge ties to new groups, or voters to alter their loyalties, processes characterized by inertia on both sides."[[128]](#footnote-129) On the other hand, these rapid changes should be stable once they occur, as they reflect the views of an attentive coalition member with leverage over the coalition.[[129]](#footnote-130)

They should also follow an articulable logic. Change in principle motivated by coalition maintenance occurs when some discrete group has changed its views, and when that group feels strongly enough about the change to potentially abandon its coalition. While, by definition, the coalition is taking a position at time 1 that is different than its position at time 0, the time 1 position must be compelling to people who had been comfortable with the time 0 position at time 0. In other words, coalition change is likely to either be modest or to reflect a significant change in the public morality of at least some segment of the public.

A second mechanism of coalition change reflects the other principle of principle formation discussed above: who you sit with depends on where you stand. In short, coalitions will sometimes change their principles (where they stand) in order to attract a new group into the coalition (who they sit with). Karol calls this process “coalition group incorporation.”[[130]](#footnote-131) Again, the logic may sound opportunistic at first, and it is clearly the kind of move driven by cold, hard politics. But the logic also contains its own limitation. A political coalition can incorporate a new member by professing a new principle only if the principle is plausible for the coalition articulating it. If a coalition claims to believe something that its current members could not possibly accept, its statement is not credible and therefore not useful for attracting new members For this reason, coalition group incorporation will occur most often when a coalition takes a position on a group that had not previously divided the parties, and when it takes a position that is seen as palatable to its existing coalition.[[131]](#footnote-132) It is simply not credible for a coalition known for the left-wing position on some issue to suddenly claim it represents the right-wing position.

Examples include the Republican (Democratic) Party’s efforts to woo pro-life (pro-choice) and pro-gun (control) voters[[132]](#footnote-133) and the Democrats’ efforts to woo environmentalists.[[133]](#footnote-134) Changes motivated by “group incorporation” are likely to be slow. When abortion first emerged as a salient political issue, neither party was dominated by advocates on either side of the debate.[[134]](#footnote-135) As a result, primary voters did not consistently push their elected officials in one direction or another.[[135]](#footnote-136) However, as elites achieved some success bringing abortion activists (pro-choice or pro-life) into their coalition,[[136]](#footnote-137) those activists began to play a role in party coalitions, accelerating the association of each party with a particular side of the abortion debate.[[137]](#footnote-138) This mutually reinforcing process of elite position change and coalition adjustment takes time, causing the principles articulated by the relevant coalitions to evolve slowly.[[138]](#footnote-139)

To summarize, the position change process has a logic that constrains erratic shifts. When voters are being wooed by a coalition, they are being asked to build ties to that coalition that will not be easily severed.[[139]](#footnote-140) They must believe that the coalition will be with them not just in the fight of the day but in future battles. This belief will be easier to sow if the coalition can make statements of principle that are consistent with the principles they have espoused in the past, and with the subjective interests of their members. A coalition built on anti-government conservatism, even if it has said nothing about race in the past, will find it easier to appeal to opponents of federal civil rights legislation.[[140]](#footnote-141) A coalition that has consistently sided with big business will have trouble persuading environmentalists that it will take on polluters.[[141]](#footnote-142) A coalition that contains active feminists will be pushed in a pro-choice direction.[[142]](#footnote-143) While a coalition’s past positions and member interests may allow for a variety of positions going forward, that variety is limited. We should not expect a coalition’s articulated principles to change in a way that seems discontinuous with its previous articulations.

# II. Coalitional Constitutionalism and Minority Rights

To Dworkin, a forum of principle is not just a decision maker that relies on general rules to decide specific cases. It is a decision maker who is willing to apply those rules in the face of majoritarian interests that point in a different direction. To this way of thinking, “achieve the greatest good for the greatest number”[[143]](#footnote-144) is not a principle, nor is “do what’s popular.”[[144]](#footnote-145) A forum of principle must be willing to assert that some values are so important they must trump what the majority wants or even needs.[[145]](#footnote-146)

While Dworkin’s definition of “principle” may not track the dictionary’s, his claim resonates with a core assumption about constitutionalism: it should be capable of checking the power of what Dworkin calls “statistical majorities,” groups whose claim to govern is based entirely on their numerical superiority in the population.[[146]](#footnote-147) If Congress is not up to the task, that suggests it will be at best an imperfect defender of constitutional values.

There is a long literature, generally associated with the “pluralists,” focused on whether democratic institutions, and specifically America’s two-party system, can protect minority rights. To make this question tractable, scholars have abstracted away from particular minority rights. The key question, at a high level of generality, is whether democratic processes will vindicate the intensely held preferences of a minority when they conflict with weakly held majority preferences.[[147]](#footnote-148)

We might disagree with Ronald Dahl that intensely held minority preferences are “almost a modern psychological version of natural rights,”[[148]](#footnote-149) but the equation of rights with strongly held preferences gets at something both descriptively and normatively compelling. Descriptively, it seems likely that serious rights deprivations often cause the groups that face them to have an intense desire for policies that will ameliorate these deprivations. It would be surprising indeed if Black people in the Jim Crow South or Jews in Hiter’s Germany did not privilege their views on Jim Crow or the Nuremberg Laws over their preferences on tax rates and spending. Similarly, though with less certainty, we might assume that Black people and Jews felt more strongly about reducing the legal burdens they faced than Whites and Gentiles felt about perpetuating them.

Normatively, we might simply prefer to equate rights with intensely held preferences. If an impacted group does not consider a supposedly rights-infringing policy to be highly salient, there is something almost paternalistic about determining that such a policy must be proscribed regardless of how the voting public feels about it. There is a reason that arguments about “false consciousness” have come to be generally derided.[[149]](#footnote-150) I do not rule out the many arguments that can be made for treating some policy as a “right” even when those who would benefit don’t much care. But if we equate rights – at least for the sake of analysis – with highly salient policies, we have a ready-made ground for demanding they be upheld.

The intensity-based conception of rights, it should be clear, generalizes beyond the rights of ascriptive minority groups. If a loosely organized set of dissidents strongly prefer that speech be unrestricted, a right to free speech can be analyzed as a policy intensely preferred by a minority group. The same goes for the strong preferences of a gun-owning minority. Criminals and their sympathizers may not constitute a particularly powerful minority, but if they strongly prefer lenient criminal justice policies, we can analyze those preferences as a demand for rights. Below, when I discuss rights and the minority group that demands them, the terms should be seen as a stand-in for any policies that are highly salient to some collection of individuals (rights) and the collection for which they are salient (minority group).

Pluralism is often seen – by its proponents[[150]](#footnote-151) and its critics[[151]](#footnote-152) – as bullish on the idea that democracy can protect rights. The basic argument is that competing political coalitions have strong incentives to woo minority groups. True, when a minority wants policies that the majority opposes there will be a cost to proposing those policies.[[152]](#footnote-153) However, under plausible circumstances that cost will be worth paying.[[153]](#footnote-154) And under some circumstances an apathetic majority will not exact a price, while a mobilized minority will most certainly provide a reward.[[154]](#footnote-155)

To be sure, this pluralist vision has been heavily criticized.[[155]](#footnote-156) Scholars have noted that a minority group is unlikely to receive its due in the pluralist marketplace if it is stigmatized,[[156]](#footnote-157) if it has limited resources,[[157]](#footnote-158) or if it is unable to mobilize as a group.[[158]](#footnote-159) However, these criticisms go to the price that politicians will be willing to pay for minority group support. The basic framework – in which politicians are willing to take some action to win the support of a group of voters, even if that group does not make up a majority of the population – remains viable.

However, the pluralist model ignores two critical considerations. First, it relies heavily on an analogy to the economic marketplace. But in the economic marketplace, market participants can sign contracts when they find a mutually beneficial exchange. In the political marketplace, the situation is considerably more complicated.

In some accounts, pluralists imagine that politicians will compete for minority group support by paying up front.[[159]](#footnote-160) They will attempt to compile favorable records on rights issues, on the hope that they will be rewarded at the next election. If we accept that some voting is “retrospective”[[160]](#footnote-161) – that voters sometimes reward politicians for actions already taken – then this model is plausible for some issues.

But imagine that what a minority group wants is not a particular action taken today, but a commitment that a set of actions will never be taken. Imagine, for example, that they want to know they will never face discriminatory laws, that their speech will never be infringed, or that they will never be denied due process. Imagine, in short, that they want a commitment that political actors will follow some small-c constitutional limitation. In this case, retrospective voting will not work. A minority group might punish the party that violates its rights at one point in time, but it cannot elicit a promise that its rights will be respected going forward. If it would be willing to pledge lasting fealty to the political coalition that commits to protecting its rights, such a trade of loyalty-for-commitment could well be mutually beneficial, as it would provide valuable certainty to both sides. But retrospective voting does not allow for such a trade.[[161]](#footnote-162)

What the minority group needs is a credible commitment mechanism. It needs a means by which politicians can commit to respect minority rights in the future and be bound to honor its commitment. The group’s success in eliciting appropriate commitments will depend, then, in part on the types of mechanisms available to perform this role.

The pluralists have also ignored the potential for minority group incorporation to change the politics that produced it. As John Skrentny has noted, scholars who have studied how politicians respond to minority group rights claims have tended to assume that the two relevant actors – minorities and the politicians who accommodate them – are necessarily distinct.[[162]](#footnote-163) This assumption gives the pluralist models a static feel. The interests of minority groups, on the one hand, and politicians, on the other, are assumed to remain fairly constant, since the makeup of the two groups remains fairly constant.

Coalitional constitutionalism adds to this picture in two ways. First, it provides a credible commitment mechanism. If the account I provide in Part I is correct, politicians can articulate statements of principle – including statements like “I will never vote to discriminate against Group X” – that minority groups should take seriously, because they ultimately bind the politicians who articulate them.

Second, coalitional constitutionalism reminds us that one result of any mutually beneficial agreement between a political coalition and a minority group is likely to be the incorporation of the minority group into the political coalition. This dynamic has important implications for understanding the incentives of all involved, as well as the likely results of the pluralist game.

The next two sections provide a stylized account of the minority group incorporation game.

## Minority Incorporation Game Part I: An Auction for Group Support

The minority incorporation game includes three players. First, a minority group strongly supports a set of policies, which I will call rights policies.[[163]](#footnote-164) These policies can be placed on a continuum and characterized in terms of their strength. For example, we can imagine a policy spectrum that includes, in order of strength: legalizing sodomy, allowing civil unions, allowing same-sex marriage, banning discrimination against gays and lesbians with religious exceptions, and banning discrimination without religious exceptions.[[164]](#footnote-165) The minority group (in this case, gay men and lesbians) prefers the strongest possible policy and, because of the salience of rights-based issues, will vote for whichever politician offers the best rights policy.[[165]](#footnote-166) Politicians that endorse any of the rights policies will lose votes, on net, among the general electorate (the set of voters who are not members of the minority group). The stronger the rights policy, the more votes will be lost.[[166]](#footnote-167)

To begin, I note that this game looks something like an auction. Politicians bid on a non-divisible good – the bloc of votes that comes with winning over the minority group – and must pay some price to secure it. The higher bidder receives the good at the cost of whatever it bid. A higher bid corresponds to a more aggressive rights policy, which will cost the bidder more votes in the general electorate.[[167]](#footnote-168) However, policy strength is not the only determinant of how many votes a bidder will lose. Bidders also have to consider their *aspirational winning coalitions* – the set of voters they hope to win over if they are to secure majority support in the next election. This aspirational winning coalition includes the voters who always support the bidder, but it also includes other voters who the bidder believes they will need to win. For example, a Democrat playing the game might count in their aspirational coalition Black women who they cannot imagine losing and White union members they feel they must win over. Republicans count gun owners but also suburban men.

The key is that the two bidders[[168]](#footnote-169) pay a different price – in terms of voters lost to their aspirational winning coalition – from the same bid. Imagine, for example, that the two parties sit roughly where they did in the mid-1970s. Assume that neither party had attempted to incorporate gay and lesbian voters, and that gay and lesbian voters could plausibly support either party.[[169]](#footnote-170) Imagine further that, putting aside their position on gay rights, Democrats hope to win with the support of younger and more liberal voters attracted to the party by its support for civil rights and its relatively liberal stand on cultural issues. Republicans, on the other hand, hope to win with traditional conservatives and skeptics of the burgeoning youth counterculture.

It should be clear that Republicans will likely pay a high price for supporting a moderate policy like civil unions. If they lose a substantial share of social conservatives, their goose is cooked. Democrats, on the other hand, have fewer social conservatives in their aspirational coalition to lose. Under plausible circumstances,[[170]](#footnote-171) the Democrats have far less to lose by proposing civil unions than do the Republicans.

To make this all simpler, imagine that gay rights policies can be described by a single number from 1 to 10. Imagine further that there are 3 million gay or lesbian voters in the country who will vote for whichever party better protects their rights. Finally, imagine that Republicans will lose one million voters, multiplied by the value of their policy choice (for a policy of 5, they will lose 5 million voters) while Democrats will lose half that.

Now, the game theory comes in. Under this setup, Democrats could propose a policy up to strength 10 and still improve their electoral situation. Republicans, on the other hand, can only propose a policy up to strength 5.

For present purposes, the important takeaway from the mathematically complicated solution to a game of this kind is that neither party will bid more than *the other party’s* highest reasonable bid. In our case, while the Democrats would still benefit from winning the auction even if they bid slightly under 10, they will never bid more than 5. The reason is simple. Since Republicans will never bid more than 5 – they would be made worse off if they win and no better off if they lose – Democrats do not benefit from bidding more than 5. To do so would increase their cost of winning without increasing their chances of winning.

To be clear, I do not claim that this analysis describes what the parties will do, much less what they should do. I simply mean to clarify a particular set of incentives that party leaders face, which I will call “general election incentives.” General election incentives, as the name suggests, relate only to the set of actions parties should take if they intend to maximize only their probability of winning a general election. And the crucial thing about general election incentives is that they are keyed not to the values of the bidding party, but to the values of the *other* party. If the two dominant parties are the competing bidders, Democrats’ general election incentives on gay rights policies depend on how homophobic they perceive *Republican* voters to be, and vice versa. This, as we will see, creates a tension between general election incentives and what I will call coalitional incentives.

## Minority Incorporation Game Part II: Coalitional Incentives and the Countermajoritarian Tension

We have already seen coalitional incentives, in the basic coalitional constitutionalism model sketched in part I. Coalitional incentives drive politicians to articulate and follow statements of principle that become foundational to the coalitions that help them win policy fights and secure reelection. The minority incorporation game from the preceding subsection can be seen as a particular situation in which politicians have an incentive to make statements of principle, incentives driven by “coalition group incorporation.”[[171]](#footnote-172)

Once a party has “won” the auction for a minority group’s support, then, coalitional incentives push party members to uphold the principles they articulated to incorporate the minority group into their coalition. However, as discussed in the previous subsection, that principle is likely to be fairly tame. At first, then, these new coalitional incentives may not be terribly inconsistent with their general election incentives.

