AMENDING CONSTITUTIONAL MYTHS

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ABSTRACT

Before any discussion of how to amend the U.S. Constitution or which aspects of it are most in need of revision, we must first determine what it is we want our Constitution to do. This Article explores the language that is often used to highlight the virtues of the U.S. Constitution that seek to restrain government action, focusing on three terms in particular: checks and balances*,* states' rights*, and* tyranny of the majority*. I refer to these terms as constitutional myths, illustrate their conceptual ambiguity and then offer a translation of them into the political language of power. In doing so, this Article highlights the partisan deployment of these constitutional myths in ways that obscure who is wielding power, how it is being used, and to what end. Amending the Constitution requires a hard look at how the existing Constitution shapes power in ways that advantage the few over the many and how our current constitutional myths serve to obfuscate this simple fact.*

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I. INTRODUCTION

Is it time to amend the Constitution? The answer must surely be *yes*. At a minimum, modern democracy must mean that the candidate for office who receives the most votes should not be preempted by a candidate who receives fewer. But the Electoral College has generated this outcome five

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times in U.S. history and twice in the past two decades.[1] There are many other features of the Constitution that seem obviously in need of repair as well—Senate malapportionment, for example, which gives the same number of representatives to Wyoming (population of 577,000) as California (population approaching 40 million) and lifetime appointment of federal judges.[2]

Before we can consider amending the U.S. Constitution, however, we first must determine what we want our Constitution to do, and that conversation requires a hard look at the language we use to describe the Constitution's purpose, functions, and distribution of power. Americans generally revere the structure of their Constitution, so much so that an entire vocabulary of constitutional virtues has developed. Students come into my constitutional law class armed with their high school civics lessons and terms such as *checks and balances*, *tyranny of the majority*, *government overreach*, and even *states' rights*.

But these alleged virtues, which I call "constitutional myths," actually tell Americans very little about who wields power, how it is used, and to what end. Worse, they perpetuate misconceptions about mass publics, exaggerate the threat posed by government, and undervalue the possibilities for collective action through government policy. In other words, our constitutional myths get a lot wrong. As a result, they reduce the ability of Americans to hold the government accountable for responding to the political interests of mass publics and for limiting the influence of the most privileged at the expense of the masses.[3]

My argument here is simple: Any serious discussion of amending the Constitution must offer a clearer understanding of how our current constitutional system works in practice, and it must begin with the recognition that constitutions shape *who* gets power, *how* they wield it, and to *what* end. If we are going to amend ours, we need to jettison comfortable tropes and start getting serious about power. We need a new, shared

1. There are ways to abolish the Electoral College that do not involve amending the Constitution. *See Agreement Among the States to Elect the President by National Popular Vote*, NAT'L POPULAR VOTE, https://www.nationalpopularvote.com/written-explanation [https://perma.cc/RT78-99VN].

2. For an extensive critique of the patently undemocratic features of the U.S. Constitution, see generally SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006).

3. *See id.* at 20–24.

language that will help citizens know the Constitution's purpose, its levers of power, and how to access them.

The first step in this process requires a kind of constitutional translation—decoding the constitutional language that lauds our Constitution's design into the language of realpolitik. Doing so reveals that our fragmented Constitution deprives average Americans of routine access to political power, benefits the few over the many, and obscures these realities through opaque constitutional myths.[4]

My research over the past 20 years has largely focused on how the highly fragmented nature of the U.S. constitutional system structures political power. *Fragmentation* refers to fundamental features of the U.S. Constitution that disperse power in ways that create both distinctive and decentralized arenas of authority.[5] The primary constitutional features of this fragmentation are separation of powers (particularly between the executive and legislature), bicameralism (two, equal branches of Congress), equal representation in the Senate (overrepresentation of low-population states), federalism (concurrent and distinctive jurisdictions between state and federal governments), judicial supremacy, and the Electoral College.[6]

Terms such as *checks and balances* can apply to most of these features, such as the expansion of presidential lawmaking in relation to Congress (separation of powers),[7] the capacity of the federal judiciary to strike down acts by elected branches and officials (judicial supremacy),[8] and the fluid and

4. *See id.*

5. *See* David Soskice, *American Exceptionalism in Comparative Political Economy*, *in* LABOR IN THE ERA OF GLOBALIZATION 51, 53–56 (Clair Brown et al. eds., 2010); Sven Steinmo, *Why Is Government So Small in America?*, 8 GOVERNANCE: INT'L J. POL'Y & ADMIN 303, 327–28 (1995); *see generally* WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE (Sheldon S. Wolin ed., 1964).

6. RIKER, *supra* note 5, at 32–33; *see also* Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 124–25 (1994); Matthew C. Stephenson, *Does Separation of Powers Promote Stability and Moderation?*, 42 J. LEGAL STUD. 331, 331–33 (2013).

7. *See generally* Greene, *supra* note 6 (discussing checks and balances by legal scholars on executive power); *see also* Jessica Slattery Karich, *Restoring Balance to Checks and Balances: Checking the Executive's Power Under the State Secrets Doctrine,* Mohamed v. Jeppesen Dataplan, Inc., 114 W. VA. L. REV. 759, 783–84 (2012).

8. *See* W. Lindman, *"Cruel and Unusual" Checks and Balances: The Supreme Court Writes a Rubber Check*, 30 DUQ. L. REV. 937, 957–58 (1992) (discussing judicial supremacy).

overlapping jurisdictional boundaries between the national government and the states (federalism).[9] Though legal scholars appear less inclined to see the Electoral College as a valuable form of checks and balances, Charles Fried defends it for the check it puts on popular majorities by giving states influence qua states.[10] In fact, after both the 2000 and 2016 elections, there was no shortage of public commentators ready to defend the institution for various checking and balancing purposes, including defending against the dangerous will of the people, the most populous cities, demagogues, or the biggest states.[11]

The presumption of virtuousness that both scholars and laypersons alike assign to all of this fragmentation is hard to overstate. In practice, however, institutional fragmentation inhibits the ability of government to respond to clear and persistent majority preferences and creates opportunities for powerful political minorities to win out instead.[12] The repeated failure of the government to respond to the preferences of clear majorities then dilutes political capacity and undermines political

9. *See* Evan H. Caminker, Printz*, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 240 (discussing federalism); *see generally* Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293 (discussing checks and balances).

10. Charles Fried, *The Electoral College Is Important Because It Reflects the Will of the States*, N.Y. TIMES (Nov. 16, 2016), https://www.nytimes.com/roomfordebate/2016/11/16/should-the-electoral-college-be-abolished; *cf.* Akhil Reed Amar, *States Don't Use an Electoral College to Choose Their Leader, Neither Should the Nation*, N.Y. TIMES (Nov. 16, 2016), https://www.nytimes.com/roomfordebate/2016/11/16/should-the-electoral-college-be-abolished.