However, the dynamics of group incorporation should quickly create a tension call it the “countermajoritarian tension,” between politicians’ coalitional incentives and their general election incentives. When a bidder wins the auction, the minority group in question should move into that bidder’s political coalition.[[172]](#footnote-173) Because where politicians stand depends on who they sit with, the newly reconstituted coalition will tend to develop ideas, identities, and institutions suited to its new membership. A political party with more gays and lesbians among its primary voters, its party officials, and its allied organizations will naturally encourage more aggressive principles on protecting LGBT rights. In order to win primary elections and to mobilize copartisans for policy and electoral fights, politicians will naturally rely on principles that are intuitive to their new coalition partners.

At the same time, the minority group may develop an identity – including a sense of its group interests and its perceived allies – that reflects its alliance with the auction-winning coalition. Andrew Proctor has documented how gay and lesbian advocates developed a “civil rights” identity through the course of their interactions with the Democratic Party.[[173]](#footnote-174) This identity gave members of the LGBT community the feeling that their interests, for better or for worse, are naturally aligned with other groups, like the Black community, who pursue civil rights-protective policies associated with Democrats.[[174]](#footnote-175) Before being incorporated into the Democratic coalition, large numbers of gays and lesbians were receptive to a “libertarian” identity suited to Republican ideals and a “liberationist” identity that would have made gays and lesbians a non-partisan force open to alliances with either party.[[175]](#footnote-176) The gay and lesbian political identity we know today, Proctor shows, is the consequence, not just the cause, of Democrats’ decision to welcome gays and lesbians into the party.[[176]](#footnote-177)

We can see the process of minority group incorporation in the two parties’ trajectories on civil rights in the middle of the 20th Century. Prior to the 1960s, a series of changes contributed to making Democrats the party better suited to win an auction for the support of Black voters. Organized labor’s support for civil rights forged links between a key Democratic constituency and Black voters.[[177]](#footnote-178) These links also shaped the civil rights movement’s agenda to prioritize economic goals that were particularly troubling for Republican officials.[[178]](#footnote-179) In 1948, the Dixiecrat revolt and Truman’s subsequent victory on a racially progressive platform made it thinkable that Democrats could win without the Solid South.[[179]](#footnote-180) In 1958, a good year for Democrats in liberal states made the Democratic Senate caucus more racially progressive and the Republican caucus less so,[[180]](#footnote-181) in turn making it easier to imagine Democratic congressional majorities built on civil rights support as opposed to civil rights opposition.

The turning point – in my terms, the auction – came in 1964. President Johnson’s leadership on the 1964 Civil Rights Act can be seen as Democrats’ bid for Black voters.[[181]](#footnote-182) Conversely, the Republicans’ nomination of Barry Goldwater – a rare GOP opponent of the 1964 Act specifically and federal civil rights legislation generally[[182]](#footnote-183) – can be seen as that party’s bid for the support of Southern Whites. The year produced significant and lasting changes in the electorate. While roughly 40 percent of Black voters supported Republicans in 1956 and roughly one-third in 1960, less than 10 percent did in 1964,[[183]](#footnote-184) with Republicans never recovering their previous support.[[184]](#footnote-185)

Crucially, both parties used coalitional constitutionalism to secure the political changes they sought. Democrats not only supported civil rights; they supported a version of civil rights built on a capacious understanding the Commerce Clause[[185]](#footnote-186) and focused in large part on regulating private business.[[186]](#footnote-187) The vision Democrats articulated maximized the fit between their existing coalition and values, on the one hand, and the coalition and values they were bidding to represent, on the other. Black voters considering an alliance with the Democrats could believe that the party would stay true to a program of active government intervention in the economy.

Republicans, on the other hand, offered a vision that emphasized the party’s long-run loyalty to business. Even those Republicans who supported the 1964 Civil Rights Act expressed concern that it would set a dangerous precedent for economic intervention in the economy.[[187]](#footnote-188) While Republican ideology originated in anti-slavery agitation, it was also rooted in commitment to pro-business policies.[[188]](#footnote-189) Goldwater himself supported desegregation while arguing that the federal government had no power to bring it about.[[189]](#footnote-190) Southern Whites could believe that, whatever their differences in core values, Republicans were more likely to oppose federal interference with the South’s approach to race relations than were the Democrats.

Consistent with my theory, the two parties were not terribly far apart on civil rights policy in 1964. A higher percentage of Republicans than Democrats voted for the Civil Rights Act, albeit only after a long struggle to win the hearts of key Republican leaders.[[190]](#footnote-191) Republicans went to great pains to point out that they had proposed similar legislation while the Democrats were still dragging their heels, and to criticize Democrats for moving too slowly.[[191]](#footnote-192)

Only after the party coalitions shifted did their elected politicians begin to take truly disparate positions on racial issues. Republicans began to reject civil rights efforts in 1966 and continued to oppose key Democratic initiatives through the 1990s.[[192]](#footnote-193) Polarization on roll call votes continued through the 1970s,[[193]](#footnote-194) as Black voters achieved official representation in Democratic Party institutions[[194]](#footnote-195) and party activists became increasingly divided on racial questions.[[195]](#footnote-196)

As politicians’ coalitional incentives shift to encourage more aggressive support for rights, their general election incentives move in the opposite direction. Just as the rights-supportive party becomes increasingly attractive to rights supporters, the other party will become increasingly attractive to rights opponents. It will also develop principles that explain and justify its opposition to rights, principles designed to unify its coalition of rights skeptics. It will attract new groups receptive to these principles. And it will reshape these groups’ identities in ways that encourage rights skepticism, just as LGBT Americans had their identities reshaped in ways that left them more amenable to rights claims.

Ultimately, politicians in the minority-supportive party[[196]](#footnote-197) are likely to face a growing tension between their desire to uphold their coalitional principles – motivated both by electoral incentives and by their values – and their recognition that there are electoral benefits to be had by throwing a coalition partner under the bus. The same forces that push the minority-supportive party in one direction ensure that the other party would face an even higher price for offering any support to the minority group in question. As the other party becomes increasingly associated with its opposition to minority rights, it becomes increasingly difficult to imagine it commanding a national majority if it were to alienate anti-rights forces. Just as important, the parties’ allied politicians are likely to increasingly see their policy goals in terms that are antithetical to the rights in question. As generations of Republicans are socialized to see Republicanism as a creed that defends traditional values against LGBT rights, it becomes increasingly difficult to imagine Republicans making a bid to be the party of LGBT rights. In turn, it becomes increasingly easy to imagine Democrats weakening their support for LGBT rights without losing electoral support.

## A Constructive Tension

In the previous section, I argued that politicians will be pulled in two different directions when they – following their political incentives – choose to champion the intense preferences of a minority group. On the one hand, their coalitional incentives will pull them to defend policies that are broadly unpopular but are important to a new member of the party coalition. On the other, their general election incentives will pull them to limit support for their new coalition-mate, a move that becomes less politically costly as the parties polarize over that coalition partner’s rights.

One the one hand, this countermajoritarian tension should cause the parties to pursue policies that are not designed to appeal to the majority of voters. Political incentives should lead politicians to protect minority rights, at least if those rights take the form of policies intensely supported by a minority group.[[197]](#footnote-198)

However, the countermajoritarian tension itself may be more important than the fact that it pulls politicians away from majority preferences. Ambitious politicians face a highly unattractive situation. They must make two difficult choices. First, they must decide how much political risk they are willing to accept in order to protect the intense preferences of their coalition partners. And second, they must decide, for a given level of political risk, which risks to take. Will they advance Black civil rights, LGBT rights, or the rights of some other partner? At any given level of political risk, this is a zero-sum game. Politicians must weigh difficult and fraught strategic, policy, and moral questions, and those questions are likely to divide political coalitions.

We can see the countermajoritarian tension at work across American history. Long before Democrats debated the importance of trans rights, Republicans – then a party built on the fight against slavery – debated how aggressively to champion the rights of the freedmen. After sustaining heavy losses in the election of 1868, Republicans openly questioned their commitment to Black voters. Republicans who questioned the wisdom of this commitment framed their arguments in terms of majoritarian values. Claiming that both Democrats and Republican primary voters had rejected suffrage for Black citizens in 1868, Senator Thomas Hendricks (R-Ind.) asked, “[i]f the people are against it, what right have you to change the Government?”

But even as some Republicans called for pulling back, the party continued to push an aggressive policy on Black civil rights. And while some no doubt believed that securing such rights would pay electoral dividends – particularly by securing Black voting rights – others backed civil rights, in the words of two scholars of the period, “not because of political expediency but *despite* political risk.”[[198]](#footnote-199) Senator Henry Wilson effectively summarized the countermajoritarian tension. While Wilson believed that Republican’s support of black voting rights “cost the party . . . a quarter of a million votes” in the 1868 election and was broadly unpopular across the country, he maintained that his “doctrine is, no matter how unpopular it is, no matter what it costs, no matter whether it brings victory or defeat, it is our duty to hope on and struggle on and work until we make the humblest citizen of the United States the peer and the equal in rights and privileges of every other citizen of the United States.”[[199]](#footnote-200)

The Second Reconstruction also featured intra-party debates over minority rights. After his brother’s death, even as President Johnson called for urgent action on civil rights, Attorney General Robert Kennedy speculated that the Democrats would lose two votes for every one they gained by moving forward.[[200]](#footnote-201) Yet move forward they did. Developments in the 1970s and 1980s further deepened Democratic disagreement over the electorally wise path on civil rights.[[201]](#footnote-202) Similarly, after winning over gay and lesbian voters in the 1970s, the Democratic Party became concerned about Republican claims that Democrats represented only special interests, including identity-based minority groups.[[202]](#footnote-203) While the party continued to push for gay and lesbian rights through the 1992 Clinton campaign, Democrats hotly debated whether this strategy was politically advantageous.[[203]](#footnote-204)

Modern Republicans have also felt torn between defending coalition partners and appealing to the median voter.[[204]](#footnote-205) Even as he developed his famous southern strategy to appeal to racially conservative Whites, Richard Nixon worried that an overtly racist message would put him outside of the mainstream of American political thought.[[205]](#footnote-206) In response, he supported affirmative action policies that were progressive by the standards of his time and ours.[[206]](#footnote-207) Republicans have also grappled with how much to embrace Christian conservatives[[207]](#footnote-208) and reactionary isolationists.[[208]](#footnote-209) In both cases, the party simultaneously worried about embracing the minority group while continuing to treat it as a coalition partner.

This section will consider what politicians will do when faced with such a difficult situation. I argue that, while many answers are possible, the countermajoritarian tension can push politicians in a normatively desirable direction. How and to what degree will depend in part on the institutional framework in which they operate. I first briefly consider three options that have been discussed by scholars: moderation, leadership, and outsourcing to the courts. I then turn to a new concept, which I call constraint shifting.

### Moderation

As Paul Frymer has documented, politicians sometimes choose to address tensions within their political coalitions by throwing coalition partners under the bus.[[209]](#footnote-210) Republicans in the 19th Century gave up on Reconstruction.[[210]](#footnote-211) Democrats tempered their support for busing and other controversial policies in the 1970s[[211]](#footnote-212) and sought to avoid specific discussion of gay and lesbian issues in the 1980s.[[212]](#footnote-213) Famously, Bill Clinton signaled his independence from the Democratic coalition by attacking an obscure rapper named Sistah Souljah.[[213]](#footnote-214) Examples could be multiplied.

As Frymer puts it, politicians concerned about being punished by the general electorate for backing a minority group – his focus is Black Americans – shift the dimension on which partisan combat occurs. Rather than fighting about race, Reconstruction Republicans sought to turn elections into battles over economics,[[214]](#footnote-215) as did New Deal Democrats under FDR.[[215]](#footnote-216) Rather than fight about LGBT rights, Democratic leaders sought to convey their views in terms of “thematic” positions, general statements about fair treatment that failed to call out the unfair treatment experienced by particular groups.[[216]](#footnote-217) In our own time, many progressive Democrats have called for emphasizing class over “identity politics.”[[217]](#footnote-218)

It is certainly true, and no surprise, that politicians moderate their support for minority group positions in response to general election incentives. But the situation should not be oversold. The moderating parties generally remain significantly more supportive of their coalition partners than the other party. Even as Bill Clinton criticized Sistah Souljah, he pursued fairly progressive policies, at least relative to Republican doctrine.[[218]](#footnote-219)

A similar dynamic characterizes almost all of our other examples. Democrats may have preferred to talk about fairness, generally, not LGBT rights, specifically. But their policy proposals were well to the left of those put forward by a Republican Party that often demonized gays and lesbians while ignoring the AIDS crisis.[[219]](#footnote-220) Nixon may have taken some progressive stands, most notably on affirmative action, but his criticism of busing and his Supreme Court appointments showed his basic fealty to a coalition of Southern and Northern racial conservatives.[[220]](#footnote-221)

The notable exception here is 19th Century Republicans. Republicans did not just moderate their approach to Reconstruction; they ran away from the whole project.[[221]](#footnote-222) However, the Reconstruction example is best seen as an exception that proves the rule. The political dynamic that drives coalitional constitutionalism does not operate when the minority group seeking to have its rights defended cannot vote. Republicans had to commit substantial resources – in terms of both money and the political capital needed to defend a continued military occupation of the South – merely to create the politics that would defend such a commitment. It is a testament to the power of coalitional incentives that Radical Republicans pushed civil rights for as long as they did. As a party built around the issue of slavery, the Republicans were defined by principles of equal protection, at least of a limited sort. But my argument here is not that principle drives politics, but that politics drives principle. When it became clear that Black Americans could be excluded from politics, Republican principles had to change to accommodate the new reality. A unique political situation led to a unique result: a near-total betrayal of a Republican coalition partner.

### Outsourcing To the Courts

Another way for politicians to dissipate the countermajoritarian tension is to have judges, not elected officials, make the tough calls. Scholars have long noted that, under certain circumstances, judicial supremacy can benefit politicians.[[222]](#footnote-223) In particular, when party coalitions are divided on particular questions, politicians may prefer to let judges answer those questions. Rather than having divisive debates over integration, for example, Democrats might prefer to let the courts implement the policy the judiciary announced in *Brown*.[[223]](#footnote-224) Rather than fight within their parties about slavery,[[224]](#footnote-225) abortion,[[225]](#footnote-226) or even antitrust,[[226]](#footnote-227) they may prefer to kick the major questions to the courts.

Just as judicial supremacy can liberate governing regimes that are divided on policy – say, between integrationists and segregationists – it can liberate regimes that are divided over how aggressively to pursue particular policies. By letting the courts lead on integration, Democrats made judges the front line in a difficult fight, letting them absorb the first blows. To the degree to which voters blamed judges and not elected officials for unpopular integration policies, the Democrats could support a coalition partner without paying a general election cost. Even if voters blamed politicians for the actions of judges – as surely some did – Democratic leaders could stop fighting over the appropriate scope and pace of change. For a party torn between coalitional and general election incentives, the best way to decide which difficult path to take may be to let somebody else make the decision. At least the party can stop fighting over what to do.

Outsourcing to the judiciary is clearly part of how politicians respond to the countermajoritarian tension. But the concept is broad and vague. In a sense, politicians outsource to the judiciary every time they pass a law. Judges, not politicians, will decide how to interpret the often-broad language Congress enacts. The question, in other words, is not whether Congress will outsource to the judiciary, but how. I consider that question below.