11. *See* Allen Guelzo & James Hulme, *In Defense of the Electoral College*, WASH. POST (Nov. 15, 2016), https://www.washingtonpost.com/posteverything/wp/2016/11/15/in-defense-of-the-electoral-college/?noredirect=on; John Samples, *In Defense of the Electoral College*, CATO INST. (Nov. 10, 2000), https://www.cato.org/publications/commentary/defense-electoral-college [https://perma.cc/62BN-ZDB2]; Peter J. Wallison, *Why We Need the Electoral College*, REALCLEAR POLS. (Dec. 6, 2016), http://www.realclearpolitics.com/articles/2016/12/06/why_we_need_the_electoral_college_132499.html [https://perma.cc/8D3F-T5W3]; *see also* Richard A. Posner, *In Defense of the Electoral College*, SLATE (Nov. 12, 2012), https://slate.com/news-and-politics/2012/11/defending-the-electoral-college.html [https://perma.cc/MKK9-4E4X].

12. *See* LISA L. MILLER, THE MYTH OF MOB RULE: VIOLENT CRIME AND DEMOCRATIC POLITICS 198–99 (2016) [hereinafter MILLER, MYTH OF MOB RULE]; LISA L. MILLER, THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL 172 (2008) [hereinafter MILLER, PERILS OF FEDERALISM]; Desmond King, *Forceful Federalism Against American Racial Inequality*, 52 GOV'T & OPPOSITION 356, 360–64 (2017); *see also* Soskice, *supra* note 5, at 77–80.

legitimacy.[13] Moreover, it leaves little room for political narrative and understanding of the persistent success of corporate power in financial gain, while wages and life opportunities for average Americans stagnate.[14]

I am not the first to claim that understanding how the U.S. Constitution fragments power is essential for understanding the Constitution as a whole and U.S. politics.[15] But I am not sure we fully appreciate the extent of the institutional fragmentation that our Constitution creates nor do we see the mismatch between the language we use to describe fragmentation—language such as *checks and balances*, *states' rights*, *government overreach*, and *tyranny of the majority*—and how fragmentation actually shapes and distributes political power.

Before beginning, I want to articulate a few a priori assumptions. First, I assume that, no matter the constitutional design, elected officials in a democratic country should, as a general matter, be permitted to govern without interference. I leave aside questions about whether and when limitations on that power should be imposed. Here, I am not interested in the tensions or potential conflicts between democracies and constitutionalism as per Richard Bellamy, Jeremy Waldron, Sanford Levinson, and others.[16] Rather, I want to focus on the routine, everyday capacity of government to provide mechanisms through which the public—broadly conceived—can understand, express, and vindicate its political interests.

13. On the effect of failed social movement mobilization or collective action, see LEE CRONK & BETH L. LEECH, MEETING AT GRAND CENTRAL: UNDERSTANDING THE SOCIAL AND EVOLUTIONARY ROOTS OF COOPERATION 166 (2012); *see generally* MANCUR OLSEN, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

14. For a compelling discussion of how businesses and multinational corporations have benefited from national policy over the past few decades, see generally JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER AND TURNED ITS BACK ON THE MIDDLE CLASS (2010).

15. *See* ROBERT DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 154–57 (2d ed. 2003); LEVINSON, *supra* note 2, at 74; RIKER, *supra* note 5, at 151–52.

16. *See* LEVINSON, *supra* note 2, at 6; Richard Bellamy & Dario Castiglione, *Constitutionalism and Democracy – Political Theory and the American Constitution*, 27 BRIT. J. POL. SCI. 595, 595–618 (1997); Jeremy Waldron, *Constitutionalism: A Skeptical View* (N.Y.U. Sch. Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 10-87, 2011).

Second, this is not a constitutional history. For the purposes of this paper, the intentions and goals of the Framers are irrelevant. Rather, I seek to illuminate how common tropes of constitutional discourse—e.g., *checks and balances* and *tyranny of the majority*—offer inaccurate and misleading understandings of political power under our constitutional system today. In other words, how would today's advocates and allies of a government by and for the people evaluate the constitutional mechanisms through which power is shaped and utilized under the U.S. Constitution?

This Article proceeds in four Parts. In Part II, I explain the idea of constitutional myths and draw on three of these myths: checks and balances; states' rights (and its corollary, government overreach); and tyranny of the majority.[17] I illustrate the ways in which these terms are typically deployed and then illustrate how they are often manipulated for a wide variety of ends by a range of (primarily) elite actors. While their use is common, they lack any objective legal or political referent. Moreover, I reveal how the myths not only obscure who is wielding power and for what purpose but also how they inaccurately convey a neutrality in U.S. political institutions. In practice, fragmentation is particularly damaging to the capacity of the government to produce public goods and comprehensive social policy. Part III preemptively responds to critics who argue for the virtues of these constitutional terms.[18] I conclude, in Part IV, with proposals for new, more accurate language for understanding constitutional power structures in the United States.[19]

II. CONSTITUTIONAL MYTHS AND POLITICAL POWER

Americans know little about the U.S. Constitution.[20] Polls reveal that most Americans cannot name all three branches of government, for example, and at least one-third cannot name a right protected by the First Amendment.[21] My focus here, however, is less on what Americans do not

17. *See infra* Part II.

18. *See infra* Part III.

19. *See infra* Part IV.

20. *Americans Are Poorly Informed About Basic Constitutional Provisions*, ANNENBERG PUB. POL'Y CTR. (Sept. 12, 2017), https://www.annenbergpublicpolicycenter.org/americans-are-poorly-informed-about-basic-constitutional-provisions/ [https://perma.cc/VH99-R49W]; *see also* Matthew Shaw, *Civic Illiteracy in America*, HARV. POL. REV. (May 25, 2017), harvardpolitics.com/culture/civic-illiteracy-in-america./ [https://perma.cc/Y8WR-5T48].

21. *Americans Are Poorly Informed About Basic Constitutional Provisions*, *supra*

know than on what many think they do know. The widespread assumption that terms such as *checks and balances*, *tyranny of the majority*, and *states' rights* have some meaningful referent—an identifiable definition that is discernable through close scrutiny of the Constitution's text or jurisprudential reasoning—is rarely challenged.[22]

But once we scratch beneath the surface, it becomes difficult to sustain these assumptions.[23] Constitutional structures are not neutral.[24] They organize power in particular ways, enabling or inhibiting who has access to it, how, and for what purpose.[25] In this section, I look at several terms that are commonly used with respect to the virtues of the U.S. Constitution: *checks and balances*; *states' rights* (and its corollary, *government overreach*); and tyranny of the majority. I explain what they mean in terms of power and how they obscure the interests they serve.

A. *Checks and Balances*

In the vernacular, *checks and balances* is typically used in reference to different branches of government checking one another, so no one branch gets too powerful.[26] If you ask people what checks and balances mean, as I frequently do, you are likely to get some version of the tautological response that checks and balances means checking and balancing.[27]

But what Americans call checks and balances, political scientists frequently call veto points (or veto players), and the comparative virtues of veto points are not at all clear.[28] *Veto points* are largely defined as "individual[s] or collective actor[s] whose agreement is required for a policy decision," and generally, the more of them there are, the harder it is for

note 20; *see also* Shaw, *supra* note 20.