### Leadership

Frymer also suggests that politicians can defy the general election incentives against minority rights protection by seeking to alter the public opinion that drives those incentives. He gives as an example Democrats’ response to proposition 187 in California, which sought to deny immigrants access to government services.[[227]](#footnote-228) Frymer argues compellingly that while proposition 187 ultimately passed, the efforts of Democratic elites dramatically reduced its popularity, at least among Democrats.[[228]](#footnote-229) Democrats could have simply accepted the popularity of this essentially nativist proposal, but they chose a different path, with some success. When we fight, perhaps, we win.

Ultimately, Frymer’s message is both descriptively compelling and normatively appealing. Descriptively, we should expect politicians to seek ways to mitigate the countermajoritarian tension by reducing the gap between majority preferences and minority rights. Normatively, the situation is more complicated, if only because not all rights are created equal. Readers may welcome efforts to lead the public away from bigotry against Black people or immigrants. They may feel differently if the goal is to increase public sympathy for gun owners or religious people asserting the right to discriminate. Nonetheless, if political incentives drive politicians to show leadership on rights questions, we have the outline of what Mark Tushnet has called an “incentive compatible Constitution” – a democratic system that drives electorally motivated politicians to defend minority rights.[[229]](#footnote-230) I now turn to how that system works.

### Constraint Shifting

The Supreme Court’s decision in *Employment Division v. Smith[[230]](#footnote-231)* hit the political system like a ton of bricks. For years, the Court had grappled with what to do when government limits the right of Americans to practice their religion. An explicit ban on an unpopular faith would be easy to address. But what happens when ostensibly neutral laws burden free exercise? When a claimant was denied unemployment benefits because she had been fired after refusing, on religious grounds, to work Saturdays, the Court held that the refusal could stand only if the government could show it was narrowly tailored to advance a compelling interest, a high bar.[[231]](#footnote-232)

Then, in *Smith*, the Court reversed course. Going forward, government could enforce neutral laws even when they prevented religious believers from following their faiths, provided they had a rational basis.[[232]](#footnote-233) The decision had implications for both major party coalitions. Democrats, the traditional choice of Jewish voters, may have been the more obvious party to defend the rights of those religious minorities most likely to have their faiths ignored when legislatures draft general statutes.[[233]](#footnote-234) *Smith* involved a racial minority (Native Americans) ingesting illegal drugs, conduct more likely to seem acceptable to social progressives, and the opinion had been joined by the Court’s conservatives and opposed by the Court’s liberals.

On the other hand, by 1990 Christan conservatives had become an important part of the Republican coalition.[[234]](#footnote-235) While mainstream Christians are unlikely to be ignored when general legislation is written, Christians with extreme or otherwise unusual views might be expected to worry about a decision like *Smith*. Even if not, they might be expected to defend – and demand their coalition partners defend – the principle that religious rights are sacrosanct.

As it turned out, both liberals and conservatives found something to hate in *Smith*. Organizers quickly built a bipartisan, trans-ideological coalition to overturn the opinion by codifying the pre-*Smith* regime for protecting religious rights.[[235]](#footnote-236) The Religious Freedom Restoration Act (RFRA), as this codification would be known, demanded that government demonstrate any statute proscribing conduct required by an individual’s religious views be narrowly tailored to advance a compelling state interest.[[236]](#footnote-237) The proposal faced two significant challenges – from pro-life advocates concerned it would create a religious right to abortion, and from prison officials and their allies, concerned about disruptions to carceral procedures – but after compromises were reached it passed overwhelmingly in both houses.[[237]](#footnote-238)

The RFRA example highlights several limitations in thinking about political action in terms of moderation, leadership, and outsourcing to the courts. On one level, RFRA could be seen as an effort by both parties to moderate their claims in support of coalition partners. Liberals allied with believers in minority (and sometimes unpopular) religions made no effort to specifically recognize and ameliorate prejudice against minority religions. It would have been technically possible, and reasonable, to construct a regime that imposed strict scrutiny only on religious restrictions that apply to minority groups unable to defend their prerogatives in the political marketplace. But the liberals who led the RFRA effort opted instead for a universalistic approach that protected all believers equally. To paraphrase a modern example of the same strategy, they chose to assert that “all religions matter,” not that “minority religions matter.”

On the other hand, liberals’ decision to focus on broad religious rights did not obviously harm minority religions. The pre-*Smith* *Sherbert* test was intended by its author to protect religious minorities.[[238]](#footnote-239) And judicial protection would arguably be most helpful to groups unlikely to succeed through majoritarian politics.

In short, the liberals who led the RFRA fight are certainly guilty of seeking to deemphasize a minority-majority political axis in favor of a more universalistic claim focused on the rights of all believers.[[239]](#footnote-240) In Andrew Proctor’s terms, they sought a “thematic” approach that did not recognize the specific claims of any persecuted group. But it is hard to simply chalk up the RFRA fight as an example of liberal sail trimming. The RFRA drafters proposed a sweeping change in case law, in the face of contrary Supreme Court precedent, and without accepting much in the way of compromise.

Conversely, conservatives apparently made little effort to focus in on the interests of the Christian Right. From the beginning, RFRA was seen as a left-wing initiative.[[240]](#footnote-241) Conservative Christian organizations were less involved in pushing for it and more involved in the push-back, largely over concerns about abortion.[[241]](#footnote-242) Ultimately, their allies compromised first in backing RFRA and then in negotiating an abortion compromise far less explicit than the one demanded by pro-lifers,[[242]](#footnote-243) a group that overlapped heavily with conservative Christians.

Yet, particularly given the subsequent history of RFRA,[[243]](#footnote-244) it is hard to argue that Republicans abandoned the Christian Right in the RFRA debate. To be sure, they accepted a compromise that downplayed the Christian Right’s key areas of focus. But they succeeded in legislating special protections for people of faith, hardly a small achievement for the nation’s largest faith-based political movement.

The question of whether RFRA’s proponents showed leadership is, in a sense, the mirror image of the question about moderation. By neglecting to defend their coalition partners explicitly – RFRA was not designed to valorize any particular religious group – they failed to show the kind of leadership Frymer advocates. However, by assembling a coalition that cuts across religious boundaries, they arguably showed exactly the kind of leadership that leads to change.

Finally, it is difficult to evaluate RFRA in terms of whether leaders outsourced policy to the courts. On the one hand, Congress stepped in when the courts refused to act. In doing so, they took responsibility for protecting religious rights, rather than leaving judges to accept the responsibility and pay the political costs. More generally, they also highlighted Congress’s role in rights protection. RFRA can be seen as standing for the general proposition that Congress retains the authority to protect those rights that the Court neglects. Congress’s specific reliance on Section 5 of the 14th Amendment as the authority for its action highlights the degree to which Congress was asserting power to reject the Court’s interpretation of constitutional rights.

On the other hand, RFRA can be seen as the ultimate punt to the judiciary. Congress said little about how courts should separate valid from invalid claims under the statute. Moreover, the specifications it did provide were borrowed from judicial case law. In effect, Congress told the courts that they had been doing fine without congressional guidance before *Smith* and should simply go back to an older judicial model.

What Congress sought to do in RFRA can best be described as shifting the ideological constraint. In short, Congress sought to shift the country’s sense of “what goes with what.”[[244]](#footnote-245)

In one vision of politics, support for the Christian Right naturally goes with opposition to the rights of religious minorities. Conservative Christians tend to vote for a different party than observant Jews and Muslims. In another, supporters of religion, generally, should be pitted against those who would limit religion’s influence.[[245]](#footnote-246) In a third, the divide should be between those who would limit some religious practices, in the name either of another faith or of secular values, and those who believe religious observance belongs to a private sphere that should be free from public regulation. Whatever else they did, RFRA’s advocates sought to impose this third schema on politics.[[246]](#footnote-247)

Changing the ideological constraint means drawing some dividing lines while erasing others. The RFRA coalition sought to erase a dividing line between observers of different faiths. In doing so, they hoped to define the relevant political cleavage as one between tolerance and intolerance, with people of all faiths asserting the principle of toleration for faith, as faith. They asserted that toleration for doctrinaire Christianity “goes with” toleration for doctrinaire observance of other religious faiths, while intolerance of minority religions “goes with” intolerance of Christians.

But while the RFRA coalition’s line-drawing and line-erasing effort was every bit as reasonable as any other, political actors cannot obviate the need to draw those lines that they themselves would rather ignore. Somebody has to decide whether a particular claimant will prevail. Under RFRA, this would involve an analysis of which beliefs should be considered religious, which are held in good faith, and which run contrary to a compelling state interest.[[247]](#footnote-248) RFRA contemplated that the courts would continue to separate winners from losers.

What RFRA’s proponents sought to achieve, then, was a shift in which dividing lines are politically salient and which are judicially salient. They sought to unite the interests of people of faith, so that politicians would not be forced to choose between different religious beliefs. At the same time, they outsourced those decisions to the courts.

A full normative analysis of this kind of move is beyond the scope of this paper, but a few preliminary thoughts are in order. I do not mean to point to RFRA as a perfect example of how politicians resolve the countermajoritarian tension. I am troubled by how RFRA has been used since its passage, and I acknowledge that any effort to redraw political lines to unify some groups can have the effect of leaving others even more isolated.

But RFRA does suggest how the countermajoritarian tension can operate in a way that pushes America towards greater inclusion. One way to dissipate the tension is to reduce the political salience of the lines that divide the ins from the outs. Rational politicians will seek to alter Americans’ sense of “what goes with what” such that previously excluded groups are included in “us” rather than derided as “them.” Under many circumstances, there will be politicians who oppose this effort, seeking to use their political opponents’ loyalties to unpopular minorities as a wedge to divide them from the general public. But rational politicians, following the incentives described in this paper, should be looking for paths to greater unity. RFRA suggests that such paths can be found.

# IV. Applicability

Thus far, I have argued for a particular model of “small-c constitutionalism” as it operates in Congress specifically and among political actors more generally. In this section, I address two lingering questions. First, to what degree should we expect small-c constitutionalism – the process by which political actors develop rules regarding the policies they will and will not accept – to incorporate large-C Constitutionalism – a process of deriving constitutional rules from the U.S. Constitution? And second, when should we expect this process of political constitutionalism to produce rules that bind participants? I address each question in turn.

## Small-c and Large-C Constitutionalism

To this point, I have sought to show that Congress adopts and follows principles and that such principles can protect minority rights against majority preferences. In other words, Congress has a small-c constitution that imposes important constraints on policymaking. This is the key point of this paper.

Nonetheless, I want to briefly consider the degree to which Congress’s small-c constitution should be expected to include those provisions associated with the large-C Constitution. Can we expect large-C Constitutional limitations like the First and Tenth amendments to be incorporated into Congress’s small-c constitution, as I have described it.[[248]](#footnote-249) Armed with the model laid out in this paper, we can get some purchase on this question.

The key conceptual move here is to think about the large-C Constitution as a set of tools, not a set of rules.[[249]](#footnote-250) The rules-based approach imagines that the Constitution requires and prohibits certain actions, and constitutionalism can be measured by the degree to which these rules are respected. A rules-based approach sees constraint as something external to the ordinary process of decision-making. We can tell that somebody is following the rules only if they want to do X but nonetheless follow a rule that dictates not-X. Hence legal scholars’ interest in finding situations in which MCs clearly want to enact a policy but conclude that the policy is unconstitutional.[[250]](#footnote-251)

If the Constitution is a tool, however, we must take a different approach to describing and evaluating a constitutional system. First, we can accept the Legal Realist insight that legal rules constrain, if at all, in a very limited fashion. However, that does not mean they are irrelevant. Just as a hammer is useful for driving in a nail but not for polishing a windowpane, the Constitution is useful for some purposes but not others. The way to evaluate American constitutionalism is not to determine which rules the Constitution contains and how well they are followed, but to determine which ends it facilitates.

Of course, we cannot evaluate a tool without knowing what its users want to accomplish. A hammer is one thing in the hands of a carpenter and something very different in the hands of a murderer. This is where coalitional constitutionalism comes in.

As I argue above, coalitional constitutionalism produces a tension in politicians between the desire to include the excluded and the desire to win votes among the general electorate. Politicians will naturally search for ways to dissipate that tension. One way to do so is to restructure the categories of political analysis, to redefine “us” and “them” such that “us” includes a group of people who had previously been part of “them.” When politicians engage in such restructuring, they may encounter opponents who benefit from the existing structure, politicians who would rather drive a wedge between groups than unite them. The uniters will therefore seek whatever tools they can muster to achieve their goals. The Constitution provides a set of tools that are helpful for this task.

Examples abound. In *Lawrence v. Texas*,[[251]](#footnote-252) one of the key disputes between the majority and the minority was over the relevant categories. In dissent, citing *Bowers v. Hardwick*,[[252]](#footnote-253) Justice Scalia insisted that the relevant question was whether there is a “right to homosexual sodomy.”[[253]](#footnote-254) He concluded there is not.[[254]](#footnote-255)

Justice Kennedy’s majority opinion did not so much challenge Scalia’s answer as it rejected his question. For the majority, the question was whether intimate conduct engaged in by consenting adults in the privacy of their bedroom is constitutionally protected.[[255]](#footnote-256) The answer to that question was as clear to the majority as the answer to Scalia’s question was clear to him. If the right to privacy means anything, it means the answer to Kennedy’s question must be yes. By shifting the relevant category, from “homosexual conduct” to “sexual conduct by consenting adults,” Kennedy shifted the analysis.

The proponents of RFRA attempted a similar shift. Rather than engaging in a debate over the rights of Native American drug users, they precipitated a debate over people of faith, as a group.[[256]](#footnote-257) This is no small feat. It should be fairly easy to get different peoples, all of whom believe they have the correct understanding of God’s will, to disagree among themselves. RFRA’s proponents were able to submerge those differences.

Their tool, like the tool used by Justice Kennedy and countless others, was the U.S. Constitution. The Constitution made it plausible that “religious rights” is a politically relevant category, just as “private, sexual conduct” is a judicially relevant category. The Constitution makes it plausible that the relevant category for speech regulations is “speech,” and not “Communist speech” or “reactionary speech.” And so on.

This is not to say that the Constitution is inherently unifying. The Constitution may divide potential allies. By creating a specific legal regime for religious rights, for example, the First Amendment arguably drives a wedge between people who claim the right to use drugs because they are not hurting anybody and those who use drugs because their faith tells them to. My point is not that the Constitution can only be used to unify, but that it can help political actors push back on efforts to discriminate, not by declaring those efforts unlawful but by giving political actors tools to restructure the political categories that make discrimination politically compelling.

In short, we should expect to see the Constitution used as a tool when it is helpful to politicians seeking to dissipate the countermajoritarian tension described in this paper. Because politicians will frequently want to dissipate that tension by rewriting politically relevant categories – by shifting from “gay people” to “people” or from “Communist speakers” to “speakers” – we should expect to see the large-C Constitution reflected in the small-c constitution. This implies both that constitutionalism can be useful for inclusion[[257]](#footnote-258) and that political incentives for inclusiveness can encourage attention to the Constitution.

## Political Holdings and Dicta: When Does Constraint Operate

I said above that politicians, like judges, issue holdings and dicta. Sometimes, the principles they articulate become core to their political coalitions and constrain their behavior going forward. Other times, principles have little impact. Broadly speaking, we can think of three situations with very different implications for the binding-ness of politicians’ articulated principles.

### Three Equilibria

There are three very different equilibria that can result from the interplay of the forces discussed in this paper. The most obvious is essentially the one described above, in which one and only one political party becomes associated with a particular minority group, defined as a group united by its intense preferences on a policy or set of policies. I will call this the partisan equilibrium. To rehash, examples of this kind of equilibrium include the politics of race and abortion. In both cases, moves by party elites towards policies favored by one side of the debate – pro-life or pro-choice, supportive or opposed to Black civil rights – shifted groups of advocates and voters into their party while moving other advocates and voters in the opposite direction. These grassroots shifts precipitated further polarization at the elite level. Ultimately, the two parties became associated with particular positions on these polarizing issues, such that the identities of party members were rebuilt around the polarized positions. At some point, the phrase “pro-life Republican” or “pro-civil rights Democrat” came to seem redundant.

When coalition principles become party principles, they can be enforced using the tools available only to parties. Party primaries can become mechanisms for ensuring fealty to coalition principles, as only voters loyal to those principles are likely to vote in primaries.[[258]](#footnote-259) Party whip operations can help secure fealty on roll call votes.[[259]](#footnote-260) By giving coalition partners representation in party decision making bodies,[[260]](#footnote-261) a party can ensure that those partners’ views of party doctrine continue to have an impact as the parties face new questions and circumstances. In short, the party equilibrium provides the clearest example of a situation in which principles should follow the common law logic described above.

A variation on the partisan equilibrium could be called a factional equilibrium. For much of its history, the Democratic Party contained factions committed to racial equality (at least, of a sort) and factions committed to its opposite.[[261]](#footnote-262) Members of both factions had strong political and psychological incentives to honor their factional principles. A politician who ran as a liberal only to govern as a conservative would have to build a new personal constituency to get him through the various steps to public office.[[262]](#footnote-263) Moreover, a liberal has likely conceived their political mission in liberal terms and will generally see no conflict between their key goals and the principles of liberalism. But factional principles might be in conflict with partisan commitments and can generally be seen as less binding than partisan principles.

There are various types of factional equilibria. In some cases, factions neatly map to geographical divisions, suggesting that politicians’ choice of faction reflects the views of their constituents. However, the situation is not always so simple. When Congress debates government surveillance, the debate tends to be between supportive and skeptical factions that cut across the two parties. And while MCs no doubt consider their constituents’ views when picking teams, senators representing the same voters can wind up on different sides. One of the strongest defenders of government surveillance, Mitch McConnell, represents the same state as one of the Senate’s most aggressive privacy hawks, Rand Paul. Both senators have found a politically viable path to upholding very different principles.

A third equilibrium is essentially the inverse of the first. In some situations, principles articulated by politicians may have short-term utility without reshaping politics in either the medium- or long-term. It could be argued, for example, that politicians sometimes assert constitutional limitations on presidential power if and only if the other party controls the presidency.[[263]](#footnote-264) However, if their parties do not coalesce around a particular vision of presidential power, these politicians are free to flip flop back and forth. I will call this a “flip-flopping equilibrium.”

One of the key arguments of this paper is that this kind of equilibrium is not the only one we should expect. Politicians should seek to use principles to build lasting coalitions, not just to score short-term political points.

However, principles may achieve a short-term benefit without any long-term impact when politicians engage in what might be called “fire alarm” constitutionalism.[[264]](#footnote-265) As Eric Schickler and Douglas Kriner have shown, when MCs raise constitutional concerns about government action, they can increase the salience of those concerns for voters.[[265]](#footnote-266) And when constitutional concerns are salient, this can affect voters. In one experiment, participants were asked whether they thought a far-right organization should be allowed to hold a rally.[[266]](#footnote-267) The researchers randomly assigned participants to receive either an editorial discussing the rally in terms of free speech values or an editorial focusing on public safety. The typical respondent who received a public safety editorial had a 26 percent chance of favoring the rally. The typical respondent exposed to the free speech frame had a 60 percent chance.[[267]](#footnote-268) The impact of free speech messaging persists even if respondents are exposed to counter-messaging and even for high information respondents.[[268]](#footnote-269) Other studies have reached similar conclusions.[[269]](#footnote-270) Simply reminding people about constitutional values in the course of policy debate appears to have a large and consistent impact.

It is not clear when we should expect a flip-flopping equilibrium. Legal scholars have considered whether and why politicians will tend to flip-flop on procedural questions, such as what actions the president can take without congressional authorization or what process should be required for lawmaking.[[270]](#footnote-271)

The analysis in this paper suggests a slightly different conclusion. Politicians use principles to signal to potential coalition partners how they will operate in the future. Procedural principles can serve this purpose. A mid-20th Century MC could provide potential allies with extremely important information by declaring herself unalterably opposed to the filibuster. The fact that this principle was procedural does not diminish its importance.[[271]](#footnote-272)

However, we might suspect that procedural principles convey less information, most of the time. Voters and activists are more likely to be committed to a particular position on warmaking – or on the wisdom of particular wars – as opposed to the process that policymakers must use before war can be waged. In that case, procedural principles help the public make predictions about how a politician will act on the question the public cares about, but that prediction will be cloudy. As a result, procedural principles may be less likely to form the basis of political coalitions and more likely to become subject to a flip-flopping equilibrium.

However, as history amply demonstrates, it is not possible to say which principles will become core coalition commitments and which will not. A narrow interpretation of the Commerce Clause was once a core commitment of the Republican Party.[[272]](#footnote-273) Now it has few adherents outside of Mike Lee’s followers on X.[[273]](#footnote-274) Some principles may be more likely to become enforceable through a process like coalitional constitutionalism, but on this question, we can speak only in probabilities. An empirical research agenda is needed to determine which provisions become core to political coalitions and which are subject to flip-flopping.

When a principle becomes subject to a flip-flopping equilibrium, other considerations may lead politicians to abandon their prior positions. The most obvious is partisanship.[[274]](#footnote-275) Since control over governmental institutions tends to shift between the parties, partisanship is the most likely driver of flip-flopping. A politician who asserts that presidents cannot wage war without congressional approval is reasonably likely to face a situation in which a president of their own party urges them to change their position. While that politician may face other types of changed circumstances, few are as common as changes in partisan control.

In many cases, this will mean that, in a flip-flopping equilibrium, constitutional limits on government power will be embraced when and only when the embracers do not hold government power. Only the non-presidential party will endorse limitations on the president. Only the minority party in Congress will endorse limitations on the majority’s will. In short, constitutional limitations are likely to be asserted only by those who have the least power to enforce them.

# V. Implications

The model of congressional constitutionalism presented here has implications for how we think about politics, about judicial doctrine, and about institutional design.

## Politics

The first set of implications takes us back to where this paper started, with “the Groups.” First, it should not be surprising, or necessarily troubling, if advocacy organizations push their political coalitions to take positions that are unpopular with the general public. Indeed, they may specifically seek positions that alienate other groups, even when those positions are not particularly beneficial to the group that seeks them. When a political coalition takes unpopular positions, it sends a costly signal to a favored group that the coalition will back the unpopular group when the chips are down. If coalitional constitutionalism is about politicians making clear where they will stand in the future, unpopular positions are particularly helpful. Any politician will say nice-sounding things (“I believe in equality”) that also happen to support a coalition partner (say, trans individuals). Only politicians who are truly allies will say things that do not sound so nice to the general electorate.

Unpopular statements also have an additional benefit from the perspective of coalition partners: they alienate the right people. If Democrats announce a pro-LGBT policy that alienates Christian conservatives, that announcement shifts the coalitional basis of the Democratic Party, making the party less reliant on social conservatives and more reliant on other groups. By alienating Christian conservatives, the Democrats not only show their willingness to build their electoral hopes around social progressives; they reduce their ability to do anything else.

A key takeaway from this paper is that this dynamic – where coalition partners push for positions that undermine their coalition’s electoral chances – is both inevitable and potentially beneficial. It is inevitable, because political coalitions will generally have strong incentives to incorporate minority groups, and those groups will have both the motive and the opportunity to push their coalitions to the extremes. It is potentially beneficial, because this is one of the ways America’s political process protects rights. The same dynamics that push the political parties to the extremes are also the dynamics that tie those parties to the mast, ensuring that they will protect minority rights when the going gets tough. Particularly during a period when the Supreme Court appears to be abrogating its responsibility to protect key constitutional rights, this political process may be the best means available for ensuring that unpopular groups are not victimized by prejudiced majorities.

Of course, whether any given example of coalitional constitutionalism is normatively attractive will depend on the rights in question. Readers who applaud coalitional constitutionalism’s potential to protect the rights of racial minorities and the right to privacy might object when it is used to protect gun rights, religious rights, or states’ rights. However, coalitional constitutionalism at least offers a vision for a constitutional democracy that is both democratic (in the sense of being responsive to public opinion and administered by electorally accountable actors) and constitutional (in the sense that some values will be protected against majoritarian whims). That, surely, is not something to lightly cast aside.

## Doctrine

Coalitional constitutionalism also has implications for judicial doctrine. It shows that rights will be least likely to receive protection when (1) the party that espouses those rights is out of power, (2) the faction that espouses those rights is weak within the governing coalition, or (3) those rights are subject to a flip-flopping equilibrium. Courts, then, stand on the strongest footing when they oppose the weakly-held preferences of a majority in favor of the strongly held preferences of a minority.[[275]](#footnote-276) When the courts face an anti-trans law passed under a Republican trifecta, it should show its greatest skepticism. The same goes when they face a limitation on gun rights passed under Democrats. This is fairly straightforward, and it is nothing new.[[276]](#footnote-277)

What is striking about the situation described here is how unlikely it seems that the courts will be a major part of the solution. Given that at least one political coalition (though rarely both) is likely to champion the cause of any rights claim that is intensely supported by a sizable group of Americans, rights violations are likely only when the other party dominates the levers of power. But in that situation, one would expect the party in power to also have planted like-minded jurists throughout the judiciary.[[277]](#footnote-278) Worse, a governing majority may use the judiciary to entrench its skepticism of those minority rights it disfavors, such that those rights cannot be resuscitated even if political power changes hands.[[278]](#footnote-279) Those interested in protecting minority rights would do well to think outside the courts.

## Institutional Design

Which brings me to my last set of implications. The three equilibria described above are all likely to produce a similar blind spot when it comes to rights-protection. In a partisan equilibrium, the majority party will ignore those rights championed by the minority party, but the minority party can be expected to try vehemently to defend those rights. In a factional equilibrium, factions will fight to protect their most valued coalition partners, but their success will depend on their bargaining position and effectiveness. In a flip-flopping equilibrium, the minority party is likely to play the role of a check on the majority consistently. But this also means, by definition, that the majority will not check itself.

What these situations have in common is (1) the presence of a political coalition with a powerful interest in defending rights and (2) the fact that this coalition is in the minority. This common problem points to a common solution: defending the prerogatives of congressional minorities.

At a glance, this may suggest the need to preserve and even expand the Senate filibuster and other similar institutions.[[279]](#footnote-280) Actually, I want to suggest the opposite. The filibuster, as it is used today, poses substantial costs and does a poor job of specifically protecting the rights of national minorities (as opposed to whichever party happens to be a minority in the Senate).[[280]](#footnote-281) At the same time, by giving the minority a tool that it can use for any reason or no reason at all, it discourages the kind of deliberation that could produce broadly acceptable solutions.[[281]](#footnote-282)

As I argue above, one of the benefits of the countermajoritarian tension is that it pushes politicians to bridge over the boundaries that divide Americans. The Constitution provides tools to achieve this goal. In particular, the equal protection and due process clauses can be used to restructure political debates such that bigoted views of particular groups do not drive public policy. If congressional rules push MCs to defend coalition partners in constitutional terms, they can encourage a more inclusive politics.

One way to achieve this goal is to eliminate the filibuster and tweak Senate rules governing constitutional points of order. Under current rules, senators who raise a constitutional point of order can trigger a discussion over the constitutional merits of whatever proposal is under consideration.[[282]](#footnote-283) As Mark Tushnet has shown, this kind of thing happens rarely, but when it happens, the debate does tend to look different than an ordinary policy debate.[[283]](#footnote-284) To make this kind of deliberation more common and more useful, the Senate should abolish the filibuster[[284]](#footnote-285) and require the presiding officer to rule on constitutional points of order in the first instance, subject to a majority vote to overturn the call of the chair.

With this rule change, Senate minorities will lose the ability to obstruct for obstruction’s sake. But they will gain a subtle but still helpful tool for raising concerns about pending legislation. They will have the opportunity to make the case that a piece of legislation transgresses some general principle held by a majority of the body. If a majority of their colleagues agree, they can block or force changes in otherwise popular legislation. If the majority disagrees, then the majority will set a precedent that the constitutional concern raised is not valid. This precedent can then be the basis of future rulings by the presiding officer/parliamentarian, giving majorities a disincentive to ignore constitutional principles in the interests of moving their agenda.

How exactly senators would operate under such a rule change is unclear. However, a set of positive changes seems at least plausible. First, partisan minorities should spend more time thinking about constitutional problems with the majority’s handiwork, rather than simply obstructing whenever it is politically feasible. Second, partisan minorities should work harder to explain their objections in terms of principles designed to secure majority support. Since they would need only a majority to sustain their objections, they will frequently have a real chance at prevailing if they can be thoughtful and ecumenical.

Finally, the rule change may encourage the development of a uniquely congressional constitution.[[285]](#footnote-286) By encouraging senators to produce well-articulated constitutional principles that can be debated and voted on by their colleagues, the rule change may facilitate the development of such principles in an environment not shaped by the particular institutional advantages and constraints of the federal judiciary. While judges have not, senators may feel empowered to establish positive as well as negative rights,[[286]](#footnote-287) to question legislation passed for impermissible reasons,[[287]](#footnote-288) and more generally to protect rights that courts are unable or unwilling to protect.[[288]](#footnote-289)

Two objections bear consideration. First, it is possible that senators will simply translate every policy objection into a constitutional claim, eliminating any benefit to legislative effectiveness that would come from nixing the filibuster. I am skeptical. However, in the worst-case scenario we would still be left with a Senate no more sclerotic than the one we have today.

More concerning, it is possible that by constitutionalizing the process of legislative obstruction we will encourage senators to rely on the kinds of abstruse reasoning characteristic of judicial decisions. At worst, the Senate will come to look like a junior varsity court, with politicians play-acting jurists and producing arguments that are neither compelling to the public nor technically proficient.

It's a risk, and one worth taking seriously. But this is where coalitional constitutionalism matters. MCs already have a constitutional language that is responsive to their political needs. They face strong incentives to develop statements of principle, and they face strategic incentives to connect their principles to the U.S. Constitution. Currently, those incentives operate largely at the coalition level; politicians have become adept at building a small-c constitution specific to their political coalition and its values. But if they had an institutional mechanism to develop a broader set of principles – a truly *congressional* constitutionalism – there is every reason to think they could respond to the courts, not just echo them.

# Conclusion

In this paper I have argued that Congress should be seen as a forum of principle. MCs, like other politicians, have strong incentives to develop and follow statements of principle regarding which policies they will and which they will not support. Moreover, politicians following their incentives should adopt and follow such principles even when they secure minority rights against majority preferences. While these principles will not always include those that can be found in the U.S. Constitution, the Constitution is not irrelevant to this story. It provides a set of tools that help politicians mitigate one of their central political liabilities: their need to simultaneously defend the minoritarian values of their political coalitions and appeal to popular majorities. MCs should frequently reach for the U.S. Constitution, even if they seek only to build and maintain power. This understanding of congressional constitutionalism has implications for how we think about politics, doctrine, and institutional design. More broadly, it offers a vision of constitutional democracy that is both constitutional and democratic.