22. *See* Greene, *supra* note 6, at 125–26.

23. *See generally* AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES (1999).

24. *See id.*

25. *See* Tom Ginsburg, *Introduction*, *in* COMPARATIVE CONSTITUTIONAL DESIGN 1, 1–2 (Tom Ginsburg ed., 2014); *see generally* COMPARATIVE CONSTITUTIONS PROJECT, https://comparativeconstitutionsproject.org/ [https://perma.cc/9EAW-HW5K].

26. *See* Greene, *supra* note 6, at 125.

27. *See* Shaw, *supra* note 20.

28. *See* George Tsebelis, *Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism*, 25 BRIT. J. POL. SCI. 289, 293 (1995).

policy to change.[29] Put simply, veto points disperse political power, and in doing so, they produce multiple venues where consent is required to create policy.[30] This creates opportunities for narrow political interests to capture a particular veto point and win out, despite popular preferences.[31]

The dispersal of political power seems inherently virtuous—particularly when one's civic education is rooted in James Madison's *The Federalist No. 51*, in which he explains the justification for separating power across many units:

> Ambition must be made to counteract ambition. . . . If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.[32]

By dispersing governmental authority, the argument goes, we restrain the inherent desire of human beings to consolidate their power.[33] The invocation of checks and balances implies political power is disarmed in this way; Hillary Rodham Clinton described "our constitutional checks and balances . . . as an immune system protecting us from the disease of authoritarianism."[34]

The comparative evidence, however, is less sanguine about the democratic value of multiple veto points. At least some studies suggest that the more veto points a political system has, the lower the quality of democratic outcomes, including reduced accountability, greater inequality, and lower social-welfare provision.[35] Veto points generally provide

29. *Id.*

30. *See id.* at 301.

31. *See id.* at 312.

32. THE FEDERALIST PAPERS NO. 51, at 294 (James Madison) (Am. Bar Ass'n ed., 2009).

33. *See id.*

34. Hillary Rodham Clinton, *American Democracy Is in Crisis*, ATLANTIC, (Sept. 16, 2018), https://www.theatlantic.com/ideas/archive/2018/09/american-democracy-is-in-crisis/570394.

35. *See* CLEM BROOKS & JEFF MANZA, WHY WELFARE STATES PERSIST: THE IMPORTANCE OF PUBLIC OPINION IN DEMOCRACIES 23–24 (2007); DAVID BRIAN ROBERTSON, FEDERALISM AND THE MAKING OF AMERICA 166–69 (1st ed. 2012) [hereinafter ROBERTSON, MAKING OF AMERICA]; Peter K. Enns et al., *Conditional*

opportunities for the preferences of the few to block the preferences of the many.[36] This is because they offer permanent, institutionalized venues for subgroups—not the national majorities that elect legislators—to block policies preferred by the majority and demand concessions in exchange for their support.[37] In the United States, as noted in Part I, the opportunities are numerous.[38] Moreover, this blocking is given the status of constitutional virtue through phrases such as *checks and balances*, which imply the fragmented features of our political system are vital because they neutralize power.[39]

But checks and balances are not the neutralization of power; they are the *exercise* of power.[40] Invocation of the checks-and-balances myth simply obscures the interests that are at stake, the powerful players who are exercising power, and the potential consequences for the people of the United States.[41] In other words, checks and balances are a form of power; who is being checked and why, however, is unclear.[42] What is being balanced and to what end? Who wins, and who loses? Who decides whom or what is checked?

Summoning checks and balances, in other words, activates a kind of magical thinking. Rather than take a political position and argue its merits, the appeal to checks and balances implies that checks are impartial and that

Status Quo Bias and Top Income Shares: How U.S. Political Institutions Have Benefited the Rich, 76 J. POL. 289, 291 (2014); Evelyne Huber, Charles Ragin & John D. Stephens, *Social Democracy, Christian Democracy, Constitutional Structure, and the Welfare State*, 99 AM. J. SOC. 711, 721 (1993); Aaron B. Wildavsky, *Federalism Means Inequality: Political Geometry, Political Sociology and Political Culture*, *in* THE COSTS OF FEDERALISM 55, 65–66 (Robert T. Golembiewski & Aaron Wildavsky eds., 1984); *see also* Christopher Wlezien & Stuart N. Soroka, *Federalism and Public Responsiveness to Policy*, 41 PUBLIUS: J. FEDERALISM 31, 42–43 (2010). For a more nuanced analysis, see generally Markus M. L. Crepaz & Ann W. Moser, *The Impact of Collective and Competitive Veto Points on Public Expenditures in the Global Age*, 37 COMP. POL. STUD. 259 (2004).

36. Tsebelis, *supra* note 28, at 301.

37. *See id.* at 302.

38. *See supra* Part I.

39. Tsebelis, *supra* note 28, at 301.

40. *See* Greene, *supra* note 6, at 124.

41. *See* Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 34 (2010).

42. *See id.* at 36.

there are no political interests at stake.[43] It suggests a kind of constitutional invisible hand. An example is Speaker of the House Nancy Pelosi (D–CA), who, in response to President Donald Trump's declaration of an emergency in order to appropriate funding for a border wall, made this claim about President Trump's action:

> Just as both parties honored our oath to protect the American people by passing the conference committee bill, the Congress on a bipartisan basis must honor the Constitution by defending our system of *checks and balances*.
>
> The President is not above the law. The Congress cannot let the President shred the Constitution.[44]

Not surprisingly, Speaker Pelosi did not invoke these checks and balances when Republicans gained control of both chambers of Congress under President Barack Obama in 2010. In fact, in 2012, it was Senate Majority Leader Mitch McConnell and House Speaker John Boehner who appealed to the myth in response to President Obama's recess appointment of Richard Cordray to head the Consumer Financial Protection Bureau: "House Speaker John A. Boehner (R-Ohio) called Obama's move 'an extraordinary and entirely unprecedented power grab.' Senate Minority Leader Mitch McConnell (R-Ky.) said the president had acted 'arrogantly' and that his decision 'fundamentally endangers the Congress' role in providing a check on the excesses of the executive branch.'"[45]

43. *See* Thomas H. Hammond, *Veto Points, Policy Preferences, and Bureaucratic Autonomy in Democratic Systems*, *in* POLITICS, POLICY AND ORGANIZATIONS: FRONTIERS IN THE SCIENTIFIC STUDY OF BUREAUCRACY 73, 76 (George A. Krause & Kenneth J. Meier eds., 2003).

44. Press Release, Speaker Nancy Pelosi and Senate Democratic Leader Chuck Schumer, Joint Statement on the President's Unlawful Emergency Declaration (Feb. 15, 2019), https://www.democrats.senate.gov/newsroom/press-releases/schumer-pelosi-joint-statement-on-the-presidents-unlawful-emergency-declaration- [https://perma.cc/YB4Q-HX7H] [hereinafter Joint Statement on the President's Unlawful Emergency Declaration] (emphasis added).