1. \* Ph.D., candidate, Princeton University Department of Politics. B.A., J.D., Harvard University. M.A., Princeton University. [↑](#footnote-ref-2)
2. Io Dodds, *Trump’s Blitz of Anti-Trans Ads Probably Worked – But Not for the Reason You Might Think*, The Independent, Dec. 1, 2024. [↑](#footnote-ref-3)
3. Donald J. Trump for President 2024, *Unbelievable,* Youtube (Oct. 3, 2024), https://www.youtube.com/watch?v=l3BXYjoAzq0. [↑](#footnote-ref-4)
4. *See* Ezra Klein, *The End of the Obama Coalition*, N.Y. Times, Nov. 13, 2024; Chris Hayes, *Where Do We Go From Here? With Anna Galland*, MSNBC, Nov. 13, 2024; Michael Barone, *The Groups and Barista Proletariat of the Democratic Party*, Washington Examiner, Nov. 27, 2024; Matthew Yglesias, *From the Veal Pen to the Groups*, Slow Boring, Dec. 18, 2024.Some commentators have suggested that this set of organizations should be known as the groups “with a capital G.” Klein, *supra*. I adopt that approach here. [↑](#footnote-ref-5)
5. See sources cited *supra*, note 3. [↑](#footnote-ref-6)
6. See Steven Shepard, *The Supreme Court Dramatically Changed Public Opinion on Abortion*, Politico (June 24, 2023); Tara Leigh Grove, *The Supreme Court’s Legitimacy Dilemma*, 132 Harv. L. Rev. 2240, 2240 (2019); Mark Graber, *Judicial Supremacy and the Structure of Partisan Conflict*, 50 Ind. L. Rev. 141, 149-52 (2016), Kevin J. McMahon, *Will the Supreme Court Still Seldom Stray Very Far: Regime Politics in a Polarized America*, 93 Chi.-Kent L. Rev. 343 (2018). [↑](#footnote-ref-7)
7. Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 Cal. L. Rev. 1703, 1738-46 (2021); Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart* Ely, 75 Vand. L. Rev. 769, 820-21 (2022). [↑](#footnote-ref-8)
8. Maggie Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, 132 Yale L.J. 2217-18 (2023). [↑](#footnote-ref-9)
9. LOUIS FISHER, CONGRESS: PROTECTING INDIVIDUAL RIGHTS 286 (2016). [↑](#footnote-ref-10)
10. For the sake of brevity, I will call this “political constitutionalism.” [↑](#footnote-ref-11)
11. The seminal work is Alexander M. Bickel, The Least Dangerous Branch (1962), but the countermajoritarian difficulty that Bickel identified has been, as one scholar called it, an “obsession” of legal academia. Barry Friedman*, The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 Yale L.J. 153, 153 (2002). [↑](#footnote-ref-12)
12. See, e.g., Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as National Policy-Maker*, 6 J. Pub. L. 279 (1957); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 Stud. Am. Pol. Dev. 35 (1993); Keith Whittington, *“Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 Am. Pol. Sci. Rev. 583 (2005). [↑](#footnote-ref-13)
13. See e.g., Josh Chafetz, Congress’s Constitution: Legislative Authority and The Separation of Powers (2017); Neal Devins & Louis Fisher, The Democratic Constitution (2015); Congress and the Constitution (Neal Devins & Keith Whittington, eds.) (2005); David P. Currie, The Constitution in Congress: Democrats and Whigs, 1829-1861 (2005) [hereinafter Currie, Democrats and Whigs]; Mark Tushnet, Taking The Constitution Away From The Courts (1999) [hereinafter Tushnet, Taking The Constitution]; Susan Burgess, Contest For Constitutional Authority: The Abortion and War Powers Debates (1992); Donald Morgan, Congress And The Constitution: A Study Of Responsibility (1966); Blackhawk, supra note 6, at 2205-28; Sam Simon, *How Statutes Create Rights: The Case of the National Labor Relations Act*, 15 U. Pa. J. Const. L. 1503 (2012); Mark Tushnet, *Some Notes on Congressional Capacity to Interpret the Constitution*, 89 Boston U. L. Rev. 499 (2009)[hereinafter Tushnet, *Some Notes*]; Walter Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 Rev. Pol. 401, 411-12 (1986). [↑](#footnote-ref-14)
14. See, e.g., Henry Steele Commager, Majority Rule and Minority Rights (1943); Fisher, *supra* note 8; Louis Fisher, Constitutional Dialogues: Interpretation As Political Process (1988) [hereinafter Fisher, Dialogues]; Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. Rev. 707 (1985) [hereinafter Fisher, *Constitutional Interpretation*]. [↑](#footnote-ref-15)
15. See discussion below. [↑](#footnote-ref-16)
16. These terms have been used to mean different things by different scholars. Compare William N. Esrkidge & John A. Ferejohn. A Republic of Statutes: The New American Constitution (2010) *to* Chilton, A., & Versteeg, M. *Small-c Constitutional Rights*, Int. J. Con. Law, 20(1), 141-176 (2022). My definitions resemble those used by Eskridge and Ferejohn, but the fit is not perfect. [↑](#footnote-ref-17)
17. This is just one of the purposes that constitutions can serve. They also, for example, determine procedures for legislative (and other forms of) action and answer a variety of questions about governmental structure. *See, e.g.*, Chafetz, *supra* note 10; CHRIS EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 35 (2001). However, for my purposes it is helpful to simplify. [↑](#footnote-ref-18)
18. SeeChafetz, *supra* note 10, at xx. [↑](#footnote-ref-19)
19. Committee and conference reports can be seen as performing something like this function, as can rulings in response to constitutional points of order. See Mark Tushnet, *Non-Judicial Review*, 40 Harv. J. Legis. 453, 456-68 (2003). However, there is no reason to think that the principles included in these sources exhaust Congress’s stock of generally-accepted principles. Unlike judges, MCs must explain themselves in a wide variety of settings in order to get reelected. *See* Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 822-24 (2002). They do not need to speak through official documents to express themselves. [↑](#footnote-ref-20)
20. M. Todd. Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 Sup. Ct. Rev. 283, 292-311 (2007). [↑](#footnote-ref-21)
21. Kenneth A. Shepsle, *Congress is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 Int. Rev. L. Econ. 239 (1992). [↑](#footnote-ref-22)
22. *See* David Mayhew, The Imprint of Congress (2017). [↑](#footnote-ref-23)
23. A Matter of Principle 33-34 (1985); Taking Rights Seriously [hereafter TRS] 22, 33-34, 90 (1978); Freedom’s Law: A Moral Reading Of The United States Constitution 34 (1996). See also Edward S. Corwin, The Doctrine of Judicial Review 64 (1914); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 19 (1959) ("[The courts] are bound to function otherwise than as a naked power organ; they participate as courts of law . . . in that they are – or are obliged to be – entirely principled.”); Henry M. Hart, Jr., *The Time Chart of the Justices*, 73 Harv. L. Rev. 84, 99 (1959) (“Only opinions which are grounded in reason . . ., can do the job which the Supreme Court of the United States has to do.”); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale LJ. 221, 246-47 (1973) (A legislature “would be constructed with the understanding that it was to respond to the people's exercise of political power.” The judiciary should “be insulated from such pressure. It would provide an environment conducive to rumination, reflection, and analysis. ‘Reason, not power’ would be the motto over its door.”); Alexander M. Bickel, The Least Dangerous Branch 58 (1962) (Judicial review “is justified only if it injects into representative government something that is not already there; and that is principle, standards of action that derive their worth from a long view of society's spiritual as well as material needs that command adherence whether or not the immediate outcome is expedient or agreeable.”). See discussion in Whittington, *supra* note 10, at 810-12. Generations of scholars have debated what exactly Dworkin meant by this and whether this idea holds water. See, e.g., Dimitrios Kyritsis, *Principles, Policies and the Power of Courts*, 20 Can. J. L. & Jurisprudence 379 (2007); Donald H. Regan, *Glosses on Dworkin: Rights, Principles, and Policies*, 76 Mich. L. Rev. 1213 (1978); H.L.A. Hart, Essays in Jurisprudence and Philosophy 208-22 (1983), Joseph Raz, *Professor Dworkin’s Theory of Rights*, 26 Pol. Stud. 123 (1978). My goal is not to perfectly encapsulate Dworkin’s idea in all its detail. It is to use Dworkin to develop a definition of “principle” that can make congressional constitutionalism attractive. TRS, supra note 140, at 90-94. [↑](#footnote-ref-24)
24. EISGRUBER, *supra* note 10, at 67. [↑](#footnote-ref-25)
25. Mikva, *supra* note 10, at 587; see also Mikva & Lundy, *supra* note 10. [↑](#footnote-ref-26)
26. Brest, *Conscientious Legislator’s Guide*, *supra* note 10. [↑](#footnote-ref-27)
27. Brest, *Congress as a Constitutional Decisionmaker*, *supra* note 10. [↑](#footnote-ref-28)
28. See, e.g., Oona A. Hathaway, *National Security Lawyering in the Post-War Era: Can Law Constrain Power?,* 68 UCLA L. Rev. 2, 85 (2021), Emily Berman, *Weaponizing the Office of Legal Counsel*, 63 B.C. L. REV. 515, 562 (2021) [↑](#footnote-ref-29)
29. Beau Baumann, *Resurrecting the Trinity of Legislative Constitutionalism*, 134 Yale L.J. (forthcoming). [↑](#footnote-ref-30)
30. See, e.g., Larry Alexander & Federick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1368 (1996) (“Occasional rhetoric notwithstanding, there are few examples of Congress subjugating its own policy views to its views about constitutional constraints.”). [↑](#footnote-ref-31)
31. *Supra* note 12, at xx. [↑](#footnote-ref-32)
32. Brest, *Conscientious Legislator’s Guide*, *supra* note 10. [↑](#footnote-ref-33)
33. Brest, *Congress as a Constitutional Decisionmaker*, *supra* note 10. [↑](#footnote-ref-34)
34. Burgess, *supra* note 10. Beau Baumann, *supra* note 28, at xx, has unearthed a practice among congressional legislative drafters of accepting a legislative proposal’s constitutionality unless judicial doctrine clearly precludes such acceptance. But while this clarifies how Congress should respond to judicial assertions of constitutionality, it does not explain how Congress should form its own views. [↑](#footnote-ref-35)
35. Ryan Lizza & Eugene Daniels, *POLITICO Playbook: The Almighty vs. the Alternative*, Politico (Aug. 29, 2022) (discussing Joe Biden). For a more scholarly articulation of this principle, see, e.g., Ryan D. Doerfler & Samuel Moyn. *The Ghost of John Hart Ely*, 75 Vand. L. Rev. 769, 772 (2022), Jeremy Waldron, *The Core of the Case against Judicial Review*, Yale L.J.1346, 1389 (2006). [↑](#footnote-ref-36)
36. *See, e.g.*, Jeffrey Segal and Harold Spaeth, *The Influence of Stare Decisis on the Votes of U.S. Supreme Court Justices*, 40 AM. J. POL. SCI. 971, 971 (1996); Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 402 (1988). [↑](#footnote-ref-37)
37. See generally Bryan Garner, et al., Law of Judicial Precedent (2016). [↑](#footnote-ref-38)
38. See Frederick Schauer, *Giving Reasons*, 47 Stan. L. Rev. 633 (1994). [↑](#footnote-ref-39)
39. See *Planned Parenthood of Southeaster Pennsylvania v. Casey*, 505 U.S. 833, 854-61 (1992); Alexander & Schauer, *supra* note 29, at 1378 n. 80. [↑](#footnote-ref-40)
40. See sources cited *supra*, note 35. [↑](#footnote-ref-41)
41. See Garner, *supra* note 36, *passim*. [↑](#footnote-ref-42)
42. Geoffrey Chaucer, Parlement of Foules (Drennan ed. 1914). [↑](#footnote-ref-43)
43. The observation that all models are wrong but some are useful has become a cliché. The classic statement is from George Box, *Science and Statistics*, 71 J. Am. Stat. Assoc. 791, 792 (1976). [↑](#footnote-ref-44)
44. See RICHARD F. FENNO, CONGRESSMEN IN COMMITTEES (1973). See also DAVID MAYHEW, THE ELECTORAL CONNECTION (1974) (focusing on MCs’ reelection motive). [↑](#footnote-ref-45)
45. See, e.g., Timothy Shenk, Realigners: Partisan Hacks, Political Visionaries, and the Struggle to Rule American Democracy 11-26 (2022). [↑](#footnote-ref-46)
46. See generally Ruth Bloch Rubin, Building the Bloc: Intraparty Organization in the U.S. Congress (2017) [↑](#footnote-ref-47)
47. See Thomas Schwartz, Why Parties? Research Memorandum, Department of Political Science, University of California at Los Angeles. Schwartz’s unpublished memo was made famous in John H. Aldrich, Why Parties?: The Origin and Transformation of Political Parties in America (1995). I rely on Aldrich’s description here. A large political science literature has built on Schwartz’s insight, much of it associated with the “UCLA School” of political scientists, see, e.g., Marcy Cohen, David Karol, Hans Noel, & John Zaller, The Party Decides: Presidential Nominations Before and After Reform (2008), Kathleen Bawm. Martin Cohen, David Karol, Seth Masket, Hans Noel & John Zaller, *A Theory of Political Parties: Groups, Policy Demands, and Nominations in American Politics*, 10 Persp. on Pol. 571 (2012). The UCLA School has been criticized for some of their assumptions and claims. See Nolan McCarty and Eric Schickler, *On the Theory of Parties*, 21 Ann. Rev. Pol. Sci. 175 (2018). However, my argument relies only on the basics of the UCLA School’s framework and should be fairly noncontroversial. While the framework is clearly pluralist in a sense, I make no assumptions about the distribution of power across groups. My model is consistent with the view that such power is distributed fairly broadly, see generally Robert Dahl, Who Governs?: Democracy And Power In An American City (1961), as well as with theories that see power in the hands of a narrow “power elite,” see generally C. Wright Mills, The Power Elite (1956). Of course, those who hold the latter view will find the story I tell less normatively attractive, but provided they see the courts as no less elitist than the political process they should still get something from it. *Cf.* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 Yale L.J. 31, 66-101 (1991) (arguing that interest group theory does not demonstrate the value of litigation generally or judicial review in particular as a corrective for Congress’s problems). [↑](#footnote-ref-48)
48. There has been a long debate over whether citizens should be able to offer reasons in public debates that they do not sincerely believe in. Most notably, Johns Rawls has argued they should not. See Political Liberalism 180, 210, 304 (1993). For a summary of the debate, see Micah Schwartzman, *The Sincerity of Public Reason*, 19 J. Pol. Phil. 375, 375-76 (2011). [↑](#footnote-ref-49)
49. Shamira Gelbman, The Civil Rights Lobby: The Leadership Conference on Civil Rights and the Second Reconstruction 30 (2021)’ Eric Schickler, Racial Realignment: The Transformation of American Liberalism, 1932-1976 108 (2016). [↑](#footnote-ref-50)
50. Gelbman, *supra* note 48, at 30-31; Schickler, *supra* note 48, at 108. [↑](#footnote-ref-51)
51. Gelbman, *supra* note 48, at 32. [↑](#footnote-ref-52)
52. Gelbman, *supra* note 48, at 30-34. [↑](#footnote-ref-53)
53. Id. at 34; Schickler, *supra* note 48, at 108-09. [↑](#footnote-ref-54)
54. The LCCR is now the Leadership Conference on Civil and Human Rights. See discussion below. [↑](#footnote-ref-55)
55. Gelbman, *supra* note48, at 34; Schickler, *supra* note 48, at 108-09. [↑](#footnote-ref-56)