45. Peter Nicholas, Lisa Mascaro & Jim Puzzanghera, *Obama Circumvents Congress to Make Appointments*, L.A. TIMES (Jan. 4, 2012), https://www.latimes.com/world/la-xpm-2012-jan-04-la-na-obama-cordray-20120105-story.html; *see also* Carl Hulse, *Hardened, Obama Strikes Tough Tone for Modest America*, N.Y. TIMES (Jan. 18, 2014), https://www.nytimes.com/2014/01/29/us/politics/executive-order-may-be-only-option-but-it-comes-with-limits.html.

Pitched in this way, both Speakers and the Senate Majority Leader effectively appealed to constitutional principle, implying the other party had gone rogue.[46] Rather than debate the issues on the merits, discussion shifts away from *whether* a particular policy or action is a good idea or popularly supported to *which branch of government* is empowered to enact it.[47] This is a form of, what David Brian Robertson calls, the "double battleground" of U.S. politics—the *whether* and the *where*—and it inhibits robust, democratic policy debate by moving away from public discussions that could inform the public's understanding and preferences to confusing constitutional language with which most Americans have little or no experience.[48]

As the following Part illustrates, the distinction between popular understandings of checks and balances and the concept of veto points is not merely semantic.[49] A system of checks and balances implies the disarmament of power.[50] But, as the study of veto points illustrates, when a political minority can stymie, disrupt, or downright block the interests of the majority, this is not power's disarmament but power at its peak.[51] References to checks and balances offer us no language by which to understand who is using that power and for what purpose.

B. *States' Rights and Government Overreach*

A set of myths closely related to checks and balances are the terms *states' rights* and its corollary, *government overreach*.[52] These terms perpetuate the idea that government power is per se dangerous and that the primary source of dangerous power in society is the government.[53] The result is an anti-statist narrative across the political spectrum that is framed as constitutional principle, rather than political preference.[54]

But the default assumption that the national government has some natural limitations and that anything beyond that is overreach not only

46. *See* Joint Statement on the President's Unlawful Emergency Declaration, *supra* note 44; *see also* Nicholas et al., *supra* note 45.

47. *See, e.g.*, Hulse, *supra* note 45.

48. *See* ROBERTSON, MAKING OF AMERICA, *supra* note 35, at 40.

49. *See* discussion *infra* Part II.B.

50. *See, e.g.*, Greene, *supra* note 6, at 124.

51. *See* Crepaz & Moser, *supra* note 35, at 271; *see also* discussion *supra* Part II.A.

52. *See* Caminker, *supra* note 9, at 206–07.

53. *See id.* at 210.

54. *See* ROBERTSON, MAKING OF AMERICA *supra* note 35, at 1–4.

perpetuates the political uses of these claims but also denies Americans the opportunity to recast alleged government overreach as, instead, vital social intervention. Moreover, repeated emphasis on constraining the government provides no vocabulary for understanding and confronting the ways in which power is exercised by private, nongovernmental actors, particularly concentrated-wealth, large, multinational firms and extreme, highly-preference-intense political actors, and how the government-overreach myth can advance those ends.

When states' rights and government overreach are lauded as constitutional virtue, it then becomes difficult to develop political narratives about the role that the national government can play in constraining power—such as private power, market power, and the power of the highly preference intense (but usually more extreme)—and more fairly and equitably distributing collective resources across the population. In the twenty-first century, there are few major social problems that states can solve on their own.[55] Unlike the national government, states are highly constrained in borrowing and spending and have no control over the macroeconomy or the size of their populations.[56] Health care, crime, pollution, gun control, and immigration are all issues that require at least a modicum of national government intervention.[57] This is not to say that the national government is better suited to solve all problems, but it notes the complexity of modern issues and challenges the conventional wisdom that assumes some obvious and natural limitation to both national and domestic policymaking.[58]

The states' rights claim is particularly odious because it renders invisible the white-supremacist origins of the term and its continued deployment in opposition to racial progress.[59] While resistance to

55. *See, e.g.*, Deborah Stone, *Why the States Can't Solve the Health Care Crisis*, AM. PROSPECT (Dec. 5, 2000), https://prospect.org/health/states-solve-health-care-crisis/ [https://perma.cc/9KMY-ZWMW].

56. *See id.*

57. *See* MALCOLM FEELEY & EDWIN RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE 117 (2008).

58. In addition, not all local decision-making needs to be lost in a more centralized policy process. There are important distinctions between federalism and decentralization. For an excellent discussion of these distinctions, see generally FEELEY & RUBIN, *supra* note 57.

59. *See* IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN THE 20TH CENTURY 49–50 (2005); CHRISTOPHER S. PARKER & MATT BARETO, CHANGE THEY CAN'T BELIEVE IN: THE TEA PARTY AND

policymaking from the federal government is nearly as old as the republic and has many forms, its most common use has been by whites seeking to block or limit federal policies that would benefit African Americans.[60]

The South Carolina secession statement, issued in December of 1860 shortly after President Abraham Lincoln's election, references the "reserved rights of States" in the first paragraph.[61] It continues:

> [A]n increasing hostility on the part of the non-slaveholding States to the institution of slavery, has led to a disregard to their obligations, and the laws of the General Government have ceased to effect the objects of the Constitution.[62]

White supremacists continued to use phrases about the rights of states for blatantly racist purposes throughout the Civil Rights Movement, most notably (though far from exclusively) in the Southern Manifesto.[63] The manifesto was the declaration of opposition against *Brown v. Board of Education*,[64] signed by 101 members of Congress from the former Confederate states and presented to the House of Representatives on March 12, 1956.[65] The manifesto declared the Supreme Court's decision was "destroying the amicable relations between the white and Negro races" and denounced "the Supreme Court's encroachment on the rights reserved to the States and to the people, contrary to established law, and to the Constitution."[66]

REACTIONARY POLITICS IN AMERICA 192 (2013); Desmond S. King & Rogers M. Smith, *Racial Orders in American Political Development*, 99 AM. POL. SCI. REV. 75, 77 (2005); *see also* HACKER & PIERSON, *supra* note 14, at 95–96; ROBERTSON, MAKING OF AMERICA, *supra* note 35, at 190–91.

60. *See* ROBERTSON, MAKING OF AMERICA, *supra* note 35, at 66.

61. *Confederate States of America – Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union*, AVALON PROJECT, (https://avalon.law.yale.edu/19th_century/csa_scarsec.asp) [https://perma.cc/Z66B-WMRU].

62. *Id.*

63. *The Southern Manifesto of 1956*, HIST. ART & ARCHIVES, https://history.house.gov/Historical-Highlights/1951-2000/The-Southern-Manifesto-of-1956/ [https://perma.cc/YS8Q-BK6K].

64. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

65. *See The Southern Manifesto of 1956*, *supra* note 63.

66. 102 CONG. REC. 4460 (1956).