56. Schickler, *supra* note 48, at 108-10. [↑](#footnote-ref-57)
57. See discussion, infra. [↑](#footnote-ref-58)
58. See Robert F. Drinan & Jennifer I. Huffman, *The Religious Freedom Restoration Act: A Legislative History*, 10 J. L. & Religion 531, 531 (1993). [↑](#footnote-ref-59)
59. See Edward D. Berkowitz, *A Historical Preface to the Americans with Disabilities Act*, 6 J. Pol’y Hist. 96, 96 (1994). See also S. 933 (101st): Americans with Disabilities Act of 1990, GOVTRACK.US, https://www.govtrack.us/congress/votes/101-1990/s152 (94 percent of senators voting support ADA); S. 933 (101st): Americans with Disabilities Act of 1990, GOVTRACK.US, https://www.govtrack.us/congress/votes/ 101-1990/h228 (93 percent of House members voting support ADA). [↑](#footnote-ref-60)
60. *See Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 364 (2001). [↑](#footnote-ref-61)
61. More precisely, the union of member beliefs can be far larger than the intersection. [↑](#footnote-ref-62)
62. Laura Weinrib, The Taming Of Free Speech: America’s Civil Liberties Compromise 14-52 (2016) [↑](#footnote-ref-63)
63. David Rabban, Free Speech In Its Forgotten Years 65-67 (1997). [↑](#footnote-ref-64)
64. Weinrib, supra note 61, at 338 n.14. [↑](#footnote-ref-65)
65. FREEDOM OF SPEECH 53 (1920). [↑](#footnote-ref-66)
66. Id. at 192-93. [↑](#footnote-ref-67)
67. Zechariah Chafee, Free Speech In The United States 218 (1941). See also id. at 37 (defending prosecutions “to punish Emma Goldman and others” under Civil War-era statutes); id. at 171 (same) Notably, the 1941 update to Chafee’s book may indicate that Chafee was warming to organized labor as it became a larger part of the civil liberties coalition. The update omits any reference to Chafee’s personal support for employers over employees. It also adds a favorable reference to recent Supreme Court decisions declaring that “peaceful picketing is the working man’s means of communication,” id. at 435 (quoting 310 U.S. 88), and a somber recognition that just three witnesses testified against the latest version of the Espionage Act in 1939: representatives from the American Federation of Labor, the Committee on Industrial Organizations, and the ACLU, *id.* at 442. [↑](#footnote-ref-68)
68. See Weinrib, supra note 61, at 271-310. See generally Mark A. Graber, Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism (1991). [↑](#footnote-ref-69)
69. Gelbman, *supra* note 48, at 50. [↑](#footnote-ref-70)
70. Id. at 52-53. [↑](#footnote-ref-71)
71. Miller 5-16-1967, LCCR Papers, Box I: 150. [↑](#footnote-ref-72)
72. April 23, 1968, LCCR Papers, Box I: 150. [↑](#footnote-ref-73)
73. Miller 7-14-1967, LCCR Papers, Box I: 150. [↑](#footnote-ref-74)
74. See, e.g., Don Edward to John Gunther, May 17, 1966 Box I: 150. [↑](#footnote-ref-75)
75. On the NAACP’s relationship with organized labor, see Eric Schickler, Racial Realignment: The Transformation of American Liberalism, 1932-1976 77-80 (2016). [↑](#footnote-ref-76)
76. Gelbman, *supra* note 48, at 33. [↑](#footnote-ref-77)
77. David Karol, Party Position Change in American Politics: Coalition Management 111-15 (2009). [↑](#footnote-ref-78)
78. See Edward G. Carmines & James A. Stimson, Issue Evolution: Race and the Transformation of American Politics 63 (1989). [↑](#footnote-ref-79)
79. Gelbman, *supra* note 48, at 125. [↑](#footnote-ref-80)
80. Id. at 126-27. [↑](#footnote-ref-81)
81. LCCR’s action may also have been targeted at the Student Non-Violent Coordinating Committee, which was at this time debating internally its openness to white members. Say Burgin, *“The Trickbag [of] the Press”*: *SNCC, Print Media, and the Myth of an Antiwhite Black Power Movement*, 8 J. Civ. Hum. Rts. 1, 16-17 (2022). [↑](#footnote-ref-82)
82. Public Opinion 173 (1922). [↑](#footnote-ref-83)
83. See John Turner, Michael A. Hogg, Penelope J. Oakes, Stephen D. Reicher & Margaret S. Wetherell, Rediscovering The Social Group: A Self-Categorization Theory 72-73, 181, 204-07 (1987). [↑](#footnote-ref-84)
84. TURNER ET AL., *supra* note 112, at 21-23. *See generally* MUZAFER SHERIF & CAROLYN SHERIF, GROUPS IN HARMONY AND TENSION: AN INTEGRATION OF STUDIES ON INTERGROUP RELATIONS (1953). [↑](#footnote-ref-85)
85. Angus Campbell, Philip Converse, Warren Miller & Donald E. Stokes, The American Voter 120-45 (1960); Larry M. Bartels, *Beyond the Running Tally: Partisan Bias in Political Perceptions*, 24 Pol. Behavior 117, 117 (2002); Paul Goren, *Party Identification and Core Political Values*, 49 Am. J. Pol. Sci. 881, 881 (2005). [↑](#footnote-ref-86)
86. Party Position Change in American Politics: Coalition Management (2009). See generally Edward G. Carmines & James A. Stimson, Issue Evolution: Race And The Trans- Formation of American Politics (1989); Eric Schickler, Racial Realignment: The Trans- Formation of American Liberalism, 1932-1965 (2016). [↑](#footnote-ref-87)
87. Frances Lee, Beyond Ideology 49 (2009); Carmines & Stimson, *supra* note 115, at 11, 89. For a clear summary of the parties’ shifting behavior on racial issues in Congress, see Carmines & Stimson, *supra* note 115, at 59-89. [↑](#footnote-ref-88)
88. Schickler, *supra* note 48, at 31-60. [↑](#footnote-ref-89)
89. Keith T. Poole & Howard Rosenthal, Congress: A Political-Economic History Of Roll-Call Voting 112 (1997). [↑](#footnote-ref-90)
90. See Karol, *supra* note 76, at 56-102 (as pro-choice voters become Democrats and pro-life voters become Republicans, the parties become associated with their stances on abortion). In this respect, constitutional coalitions are no different than any other kind of coalition. See, e.g., David Karol, Red, Green, And Blue: The Party Divide On Environmental Issues 11-42 (2019) (describing environmentalists’ incorporation into and growing association with the Democratic Party). [↑](#footnote-ref-91)
91. See Turner, *supra* note 112, at 71-73, 181, 204-07. [↑](#footnote-ref-92)
92. See Currie, Democrats And Whigs, *supra* note 8, at 56. See also Keith Whittington, *Give “The People” What They Want?*, 81 Chi.-Kent L. Rev. 911, 915 (2006) (“Intraparty agreement on constitutional principles, robust party discipline, and unified party government allowed the parties of the early Jacksonian system to serve as vehicles for popular constitutionalism and to resist the blandishments and enticements of judicial supremacy.”). [↑](#footnote-ref-93)
93. See Weinrib, *supra* note 61, at 56-81; Samuel Walker, In Defense Of American Liberties: A History of the ACLU 11-51 (1990). [↑](#footnote-ref-94)
94. Deborah Archer. See Officers & Board of Directors, ACLU.org, https://www.aclu.org/about/ officers-board-directors. [↑](#footnote-ref-95)
95. Michelle Brown-Yazzie. Id. [↑](#footnote-ref-96)
96. Royce Murray. Id. [↑](#footnote-ref-97)
97. Ruth Colker. Id. [↑](#footnote-ref-98)
98. Robert Remar. Id. [↑](#footnote-ref-99)
99. The Coalition, CivilRights.org, https://civilrights.org/about/the-coalition/. [↑](#footnote-ref-100)
100. Karol, *supra* note 76, at 81, 93-94, 131. [↑](#footnote-ref-101)
101. It is, of course, possible that judges take these criticisms far more seriously than do MCs, whether because they face stronger norms or because MCs face stronger countervailing pressures, generated by their need to seek reelection. It is difficult to evaluate this possibility in theory. [↑](#footnote-ref-102)
102. The classic example is George H.W. Bush’s violation of his “read my lips: no new taxes” pledge. See Ryan J. Barilleaux & Mark J. Rozell, Power And Prudence: The Presidency of George H.W. Bush 34 (2004). David Karol, supra note 76, at 2-3, has argued that politicians generally pay little cost, and can garner substantial benefits, for flip-flopping. But Karol’s claim is not that politicians can violate their party line with impunity but that the party line may change, as discussed below. [↑](#footnote-ref-103)
103. See, e.g., Jay Nordlinger, *‘#ExGOP’ – Ugh*, National Review (June 7, 2016). [↑](#footnote-ref-104)
104. H.L.A. Hart, The Concept of Law 181 (1961). [↑](#footnote-ref-105)
105. Id. at 181-93. This observation is often associated with the legal realist movement. See, e.g., Jerome Frank, Law And The Modern Mind 148-59 (1930). [↑](#footnote-ref-106)
106. For an argument that judges are not constrained by principle because they can so often choose between conflicting principles, see Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, *in* Precedents, Statutes, and Analysis of Legal Concepts 85 (2013). [↑](#footnote-ref-107)
107. I am certainly not the first to notice that references to precedent are often used in institutions other than the judiciary, or that open texture gives political actors significant flexibility in how they reason from precedent. See Josh Chafetz, *Unprecedented?: Judicial Confirmation Battles and the Search for a Usable Past*, 131 Harv. L. Rev. 96 (2017). [↑](#footnote-ref-108)
108. Philip Bobbitt, Constitutional Fate: Theory of the Constitution 3-123 (1982). [↑](#footnote-ref-109)
109. Id. at 94. [↑](#footnote-ref-110)
110. Id. at 123. Cf. Jack Balkin & Sanford Levinson, Constitutional Grammar, 72 Tex. L. Rev. 1771, 1798-1802 (1994) (noting that “intra-modal" conflicts are also quite frequent). [↑](#footnote-ref-111)
111. Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin’s Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. Rev. 1156, 1199-1200, 1204 (2005). Lundquist and Cross measure the impact of adding more judicial opinions, not the impact of adding more words in opinions. It may be that longer opinions have a different impact than more opinions, but I am aware of no evidence on point. [↑](#footnote-ref-112)
112. David Greenberg, John Lewis in Congress 4 (forthcoming 2024) (on file with author). [↑](#footnote-ref-113)
113. Wayne Dawkins, Emanuel Celler: Immigration And Civil Rights Champion chs. 10-11 (2020); Chales and Barbara Whale, The Longest Debate: A Legislative History of the 1964 Civil Rights Act 1-29 (1985). [↑](#footnote-ref-114)
114. See Thomas P. Ronan, *A Woman Leader in Brooklyn to Challenge Celler in Primary*, N.Y. Times (March 29, 1972). [↑](#footnote-ref-115)
115. I am aware of no systematic evidence on this point, but I suspect the observation is non-controversial. For anecdotal evidence, consider Justice White’s complaint that the Court ignored his majority opinion in Atlas Roofing v. Occupational Safety and Health Review Comm’n, 430 U.S. 442 (1977) when it decided Granfinanciera, SA v. Nordberg, 492 US 33 (1989), a complaint, notably, contained in his solo dissent. Or, more recently, consider Justice Thomas’s solo dissent in United States v. Rahimi, No. 22-915 (slip op. at 1) (Thomas, J., dissenting), https://www.supremecourt.gov/opinions/23pdf/22-915\_8o6b.pdf, interpreting his decision for the Court in New York State Rifle & Pistol Association, Inc. v. Bruen, 597 U.S. 1 (2022). [↑](#footnote-ref-116)
116. Philip E. Converse, *The Nature of Belief Systems in Mass Publics* (1964),18 Crit. Rev.1 (2006). For a deeper look at how such constraint develops, see Hans Noel, Political Ideologies and Political Parties in America 80-132 (2013). [↑](#footnote-ref-117)
117. Eric Foner, Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War (1970). [↑](#footnote-ref-118)
118. See Noel, *supra* note 115, at 132-157. [↑](#footnote-ref-119)
119. See Converse, *supra* note 115, at xx. [↑](#footnote-ref-120)
120. For a helpful, if slightly unusual, analogy, consider the “Freedom of a Christian,” by which a true Christian is fully bound while being also fully free. Martin Luther, The Freedom of a Christian (1961). Similarly, MCs do not sin against their principles because they do not want to. This dynamic explains why we can speak of a system of congressional constitutionalism even if we do not find instances in which MCs prefer something on policy grounds while deeming it unconstitutional. In most cases, we should expect MCs’ constitutional principles to be fully consistent with their overall view of appropriate public policy. See Whittington, *supra* note 10, at 822. [↑](#footnote-ref-121)
121. One of the classic justifications for the common law is its alleged tendency to develop attractive legal rules through a system akin to natural selection. See Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 Colum. L. Rev. 1482, 1518-19 (2007), and sources cited. [↑](#footnote-ref-122)
122. Nina Varsava, *Precedent on Precedent*, 169 U. Pa. L. Rev. Online 118, 118 (2020). [↑](#footnote-ref-123)
123. The most prominent treatise on these meta-principles is Garner, *supra* note 36. [↑](#footnote-ref-124)
124. See discussion, *supra*. [↑](#footnote-ref-125)
125. Karol, supra note 76, at 18. Karol focuses on the political parties, but his insights can extend more broadly. While the political parties are certainly the most important coalitions in American politics, they are not the only coalitions that matter. The “conservative coalition” of Republicans and southern Democrats that coalesced during the early- to mid-20th Century is just one example of a long coalition that operated something like a political party. *See generally* John F. Manley, *The Conservative Coalition in Congress*, 17 AM. BEHAV. SCIENTIST 223 (November-December 1973). Other coalitions may come together on only one set of policy questions. An example is the coalition of liberal Democrats and conservative Republicans who tend to work together on issues of government surveillance. *See* Rafi Schwartz, *Making Sense of FISA’s Strange Bedfellows in Congress*, THE WEEK (April 12, 2024). [↑](#footnote-ref-126)
126. Karol, supra note 76, at 18. [↑](#footnote-ref-127)
127. Karol, supra note 76, at 102-34. See generally Schickler, supra note 48. Schickler emphasizes the role of particular labor leaders and activists, but the basic dynamic is the same. A group (Northern Democrats in Karol’s telling, organized labor in Schickler’s) changed its approach to an issue of principle (civil rights), and the group’s coalition responded by changing its articulated principles on that issue. [↑](#footnote-ref-128)
128. Karol, *supra* note 76, at 18. [↑](#footnote-ref-129)
129. Id. [↑](#footnote-ref-130)
130. Id. [↑](#footnote-ref-131)
131. Id. [↑](#footnote-ref-132)
132. KAROL, *supra* note 76, at 56-102. [↑](#footnote-ref-133)
133. KAROL, *supra* note 119, at 11-42. [↑](#footnote-ref-134)
134. KAROL, *supra* note 76, at 56. [↑](#footnote-ref-135)
135. Id. at 63. [↑](#footnote-ref-136)
136. Id. at 64-67. [↑](#footnote-ref-137)
137. Id. at 67-81. [↑](#footnote-ref-138)
138. Id. at 19. [↑](#footnote-ref-139)
139. See id. at 20; see also Chong, supra note 97, at 132-41. [↑](#footnote-ref-140)
140. Carmines & Stimson, *supra* note 115, at 191. [↑](#footnote-ref-141)
141. Karol, *supra* note 119, at 6. [↑](#footnote-ref-142)
142. Karol, *supra* note 76, at 67. [↑](#footnote-ref-143)
143. Dworkin, TRS, *supra* note 9, at 22. [↑](#footnote-ref-144)
144. Dworkin, Freedom's Law, supra note 22, at 20. [↑](#footnote-ref-145)
145. I do not claim that Dworkin is correct on this. My goal here is to show that, even if we accept Dworkin’s conception of principle, it does not follow that judges and not lawmakers must make constitutional decisions. I therefore accept his framework for the sake of argument. [↑](#footnote-ref-146)
146. This is not to say constitutions are designed *only* to check majorities. They also define the rules under which preferences will be aggregated, such that it makes no sense to speak of a governing majority in the absence of some sort of constitutional system. See Chafetz, *supra* note 10, ch. 1. However, this paper began with a question about the suitability of the political branches to enforce constitutional rights that happen to be unpopular at a particular moment in time. I therefore consider it appropriate to demand that Congress be, at least theoretically, willing to protect certain values against numerical majorities. [↑](#footnote-ref-147)
147. Robert Dahl, A Preface to Democratic Theory 106 (1956). [↑](#footnote-ref-148)
148. Id. [↑](#footnote-ref-149)
149. See, e.g., Bruce Ackerman, *Beyond* Carolene Products, 98 Harv. L. Rev. 713, 736 (1987). [↑](#footnote-ref-150)
150. Edward S. Greenberg & Benjamin I. Page, The Struggle for Democracy 268 (1995), Judson L. James, American Political Parties in Transition 4 (1974), William J. Keefe, Parties, Politics, and Public Policy in America 10 (1972), Frank J. Sorauf, Political Parties in the American System 21 (1964). [↑](#footnote-ref-151)
151. See John Hart Ely, Democracy andDistrust: A Theory of Judicial Review 148 (1980), Paul Frymer, Uneasy Alliances: Race and Party Competition in America 26- 39 (1999). [↑](#footnote-ref-152)
152. See, e.g., Frymer, *supra* note 150. [↑](#footnote-ref-153)
153. Ackerman, *surpa* note 148, at 732-33. [↑](#footnote-ref-154)
154. Id. at 733 n. 34. [↑](#footnote-ref-155)
155. See sources cited note 150. [↑](#footnote-ref-156)
156. Ely, *supra* note 150, at 148-93; Frymer, *supra* note 150, at 23. [↑](#footnote-ref-157)
157. See generally Martin Gilens, Affluence and Influence: Economic Inequality and Political Power in America (2012); Larry Bartels, Unequal Democracy: The Political Economy of the New Gilded Age (2d ed. 2017). [↑](#footnote-ref-158)
158. See generally Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups (1965). [↑](#footnote-ref-159)
159. See, e.g., Greenberg & Page, *supra* note 149, at 268. [↑](#footnote-ref-160)
160. See, e.g., Morris Fiorina, Retrospective Voting in American Elections (1981). [↑](#footnote-ref-161)
161. The problem with retrospective voting also applies to congressional logrolls like the one suggested in Ackerman, *supra* note 148, at 732-34. Ackerman suggests, plausibly, that a congressional coalition will generally be willing to trade some policy benefit for a block of votes controlled by a minority group. However, this kind of trade can only ensure minority-friendly policies in a particular piece of legislation. It cannot provide the group in question with a lasting commitment that its rights will be respected in future legislation, since that future legislation will be assembled after the minority group has already supplied its votes and lost its leverage. Game theorists have long struggled to identify mechanisms to enforce these kinds of long-term bargains. *See, e.g.*, Kenneth Shepsle & Barry Weingast, *The Institutional Foundations of Committee Power*, 81 Am. Pol. Sci. Rev. 85, 85 (1987). The classic solutions do not apply here. Similarly, the problem with retrospective voting will undermine a minority group’s efforts to secure other kinds of long-term commitments. If Black voters, for example, want not just passage of civil rights legislation but assurances that such legislation will not be undermined by under-enforcement or judicial hostility, retrospective voting does not help it achieve this goal. [↑](#footnote-ref-162)
162. John D. Skrentny, The Minority Rights Revolution 5 (2002) [↑](#footnote-ref-163)
163. The game does not require that the minority group with strong preferences constitute the entirely of an existing ascriptive group. If, for example, half of all Black Americans strongly support civil rights protections, then the minority group for the purposes of the game is simply the group of Black Americans who strongly support civil rights (plus whichever non-Black Americans feel the same way). The key is that come bloc of voters will support whichever coalition is best on civil rights, not that this bloc of voters come from a recognizable social group. [↑](#footnote-ref-164)
164. The exact makeup of the continuum does not matter. What matters is that there be a sufficient number of options on the spectrum from strong to weak such that a policy maker can tailor their policy choice to their political incentives. If minority group members want only one policy, and that policy is unpopular, then policy makers must either adopt the unpopular policy or do nothing to help the minority group, and they may choose to do nothing. If they have an infinite number of options that the minority group prefers to the status quo, they are likely to pick one. [↑](#footnote-ref-165)
165. If the two parties offer the same policy – or two policies so similar that the minority group will not plausibly move as a bloc to the party offering the marginally better policy – the game continues. [↑](#footnote-ref-166)
166. This is necessary to ensure the game describes politicians’ willingness to protect rights in the face of majority preferences. If the general electorate supports some of the options on the rights policy list, then we can think of the game as involving only those policies that the general electorate does not support. [↑](#footnote-ref-167)
167. I am torn as to whether the auction should be conceived as a winner-pays auction, where only the wining bidder pays what it bid, or an all-pay auction, in which every player pays their bid amount, regardless of whether they win. It is possible that a losing bidder will avoid enacting its proposed policy and avoid accountability, because it did not succeed in moving the minority group in question into its coalition. However, I suspect that in most cases politicians will pay a price proportionate to their bid, either because that act of bidding requires them to enact some unpopular policy or because they are punished just for proposing an unpopular policy that never becomes law. Douglas Arnold provides a helpful framework for thinking through these kinds of accountability questions in The Logic of Congressional Action (1992). If the minority incorporation game looks like an all-pay auction, the bidder that must pay more for minority group support will bid far less than it would have in a winner-pays auction, to account for the risk that it will have to pay it bid while losing the auction. In other words, the countermajoritarian tension I describe in the text is likely to be more powerful than I make it sound. [↑](#footnote-ref-168)
168. I assume there are two both for the sake of simplicity and because an auction between the two dominant political parties is probably the clearest and most common example of the minority incorporation game in practice. [↑](#footnote-ref-169)
169. See Andrew Proctor, *Coming Out to Vote: The Construction of a Lesbian and Gay Electoral Constituency in the United States*, 116 Am. Pol. Sci. Rev. 777, 780-82 (2022) [↑](#footnote-ref-170)
170. In particular, I assume that some but not all voters will leave the political party they like best if that party proposes policies with which they disagree. If every general electorate voter opposed to civil unions voted against the party that proposed them, this would violate my assumption that the general electorate has less intense preferences on rights issues than the minority group whose rights are at stake. In that case, no politician would support minority rights. On the other hand, if no member of the general electorate changes their vote based on a civil unions proposal – say, because they still prefer their Republican Party, all things considered, even if it takes a single liberal position – then the party with a more anti-gay coalition should adopt the more pro-gay policies. I consider this unlikely, though demonstrating that goes beyond the scope of this paper. Finally, it is possible that conservative Democrats will leave their party if it takes a pro-gay stand, while conservative Republicans will not. This is plausible, and I assume only that any partisan differential in how conservative voters react to pro-gay policies is outweighed by the fact that so many more conservative voters are part of the Republicans’ aspirational majority coalition. [↑](#footnote-ref-171)
171. Karol, *supra* note 76, at 18. [↑](#footnote-ref-172)
172. In the real world, as opposed to my stylized model, this process may take a long time. See id. at 56-102 (describing slow party position change on abortion and gun rights). As I discus below, a minority group may remain divided between two parties indefinitely. However, when one of the dominant political parties decisively wins a bid for a minority group’s support, we should expect to see the parties polarize over that group’s rights. [↑](#footnote-ref-173)
173. See Proctor, *supra* note 168, at 777. [↑](#footnote-ref-174)
174. Id. at 786. [↑](#footnote-ref-175)
175. Id. at 780-82. [↑](#footnote-ref-176)
176. As Proctor notes, this welcoming posture was neither automatic nor consistent. Id. at 786-87. [↑](#footnote-ref-177)
177. See, e.g., Schickler, *supra* note 48, at 113-223. [↑](#footnote-ref-178)
178. See *supra*. [↑](#footnote-ref-179)
179. Joseph E. Lowndes, From the New Deal to the New Right: Race and the Southern Origins of Modern Conservatism 11-45 (2008). [↑](#footnote-ref-180)
180. Carmines & Stimson, *supra* note 77, at 53-54. [↑](#footnote-ref-181)
181. This is a good time to remember that my model is a stylized vision of American politics, designed to focus on the implications of political incentives. I do not deny that for many participants in the 1960s civil rights battles, including many in the White House, the fight was waged because it was seen as the right thing to do. See, e.g. Charles Whalen & Barbara Whalen, The Longest Debate: A Legislative History of the 1964 Civil Rights Act 16 (1985). [↑](#footnote-ref-182)
182. See Barry Goldwater, The Conscience of a Conservative 25-32 (1960). [↑](#footnote-ref-183)
183. Carmines & Stimson, *supra* note 77, at 63. [↑](#footnote-ref-184)
184. Frymer, *supra* note 150, at 100. [↑](#footnote-ref-185)
185. See, e.g., *See* Bruce Ackerman, We the People, Vol. III: The Civil Rights Revolution 154 (2014). [↑](#footnote-ref-186)
186. See Civil Rights Act of 1964, Title II (public accommodations) and Title VII (regulating employment). [↑](#footnote-ref-187)
187. See, e.g., Gordon Allott to Ray Gibbons, Sept. 19, 1963. LCCR papers, Part I: Box 50; Robert Taft, Jr., to Ray Gibbons, Sept. 12, 1963, LCCR papers, Part I: Box 50; John B. Anderson to Ray Gibbons, Sept. 10, 1963, LCCR papers, Part I: Box 50. [↑](#footnote-ref-188)
188. Foner, *supra* note 116, at 11-40. [↑](#footnote-ref-189)
189. Goldwater, *supra* note 181, at 29. [↑](#footnote-ref-190)
190. Whalen & Whalen, *supra* note 180, at 29-71, 149-94. [↑](#footnote-ref-191)
191. Seeid. at 6-9; Gordon Allott to Ray Gibbons, Sept. 19, 1963. LCCR papers, Part I: Box 50; Frances Bolton to Mrs. Albert C. Eisenberg, Sept. 13, 1963, LCCR papers, Part I: Box 50; Robert Taft, Jr., to Ray Gibbons, Sept. 12, 1963, LCCR papers, Part I: Box 50; John B. Anderson to Ray Gibbons, Sept. 10, 1963, LCCR papers, Part I: Box 50. [↑](#footnote-ref-192)
192. Karol, *supra* note 76, at 118. [↑](#footnote-ref-193)
193. Id.; see also Carmines & Stimson, *supra* note 77, at 70. [↑](#footnote-ref-194)
194. Frymer, *supra* note 150, at 117-25. [↑](#footnote-ref-195)
195. Carmines & Stimson, *supra* note 77, at 119, 128. [↑](#footnote-ref-196)
196. Note that the “minority supportive party” may be different for different minority groups. One party may support the rights of Black people, the LGBT community, and immigrants, while the other supports conservative Christians, gun owners, and residents of rural areas. The model presented here suggests that the parties will polarize over particular rights questions, not rights generally. [↑](#footnote-ref-197)
197. As I have throughout, I ignore here important questions about the political resources available to the minority group in question. Those have been much-discussed elsewhere. See. They raise questions about how much politicians will do to protect particular minority groups, but unless a group has nothing to offer ambitious politicians it should receive some degree of protection from the dynamic described here. I make no claim that the level of protection is normatively appropriate. However, proponents of various normative theories can use the descriptive account offered here to evaluate such a claim. [↑](#footnote-ref-198)
198. LaWanda Cox & Joyn H. Cox, *Negro Suffrage and Republican Politics: The Problem of Motivation in Reconstruction Historiography*, 33 J. So. Hist. 303, 317 (1967) (quoted in Frymer, *supra* 150, at 72). [↑](#footnote-ref-199)
199. Congressional Globe, Third Session, Fortieth Congress (January 28, 1869), 673 (quoted in Frymer, *supra* note 150, at 72). [↑](#footnote-ref-200)
200. Frymer, *supra* note 150, at 109. Evidence from the 1964 elections suggests Robert Kennedy may have been too pessimistic. *See id.* at 110. [↑](#footnote-ref-201)
201. Id. at 123-30. [↑](#footnote-ref-202)
202. Proctor, *supra* note 168, at 786-87. [↑](#footnote-ref-203)
203. Frymer, *supra* note 150, at 198-205. [↑](#footnote-ref-204)
204. In a widely influential argument, Matt Grossman and David A. Hopkins have argued that the Democratic and Republican parties are fundamentally different, in that Republicans are a party unified by an ideology, while Democrats are a coalition of interest groups. See generally Asymmetric Politics: Ideological Republicans and Group Interest Democrats (2016). While this may be true on some level, Republicans have clearly sought to unite groups that could plausibly have seen themselves as having distinct interests, for example downscale social conservatives and allies of big business. Whether or not this makes them a coalition of interest groups, as opposed to an ideologically united party, is outside the scope of this paper. What is important is that Republicans, like Democrats, have to decide what they stand for with an eye to who their professed ideals will bring into, and exclude from, their party coalition. [↑](#footnote-ref-205)
205. Frymer, *supra* note 150, at 40-62. [↑](#footnote-ref-206)
206. Skrentny, *supra* note 161, at 143-164. [↑](#footnote-ref-207)
207. Frymer, *supra* note 150, at 205-08. [↑](#footnote-ref-208)
208. See, e.g., Duane Tananbaum, The Bricker Amendment Controversy: A Test of Eisenhower’s Political Leadership (1988). [↑](#footnote-ref-209)
209. Frymer, *supra* note 150, at 40-62. [↑](#footnote-ref-210)
210. Eric Foner, Reconstruction: America’s Unfinished Revolution, 1863-1877, 564-602 (2011). [↑](#footnote-ref-211)