Liberals have more recently discovered states' rights, which they invoked to challenge the harshness of crime bills in the 1990s,[67] to promote medical marijuana in the 2000s,[68] and to defend sanctuary cities in the wake President Trump's election.[69] For example, in responding to the government's appeal in *Ashcroft v. Raich* involving the growing and using of cannabis for medical purposes in California, respondents argued that applying the Controlled Substance Act to them would interfere with the authority of states:

> Applying the CSA to Respondents would *contravene basic principles of federalism and State sovereignty*. States possess broad powers to define criminal law, regulate medical practice, and protect the lives of their citizens. . . . Principles of federalism and State sovereignty have led the Court, in cases such as *Parker v. Brown,* 317 U.S. 341 (1943), and *Gregory v. Ashcroft,* 501 U.S. 452 (1991), to interpret federal laws as inapplicable to conduct that is authorized and supervised by a State or that *involves the States' historic powers*.[70]

Similarly, recent cases brought by Democrats involving sanctuary cities illustrate the use of states' rights claims for liberal political ends. In *City of San Francisco v. Sessions* and its subsequent affirmation in the Ninth Circuit, federal courts rejected the Trump Administration's efforts to withhold law enforcement funds to cities that did not enforce immigration law as the administration demanded and embraced standard arguments about the states' sovereign authority over their own citizens.[71]

Liberals generally avoid the phrase *states' rights*, but their legal claims are no less rooted in Tenth Amendment jurisprudence.[72] A states' rights claim in state-sovereignty clothing is still a states' rights claim.[73]

67. *See, e.g.*, Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503, 508–08 (1995).

68. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1 (2005).

69. *See, e.g.*, City & Cty. of S.F. v. Trump, 897 F.3d 1225 (9th Cir. 2018).

70. Brief for Respondents at 9, Gonzales v. Raich, 545 U.S. 1 (2005) (No. 03-1454), 2004 WL 2308766, at *11 (emphasis added).

71. *Trump*, 897 F.3d at 1234–35; City & Cty. of S.F. v. Sessions, 349 F. Supp. 3d 924, 950 (N.D. Cal. 2018).

72. *See* Gerken, *supra* note 41, at 12–13.

73. *See id.* at 15.

But what does it mean to make these assertions in the twenty-first century? Some will argue the fact that the jurisprudence of states' rights can serve both liberal and conservative ends reveals the political neutrality of U.S. federalism.[74] But constitutional clashes among municipalities, states, and the federal government reveal precisely the opposite for two reasons.[75] First, mounting a legal challenge is costly, time consuming, and largely out of reach for most people.[76] A constitutional system that facilitates shifting political battles from the content of policies to the venue in which policy originates can be broadly accessible to political elites regardless of partisan affiliation, but this is not the same as being equally available to all political interests.[77] As David Brian Robertson notes in his illuminating analysis of federalism throughout U.S. history, "American political opponents routinely choose to fight . . . over the role of the states versus the national government, *because they are likely to get better results at one level of government than the other*."[78]

The interests of the vast majority of Americans, who have little connection to political elites, are hardly in a position to participate in this venue shopping, which particularly disadvantages low-income and middle-income people, both in terms of access to justice but also in terms of the highly uneven distribution of resources and benefits across the states.[79]

A second reason why this analysis reveals the non-neutrality of federalism with respect to states' rights and government overreach claims is that these legal challenges force ordinary Americans to recast their political

74. Heather K. Gerken & Joshua Revesz, *Progressive Federalism: A User's Guide*, DEMOCRACY: A JOURNAL OF IDEAS (2017), https://democracyjournal.org/magazine/44/progressive-federalism-a-users-guide/.

75. *See* STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 83–96 (2d ed. 2004).

76. For a foundational argument about the challenges of vindicating rights, see SCHEINGOLD, *supra* note 75, at 97–116.

77. *See id.* at 118–23.

78. ROBERTSON, MAKING OF AMERICA, *supra* note 35, at 39 (emphasis added).

79. *See* Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1785 n.1 (2001) (providing an extensive list of relevant research on the challenges of access to legal institutions for most Americans). On the vast irregularities in social benefits across the states, see JAMILA MICHENER, FRAGMENTED DEMOCRACY: MEDICAID, FEDERALISM, AND UNEQUAL POLITICS 167–68 (2018); *see generally* ANDREA LOUISE CAMPBELL, TRAPPED IN AMERICA'S SAFETY NET: ONE FAMILY'S STRUGGLE 71–100 (2014).

interests into constitutional claims.[80] But legal language winnows, individualizes, and closes off particular types of political remedies.[81] As Emily Zackin has powerfully illustrated, the positive rights of U.S. constitutionalism are embedded in state constitutions, not the federal one.[82] Constitutional claims in federal courts are, by definition, biased toward *blocking* government action—freedom from—because there are few rights in the Constitution that require the government to provide some desired political good, such as greater economic equality, access to health care, quality education, affordable housing, living-wage employment, environmental protection, and so on.[83]

This is precisely how power is obscured through constitutional myths and what constitutional scholars too often miss.[84] Accounts of the role of states in the federal system that rely on abstract legal rules and principles overlook the ways in which states' rights claims are not just another set of political commodities in the toolkit of activists and the electorate writ large.[85] Rather, they privilege some substantive interests over others and allow political elites to pursue their favored policies in different venues, policies that rarely involve the material interests of ordinary Americans.[86]

To be clear, I am not suggesting that legalizing medical marijuana or protecting immigrants from a highly punitive detention and deportation system are not in the interests of ordinary Americans. My point is that the shift from political mobilization and electoral capacity to legal claims obscures the public interest potential of both. Speaker Pelosi's invocation of checks and balances discussed earlier serves as a useful example.[87] Drawing on constitutional claims was an odd way to challenge the President, given that, by early 2019, nearly six in ten Americans opposed a border wall, and even Republicans could not muster enough votes to secure border-wall

80. *See* SCHEINGOLD, *supra* 75, at 117–18.

81. *See id.* at 130; *see also* Mark Graber, *The Non-Majoritarian Problem: Legislative Deference to the Judiciary*, 7 STUDS. AM. POL. DEV. 35, 41 (1993).

82. EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 43 (2013).

83. *See, e.g.*, *id.* at 197–98.

84. *See* LEVINSON, *supra* note 2, at 22–24.

85. *See, e.g.*, ROBERTSON, MAKING OF AMERICA, *supra* note 35, at 31.

86. *See, e.g.*, SCHEINGOLD, *supra* note 75, at 130.

87. *See* Joint Statement on the President's Unlawful Emergency Declaration, *supra* note 44.

funding when they controlled the House of Representatives in 2017–2018.[88] In other words, constitutional claims aside, the President's actions were not popular, even within the President's own party.[89] The emphasis on checks and balances by the Constitution suggests that it is not the *policy* that is the problem but the manner in which it is being executed.[90] Democrats missed an opportunity to tie the unpopular border wall to Republican obstruction of meaningful immigration reform for three decades.[91]

The government overreach claim is similarly hollow. As an illustration, contemporary gun advocacy groups routinely use the veto points of U.S. politics and deploy constitutional myths in the process.[92] The government-overreach myth is deployed aggressively at the federal level to resist federal gun-control legislation on the basis of state sovereignty and nonuniformity.[93] Whether the issue is universal background checks, gun-safety technology, or buy-back schemes, gun-rights groups regularly condemn congressional gun regulations as overreach.[94]

As a statement of power and politics in the United States during the twentieth century, however, it makes little sense. The concept of overreach has no meaningful referent, other than that which it is given by interested parties. What, exactly, are states being protected from? And which states? What about the states whose residents would like stricter gun legislation? After all, with free and open borders among states, restrictive gun laws in

88. *See* John Gramlich, *How Americans See Illegal Immigration, the Border Wall, and Political Compromise*, PEW RES. CTR. (Jan. 16, 2019), https://www.pewresearch.org/fact-tank/2019/01/16/how-americans-see-illegal-immigration-the-border-wall-and-political-compromise/ [https://perma.cc/ZA6T-FH5D].

89. *Id.*

90. *See* Greene, *supra* note 6, at 136–38.

91. *See* Gramlich, *supra* note 88.

92. *See, e.g.*, Lorelei Kelly, *How Groups Like the NRA Captured Congress—and How to Take It Back*, ATLANTIC (Mar. 7, 2013), https://www.theatlantic.com/politics/archive/2013/03/how-groups-like-the-nra-captured-congress-and-how-to-take-it-back/273623/.

93. *See* Caminker, *supra* note 9, at 203–04.

94. Chris Cox, *Executive Overreach: The New Normal in Anti-Gun Politics*, NRA-ILA (Feb. 24, 2016), https://www.nraila.org/articles/20160224/executive-overreach-the-new-normal-in-anti-gun-politics [https://perma.cc/KK2N-D5ZN]; John Whitesides & David Lawder, *Senate Blocks Gun-Control Legislation in Blow to Obama*, REUTERS (Apr. 16, 2013), https://www.reuters.com/article/us-usa-guns/senate-blocks-gun-control-legislation-in-blow-to-obama-idUSBRE93F00D20130417 [https://perma.cc/9RCN-TB53].

one state are largely meaningless when a neighboring state has highly lenient ones. How do we make sense out of these terms?

The term *government overreach* is actually deployed in relation to a dizzying array of issues: financial regulation, environmental standards, health care, phone surveillance, Internet privacy, public lands, energy efficiency, prosecutorial and police actions, and bottled water.[95] A sample of some of the uses of the term from popular newspapers in relation to these issues reveals the ease with which the term can be used in virtually any context:

2015: The bottled water and soda industries pressured Congress to roll back rules allowing the National Park Service to ban water bottles, calling it "intrusive government overreach."[96]

2010: Senate Republicans called the proposed regulation of the financial industry following the 2008 economic collapse a "massive government overreach."[97]

2012: Journalists and Wikileaks supporters successfully challenged a congressional law on indefinite detention of suspected terrorists, calling the victory a "historic repudiation of government overreach."[98]

2013: Secretary of the Interior Ken Salazar is sued by Cause of Action, a government watchdog group, after refusing to extend the lease of an oyster farm in California.[99] Cause of Action calls Salazar's actions "a matter of overreach and accountability."[100]

95. Author's analysis of 60 articles in major newspapers using the phrase *government overreach*, between 2000–2015. *See infra* notes 102–07 and accompanying text.

96. The Editorial Board, *The Republican Fetish with Water Bottles*, N.Y. TIMES (July 17, 2015), https://www.nytimes.com/2015/07/18/opinion/the-republican-fetish-with-water-bottles.html.

97. David M. Herszenhorn, *Senate Republicans Call Reform Bill a 'Takeover' of the Banking Industry*, N.Y. TIMES (May 18, 2010), http://nytimes.com/2010/05/19/business/19regulate.html.

98. Charlie Savage, *Judge Rules Against Law on Indefinite Detention*, N.Y. TIMES (Sept. 12, 2012), http://nytimes.com/2012/09/13/us/judge-blocks-controversial-indefinite-detention-law.html.

99. *See* Norimitsu Onishi, *Oyster Farm Caught up in Pipeline Politics*, CAUSE ACTION INST. (Apr. 10, 2013), https://causeofaction.org/new-york-times-oyster-farm-caught-up-in-pipeline-politics/ [https://perma.cc/TTH6-BEZ7].

100. *Id.*

2013: An editorial urged readers not to say *government overreach* in relation to the Federal Communications Commission's regulation of wireless phone carriers.[101]

There may very well be some limit to the scope of issues that Americans want the federal government to address, but it cannot simply be "when government overreaches."[102] How do we know overreach when we see it, beyond the eye of the beholder? Moreover, it is not clear that Americans care very much about which level of government does what. If their political demands are any indication, and as public-choice theory would suggest, people prefer to have their needs met than to quibble over which level or branch of government is meeting them.[103]

Regardless of who is invoking states' rights or government overreach, it obscures the real issues at stake and may reduce the ability of voters to hold government accountable. One person's overreach is another person's public policy, and these claims appear to serve the interests of the people who make them more than the interests of average Americans.

C. *Tyranny of the Majority*

The third and final myth I want to discuss is *tyranny of the majority*, which is often deployed to defend countermajoritarian institutions on the assumption that mass publics are irrational, mercurial, and largely ignorant of their social and economic reality.[104] This classic argument is articulated most famously in the U.S. context by James Madison in *The Federalist No. 55*: "Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob."[105] But it is frequently invoked today, including

101. Ajit V. Pai, *Don't Treat Consumers Like Criminals*, N.Y. TIMES *(*June 5, 2013), https://www.nytimes.com/2013/06/06/opinion/switching-wireless-carriers-shouldnt-be-a-crime.html.

102. *See, e.g.*, Caminker, *supra* note 9, at 239–40.

103. See ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN 13 (2011), for a detailed analysis of the variety of issues that are being addressed by both state and national governments and an argument for federal courts to consider a state's capacity in their federalism jurisprudence, not just congressional or presidential overreach. *See also* SOTIRIOS A. BARBER, THE FALLACIES OF STATES' RIGHTS 145–71 (2013) (arguing states' rights are rooted in policy preference, not constitutional principle); Jacob T. Levy, *Federalism, Liberalism, and the Separation of Loyalties*, 101 AM. POL. SCI. REV. 459, 459–77 (2007).

104. *See* Graber, *supra* note 81, at 37.