211. Vesla Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 Stud. Am. Pol. Dev. 230, 251-59 (2007). [↑](#footnote-ref-212)
212. Proctor, *supra* note 168, at 786-87. [↑](#footnote-ref-213)
213. Frymer, *supra* note 150, at 18. [↑](#footnote-ref-214)
214. Id. at 62-100. [↑](#footnote-ref-215)
215. See generally Ira Katznelson, When Affirmative Action Was White: An Untold History of Racial Inequality in Twentieth-Century America (2006). [↑](#footnote-ref-216)
216. Proctor, *supra* note 168, at 785-86. [↑](#footnote-ref-217)
217. The Editors, *The Future of the Democratic Party*, The Atlantic (Dec. 28, 2024). [↑](#footnote-ref-218)
218. For a general argument on this point, see Lawrence J. McAndrews, *Talking the Talk: Bill Clinton and School Desegregation*, 79 Int. Soc. Sci. Rev. 87*,* 93 (2004) and sources cited there. [↑](#footnote-ref-219)
219. See, e.g., Jennifer Brier, Infectious Ideas: U.S. Political Responses to the AIDS Crisis (2009). [↑](#footnote-ref-220)
220. See, e.g., Carmines & Stimson, *supra* note 115, at 70. [↑](#footnote-ref-221)
221. Foner, *supra* note 209, at 564-602. [↑](#footnote-ref-222)
222. See generally Keith Whittington, Political Foundations of Judicial Supremacy (2007); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 Stud. Am. Pol. Dev. 35 (1993); Keith Whittington, *“Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 Am. Pol. Sci. Rev. 583 (2005). [↑](#footnote-ref-223)
223. Whittington, *supra* note 221, at 592-93. [↑](#footnote-ref-224)
224. Graber, *supra* note 221, at 46-50. [↑](#footnote-ref-225)
225. Id. at 53-61. [↑](#footnote-ref-226)
226. Id. at 50-53. [↑](#footnote-ref-227)
227. Frymer, *supra* note 150, at 214-16. [↑](#footnote-ref-228)
228. Id. at 216. [↑](#footnote-ref-229)
229. Tushnet, Taking The Constitution, supra note 10, at 106-40. The idea of an incentive-compatible Constitution, as Tushnet acknowledges, has deep roots in American constitutional history. Id. at 107-10. See generally Michael Kammen, A Machine That Would Go Of Itself (2006). [↑](#footnote-ref-230)
230. 494 U.S. 872 (1990). [↑](#footnote-ref-231)
231. Sherbert v. Verner, 374 U.S. 398 (1963). [↑](#footnote-ref-232)
232. 494 U.S. at 878. [↑](#footnote-ref-233)
233. For more on the relationship between liberal values and the defense of the often illiberal views of minority groups, see Merlin Owen Newton, Armed with the Constitution: Jehovah's Witnesses in Alabama and the U.S. Supreme Court, 1939–1946 (1995), Noel, *supra* note 115, at 71-75 (describing liberal support for Muslims offended by portrayals of the Prophet Mohammed). [↑](#footnote-ref-234)
234. See Daniel K. Williams, God’s Own Party: The Making of the Christian Right 213-45 (2010); John C. Green & James L. Guth, *The Christian Right in the Republican Party: The Case of Pat Robertson’s Supporters*, 50 J. Pol. 150, 150 (1988) (arguing Christian conservatives would soon be assimilated into Republican Party). [↑](#footnote-ref-235)
235. Robert F. Drinan & Jennifer I. Huffman, *The Religious Freedom Restoration Act: A Legislative History*, 10 J. L. & RELIGION 531, 531 (1993). [↑](#footnote-ref-236)
236. Proponents of the Act claimed that this rule was simply the rule in place before *Smith*, as articulated in *Sherbert*. *Id.* at 533. See also Martin S. Lederman, *Reconstructing RFRA: The Contested Legacy of Religious Freedom Restoration*, 125 Yale L.J. Forum 416, 430-31 (2015). [↑](#footnote-ref-237)
237. Drinan & Huffman, *supra* note 234, at 535-41. [↑](#footnote-ref-238)
238. De'Siree N. Reeves, *Missing Link: The Origin of Sherbert and the Irony of Religious Equality*, 15 Stan. J. C.R. & C.L. 201, 242-48 (2019). [↑](#footnote-ref-239)
239. In the early 1990s, religious believers made up 96 percent of all Americans. https://news.gallup.com/poll/1690/Religion.aspx [↑](#footnote-ref-240)
240. The bill was sponsored by liberal Democrat Stephen Solarz, and 27 of its 33 original cosponsors were Democrats. [↑](#footnote-ref-241)
241. Drinan & Huffman, *supra* note 234, at 535-38. [↑](#footnote-ref-242)
242. Id. at 538. [↑](#footnote-ref-243)
243. While much of RFRA was invalidated in *City of Boerne v. Flores*, 521 U.S. 507 (1997), those provisions that survived have been used to undermine the Affordable Care Act and other piece of liberal legislation opposed by the Christian Right. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2759 (2014). [↑](#footnote-ref-244)
244. See discussion of Converse, *supra*. [↑](#footnote-ref-245)
245. See, e.g., Robert P. George, *Championing Religious Freedom: ‘We Must Preserve Our Unity’ Going Beyond Political Disputes* (Nov. 4, 2023) (speech to Religious Freedom Institute), https://robertpgeorge.com/articles/championing-religious-freedom-we-must-preserve-our-unity-going-beyond-political-disputes/ [↑](#footnote-ref-246)
246. See, e.g., Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 209 (1994) (RFRA’s drafters argue “that the generality of the Act resulted from a principled determination to treat all religions equally.”). [↑](#footnote-ref-247)
247. See generally id. [↑](#footnote-ref-248)
248. The question I pose here is similar to a question scholars have periodically grappled with, whether certain constitutional rules are protected by “political safeguards.” Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954). See generally Jesse Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court (1980); Stephen G. Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, 574 Annals Am. Acad. Pol. Soc. Sci. 24, 30-31 (2001). I hope that the model of congressional behavior presented in this paper can help to answer the question, though a full answer is beyond the scope of this paper. [↑](#footnote-ref-249)
249. My approach is similar to that of Stuart Scheingold, who described legal rights as providing resources to political actors. The Politics of Rights: Lawyers, Public Policy, and Political Change 83-97 (2d ed. 2004) [1974]. I use “tools” rather than “resources” to emphasize the degree to which particular legal concepts are useful only to achieve particular goals. [↑](#footnote-ref-250)
250. See, e.g., Alexander & Schauer, *supra* note 29, at 1368. [↑](#footnote-ref-251)
251. 539 U.S. 558 (2003). [↑](#footnote-ref-252)
252. 478 U.S. 186 (1986). [↑](#footnote-ref-253)
253. 539 U.S. at 594. [↑](#footnote-ref-254)
254. Id. at 594-98. Notably, as Scalia points, out, the majority also declines to hold that there is a fundamental right to engage in homosexual conduct. *Id.* at 594. [↑](#footnote-ref-255)
255. Id. at 582. [↑](#footnote-ref-256)
256. This was done self-consciously. *See* Laycox & Thomas, *supra* note 245, at 209. [↑](#footnote-ref-257)
257. This is a response – though an admittedly preliminary response – to recent commentary criticizing constitutionalism as a political discourse. See, e.g., Ryan D. Doerfler & Samuel Moyn, *The Constitution is Broken and Should Not Be Reclaimed*, N.Y. Times (Aug. 21, 2022). <https://www.nytimes.com/2022/08/19/opinion/liberals-constitution.html>. For a thoughtful and nuanced take on the value of constitutionalism, see generally AZIZ RANA, THE CONSTITUTIONAL BIND: HOW AMERICANS CAME TO IDOLIZE A DOCUMENT THAT FAILS THEM (2024). [↑](#footnote-ref-258)
258. See generally Cohen et al., *supra* note 46. [↑](#footnote-ref-259)
259. See James Snyder & Timothy Groseclose, *Estimating Party Influence in Congressional Roll-Call Voting*, 44 Am. J. Pol. Sci. 193, 193 (2000); Nolan McCarty, Keith T. Poole & Howard Rosenthal, *The Hunt for Party Discipline in Congress*, 95 AM. POL. SCI. REV. 673, 685-86 (2001). [↑](#footnote-ref-260)
260. See Frymer, *supra* note 150, at 117-25. [↑](#footnote-ref-261)
261. See, e.g., Aage Clausen, How Congressmen Decide: A Policy Focus 97 (1973). [↑](#footnote-ref-262)
262. Richard Fenno has shown that politicians are dependent for their positions not just on the “general election” constituency that ultimately elects them or the “primary constituency” that makes them the party’s nominees, but also a “personal constituency” that does that hard work of making them into a viable candidate for nomination and election. *U.S. House Members in Their Constituencies: An Exploration*, 71 Am. Pol. Sci. Rev. 883, 889 (1977). Politicians must show loyalty – and may show their greatest loyalty – to this smaller group of fairly like-minded constituents. Assuming that this group is the most likely to share the candidate’s expressed principles, they are also the most likely to hold them to those principles. [↑](#footnote-ref-263)
263. For a thoughtful and nuanced look at this claim, see Eric A. Posner & Cass Sunstein, *Institutional Flip-Flops*, 94 Tex. L. Rev. 485, 496-99 (2015). For another, see Mark Tushnet, *Politics as Rational Deliberation or Theater: A Response to* Institutional Flip-Flops, 94 Tex. L. Rev. 82 (2015). [↑](#footnote-ref-264)
264. The term is borrowed from Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 Am. J. Pol. Sci. 165, 165 (1984). [↑](#footnote-ref-265)
265. Douglas Kriner & Eric Schickler, Investigating the President: Congressional Checks on Presidential Power (2016). [↑](#footnote-ref-266)
266. Dennis Chong & James N. Druckman, *Framing Public Opinion in Competitive Democracies*, 101 Am. Pol. Sci. Rev. 637, 642 (2007). [↑](#footnote-ref-267)
267. Chong & Druckman, *supra* note 265, at 647. [↑](#footnote-ref-268)
268. Id. at 648-49. [↑](#footnote-ref-269)
269. See Paul M. Sniderman & Sean M. Theriault, *The Structure of Political Argument and the Logic of Issue Framing*, *in* Studies in Public Opinion 133 (eds. Willem E. Saris, and Paul M. Sniderman) (2004) (finding similar effects to the Chong-Druckman study after simply mentioning “free speech” or “public safety” when questioning experiment participants). [↑](#footnote-ref-270)
270. Posner & Sunstein, *supra* note 262, at 496-99. [↑](#footnote-ref-271)
271. For more on the centrality of filibuster reform to the civil rights movement, see Gelbman, *supra* note 48, at 33. A procedural principle can sometimes convey more information to potential coalition partners than a substantive one, for example, when articulating a procedural principle sends a costlier signal than articulating a substantive principle. For example, during House debate over the Kennedy Administration’s civil rights proposal, many MCs who declared themselves supporters of civil rights legislation refused to sign the discharge petition that would have freed such legislation from segregationist Rep. Smith’s Rules Committee, where it was stalled. See Memo by Richard W. Taylor re: Rep. James Bromwell, Dec. 5, 1963, LCCR Papers, Part I: Box 50. In this situation, a procedural principle in support of discharging bills that have majority support, combined with even vague support for civil rights, provides more information than a strong commitment to civil rights. [↑](#footnote-ref-272)
272. See Richard Franklin Bensel, The Political Economy of American Industrialization, 1877-1900 ch. 5 (2000). [↑](#footnote-ref-273)
273. Mike Lee on X.com (“All I wanted [for Christmas] was a restoration of the pre-1937 interpretation of the Commerce Clause”), https://x.com/search?q=%40mikelee%20commerce%20clause&src=typed\_query [↑](#footnote-ref-274)
274. See Darryl J. Levinson & Richard Pildes, *Separation of Parties, Not Powers*, 119 Harv. L. Rev. 2311, 2342-47 (2006). [↑](#footnote-ref-275)
275. See Dahl, *supra* note 146, at 121. [↑](#footnote-ref-276)
276. See, e.g., id.; Levinson & Pildes, *supra* note 273, at 2347-85. [↑](#footnote-ref-277)
277. Alternatively, given the size of the current conservative majority on the Supreme Court, it may simply be unthinkable that the Court will be interested in protecting rights valued by progressives, at least in the reasonably foreseeable future. [↑](#footnote-ref-278)
278. For more on the use of the judiciary to entrench policies, see generally Ran Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Israel’s Constitutional Revolution*, Comparative Pol. 315 (2001). Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 Am. Pol. Sci. Rev. 511 (2002). [↑](#footnote-ref-279)
279. For a balanced consideration of this idea, see Levinson & Pildes, *supra* note 273, at 2368-75. [↑](#footnote-ref-280)
280. Cf. Dahl, *supra* note 146, at 127-34 (arguing that the Senate structure, generally, is a poor tool for protecting the intensely held preferences of minorities). [↑](#footnote-ref-281)
281. See Levinson & Pildes, *supra* note 273, at 2368-75. [↑](#footnote-ref-282)
282. Because the House tends to pass a unique rule for each legislative debate, and that rule tends to supersede any standing rules, constitutional points of order are effectively off limits in the House. In theory, there is no reason not to facilitate constitutional deliberation in the House as well as the Senate, and if the Senate consistently held constitutional debates perhaps the House would follow suit. However, it is difficult to see how House rules can institutionalize this process. [↑](#footnote-ref-283)
283. Tushnet, *supra* note 18, at 1556-68. [↑](#footnote-ref-284)
284. I realize that to supporters of the filibuster this may seem like a very small tail (my desire for greater constitutional deliberation) wagging a very large dog (and end to the filibuster). My proposal will be most attractive to those who currently oppose the filibuster but have questions about simply eliminating it. For an example of a proposal to mend not end the filibuster, see Jonathan S. Gould, Kenneth A. Shepsle, & Matthew C. Stephenson, *Democratizing the Senate from Within*, 13 J. Legal Analysis 502 (2021). [↑](#footnote-ref-285)
285. See Robin L. West, *The Missing Jurisprudence of the Legislated Constitution*, *in* The Constitution in 2020 79 (2011). [↑](#footnote-ref-286)
286. Robin L. West, *Toward the Study of the Legislated Constitution*, 72 Ohio St. L. Rev. 1343, 1360-61 (2011). This possibility may seem limited when the constitutional point of order is available only to block legislation. But nothing would stop senators from blocking legislation to cut welfare benefits based on an alleged right to subsistence. See Akhil Reed Amar, *Property and the Constitution: Panel II – Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 Harv. J.L. & Pub. Pol'y 37 (1990). However, it would also be helpful for the Senate or the House to develop rules that require streamlined consideration – perhaps time limits on committee consideration combined with the availability of a privileged motion to compel floor consideration – for constitutionally required legislation. [↑](#footnote-ref-287)
287. Brest, *Conscientious Lawmaker*, *supra* note10. [↑](#footnote-ref-288)
288. See Lawrence Sager, Justice In Plain Clothes: A Theory Of American Constitutional Practice 84-92 (2004); Lawrence Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 passim (1978). Of course, these could include rights that were once judicially protected. See Blackhawk, *supra* note 7, at 2217-18, Laycox & Thomas, *supra* note 245, at 209. [↑](#footnote-ref-289)