105. THE FEDERALIST NO. 55, at 318 (James Madison) (Am. Bar Ass'n ed., 2009).

recently by Jeffrey Rosen in which he claims that contemporary politics illustrates, "Madison's worst fears of mob rule have been realized . . . ."[106]

Some scholars argue that tyranny of the majority is primarily a problem of direct democracy (e.g., referenda), and there is some evidence that referenda disadvantage racial, ethnic, and sexual minorities.[107] A more thorough discussion of the relationship among conceptions of direct democracy, referenda, and representative democracy is beyond the scope of this Article, but tyranny of the majority is not restricted to referenda.[108] Liberals, in particular, have used this claim to oppose, for example, a constitutional amendment that would ban flag burning, which would, in one commentators words, "give constitutional sanction to . . . 'tyranny of the majority'"[109] as well as various forms of surveillance and detention.[110]

It is not at all clear, however, that legislative bodies representing political majorities are, in fact, routinely more dangerous than rule by elites, and there is quite a bit of evidence to the contrary.[111] Moreover, the

106. Jeffrey Rosen, *America Is Living in James Madison's Nightmare,* ATLANTIC (Oct. 2018), https;//www.theatlantic.com/magazine/archive/2018/10/james-madison-mob-rule/568351/.

107. *See* Barbara Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 253 (1997). For a persuasive analysis of the anti-civil-rights consequences of direct democracy for LGBTQ minorities, see Donald P. Haider-Markel, Alana Querze & Kara Lindaman, *Lose, Win, or Draw? A Re-Examination of Direct Democracy and Minority Rights*, 60 POL. RES. Q. 304, 306–13 (2007).

108. Lani Guinier made a powerful, more general case for the problem of tyranny of the majority in representative democracies. Ironically, at least some of the problems cited by Guinier are a function of a subnational political minority (the Jim Crow south) that perpetuated a system of apartheid for over a century after the Civil War, precisely because of the veto system of U.S. federalism. *See generally* LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994). Political scientist William H. Riker's analysis of U.S. federalism led him to the powerful conclusion, "[I]n the United States if one disapproves of racism, one should disapprove of federalism." *See* RIKER, *supra* note 5, at 155.

109. *See* Arthur Schlesinger, Jr., *One Gain for Freedom, One Loss*, WALL ST. J., July 10, 1989, at 10.

110. *See* Adam Cohen, *Democracy in America, Then and Now, a Struggle Against Majority Tyranny*, N.Y. TIMES (Jan. 23, 2006), https://www.nytimes.com/2006/01/23/opinion/democracy-in-america-then-and-now-a-struggle-against-majority.html.

111. *See* HÉLÈNE LANDEMORE, DEMOCRATIC REASON: POLITICS, COLLECTIVE INTELLIGENCE, AND THE RULE OF THE MANY 195–207 (2017); MILLER, MYTH OF MOB RULE, *supra* note 12, at 201–07; *see generally* RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY 145–75 (2007) (discussing democratic theory).

perpetuation of the tyranny-of-the-majority myth makes it difficult to generate political discourse about the ways in which government can, and has, served as the embodiment of collective interests and produced policies that have dramatically improved people's lives.[112] The (national) anti-statist rhetoric that emanates from the right on issues such as gun control and health care merges with an anti-statist narrative from liberals on issues such as flag burning and criminal justice that leaves little room for robust political frameworks of the ways in which national politics can produce collective goods.[113]

The point here is not that political majorities never undertake policies that harm a discreet minority but, rather, that calling this "tyranny" does not allow for any distinction between majority decision-making for the collective good and decision-making for the purpose of overt repression.[114] Put differently, who gets to decide when majorities are being tyrannical and when they are simply governing?

Relatedly, and crucially, tyranny of the majority cannot tell us which political minorities should be granted veto power over political majorities nor can it explain which political minorities are most likely to actually have access to this veto power or how it is used.[115] When people invoke the idea of tyranny of the majority, they typically imagine majorities doing harm to some arbitrary political minority that is less powerful, such as racial or religious minorities, or people with unpopular political views.[116]

But nothing in the U.S. Constitution or the institutions it creates restricts the use of veto points to people who are so situated.[117] In fact, the beneficiaries of this complex constitutional system and its laudatory myths can be some of the most powerful groups and individuals, precisely because they have the greatest access to institutional levers of power.[118] The vast majority of ordinary people, by contrast, have few pathways to access, let

112. *See* HACKER & PIERSON, *supra* note 14, at 54–56; KATZNELSON, *supra* note 59, at 36.

113. *See* HACKER & PIERSON, *supra* note 14, at 291–96.

114. *See* KATZNELSON, *supra* note 59, at 38; *see also* MILLER, MYTH OF MOB RULE, *supra* note 12, at 208–09.

115. *See generally* DARA Z. STROLOVITCH, AFFIRMATIVE ADVOCACY: RACE, CLASS, AND GENDER IN INTEREST GROUP POLITICS 136–59 (2007).

116. *See* THE FEDERALIST NO. 51 (James Madison).

117. *See* U.S. CONST. art. 1, § 7.

118. *See* HACKER & PIERSON, *supra* note 14, at 41–72.

alone control, any governmental institutions, and their preferences are sidelined as a result.[119] A veritable cottage industry in political science illustrates the yawning gap between the preferences of ordinary Americans and the decisions of political elites.[120]

In other words, tyranny of the majority and the institutional fragmentation that is usually lauded for stopping it obscure the fact that not all political minorities are equally situated in relation to power.[121] Access to power is costly; it requires a level of time and resources that the vast majority of individuals do not have, and a large amount of policymaking and rulemaking (and blocking) occurs well out of view from ordinary people through the myriad venues in this highly fragmented political system.[122]

Well-heeled elites, by contrast, are what John Adams called "intriguing aristocratic minorities" and are always much closer to power and more likely to have the time, money, and political savvy to take advantage of veto points in the constitutional system.[123]

The consequences go well beyond the fact that public policies frequently do not reflect the preferences of average Americans.[124] Repeated political participation that results in very little, if any, policy change leaves the electorate confused about political accountability and disillusioned or cynical about the political system.[125] In a positive feedback loop, our constitutional myths then cause us to double down on these features of our constitutional system, which further erodes accountability, transparency, and democratic policy change.

119. *See* DAHL, *supra* note 15, at 155.

120. *See* LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 19–22 (2009); MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA 241–43 (2012); STROLOVITCH, *supra* note 115, at 206–07.

121. *See* STROLOVITCH, *supra* note 115, at 17, 206.

122. *See* SUZANNE METTLER, THE SUBMERGED STATE: HOW INVISIBLE GOVERNMENT POLICIES UNDERMINE AMERICAN DEMOCRACY 31–32 (2011); *see also* KIMBERLY J. MORGAN & ANDREA LOUISE CAMPBELL, THE DELEGATED WELFARE STATE: MEDICAID, MARKETS, AND THE GOVERNANCE OF SOCIAL POLICY 223–24 (2011).

123. *See* Luke Mayville, *Fear of the Few: John Adams and the Power Elite*, 47 POLITY 5, 6–7 (2015).

124. *See* BARTELS, *supra* note 120, at 2–3.

125. *See* Jonathan Fox, *How Does Civil Society Thicken? The Political Construction of Social Capital in Rural Mexico*, 24 WORLD DEV. 1089, 1091 (1996).

D. *Summary*

What is crucial about these illustrations is not simply pulling back the mask of constitutional myth and revealing partisan preference. Rather, it is when we examine how these myths are used and for what end that we begin to see their significance. Constitutional veto points are not neutral.[126] Rather, they are biased in three crucial ways. First, they are not equally accessible to all Americans because constitutional challenges are costly and time-consuming, making them more amenable to large, organized, well-financed groups than to the vast majority of people.[127] Second, the issues that these myths are applicable to are narrow.[128] They are more useful when groups seek to block government action than when they seek to force representatives to be accountable to ordinary people.[129] Finally, they not only ignore but actually undermine arguments for a positive and active role for the government in the production of public and social goods.[130]

III. COUNTERARGUMENTS

Given the powerful allure of the constitutional myths I have described here, I expect considerable resistance to my argument. Here I anticipate a few responses and offer a rebuttal.

Counterargument: The U.S. system was designed to make it difficult to enact policy change because of the dangers of government repression.

Response: Perhaps. But the purpose here is not to debate the merits of an eighteenth-century document as it befits a twenty-first century world but rather simply to shed light on the contemporary consequences of this deeply fragmented system, whatever its origins or original purposes. In point of fact, the evidence suggests the men who came to Philadelphia in the summer of 1787 sought to *strengthen* the capacity of the central government to solve national problems, not hamstring it.[131] There is little evidence that the Framers of the Constitution intended to create a system so fragmented that

126. *See, e.g.*, Ginsburg, *supra* note 25, at 1–2.

127. *See* SCHEINGOLD, *supra* note 75, at 130.

128. *Id.*

129. *See* MILLER, MYTH OF MOB RULE, *supra* note 12, at 208.

130. *See* HACKER & PIERSON, *supra* note 14, at 295–96.

131. *See* MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 147–48 (2016); *see also* RICHARD BEEMAN, PLAIN HONEST MEN: THE MAKING OF THE CONSTITUTION 66 (2009).

it could easily be exploited by narrow factions.[132] On the contrary, James Madison's Virginia Plan was a more centralized plan than the final Constitution, and the decision-making process was clearly one of great path dependence.[133] Once a decision was made about bicameralism, for example, delegates shifted their priorities to other dimensions of government in order to best accommodate their state's interests.[134]

Our understanding of the Constitution as a deliberate and organized effort to make decision-making difficult for the federal government is difficult to square with the evidence.[135] Thus, even if we believe modern Americans should follow the original design of the Framers (and it's not clear why they should), the claim is undermined by the fact that the Framers themselves engaged in extensive bargaining, not ideological purity.[136]

Counterargument: Americans have strong preferences about which level of government should engage in which type of policymaking, and they do not want the national government to make certain kinds of policies.

Response: There is virtually no evidence for this claim and quite a bit to the contrary.[137] The U.S. constitutional structure is simply the political system Americans have. Despite the requisite genuflections to its virtues, as political theorist Jacob Levy argues, Americans are largely jurisdictionally indifferent with respect to which level of government should solve which social problems.[138] Moreover, fragmentation and veto points actually generate voter fatigue and confusion, diluting the capacity of voters to hold politicians accountable.[139]

132. Matthew C. Stephenson, *Does Separation of Powers Promote Stability and Moderation?*, 42 J. LEGAL STUD. 331, 333–34 (2013).

133. *See* BEEMAN, *supra* note 131, at 105.

134. *See* DAVID BRIAN ROBERTSON, THE ORIGINAL COMPROMISE: WHAT THE CONSTITUTION'S FRAMERS WERE REALLY THINKING 163 (2013) [hereinafter ROBERTSON, THE ORIGINAL COMPROMISE]; *see also* GEORGE WILLIAM VAN CLEVE, A SLAVEHOLDERS' UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN EARLY AMERICAN REPUBLIC 143–44 (2010).

135. *See* ROBERTSON, THE ORIGINAL COMPROMISE, *supra* note 134, at 8.

136. *See generally* BEEMAN, *supra* note 131, at 105.

137. *See* FEELEY & RUBIN, *supra* note 57, at 117; Levy, *supra* note 103, at 459.

138. *See* Levy, *supra* note 103, at 460.

139. *See id.* at 469.

Amending the Constitution is exceedingly difficult, but it might become possible if Americans better understood that our constitutional virtues are more mythical than real.[140]

Counterargument: The problem is not the veto of popular policies at the national level but rather the gradual growth of federal power and decline of state power. States, after all, are where the Framers of the Constitution thought social policy was better accomplished, where policy would be closer to the people. This allows for the productive use of states as laboratories of democracy.

Response: Leaving aside the fact that it is not clear how nearly 40 million Californians living in 164,000 square miles are in any way "close" to their state government,[141] Americans don't live in the eighteenth century.[142] States are simply unable to resolve or even ameliorate many of the social problems of the modern world.[143] Environmental protection, gun control, stagnant wages, and health care, for example, are all areas where it has become extremely difficult, if not impossible, for states to deliver the kinds of social policies that political majorities often prefer.[144] Moreover, as gun control and environmental policies illustrate, states can hardly serve as laboratories of democracy in a country with free and open borders among states. Strict gun laws in one state, for example, are virtually unenforceable given how easy it is to simply purchase guns legally in another.[145] The Clean Air Act of 1970 and the Patient Protection and Affordable Care Act of 2010 (Obamacare) also illustrate challenges to resolution of major social problems at the state level.[146]

140. *See* U.S. CONST. art. V.

141. *California Population 2019*, WORLD POPULATION REV., http://worldpopulationreview.com/states/california-population/ [https://perma.cc/8HXF-77TH].

142. *See* Levy, *supra* note 103, at 462 (discussing how the size of politics relates to the effectiveness of individual voter participation).

143. *Cf.* Carol F. Peterkort, Comment, *The Conflict Between State and Federal Constitutionally Guaranteed Rights: A Problem of the Independent Interpretation of State Constitutions*, 32 CASE W. RES. L. REV. 158, 159 (1981).

144. MICHENER, *supra* note 79, at 163.

145. *See, e.g.*, Caminker, *supra* note 9, at 199–200.

146. *See* Clean Air Act, 42 U.S.C. § 7401 (2018); Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 (2018).

Perhaps more importantly, these issues illustrate the problem of national accountability in such a fragmented system.[147] While Congress can largely be a "do-nothing" legislative body, contemporary political and social problems do not simply disappear as a result.[148] Rather, they pop up on state and local legislative agendas as people seek some form of redress and accountability for their daily needs.[149] The fact that some states have moved forward with more extensive environmental regulation than the federal government under President Trump, for example, illustrates this point.[150] That these issues reappear at the state level is not then a cause of environmental legislative success but rather a powerful example of the *failure* of our constitutional system.[151] Separation of powers and federalism permit federal lawmakers to largely ignore the preferences of political majorities because the overlapping and simultaneous jurisdictions of state and local governments simply force accountability downward to levels of government with far less economic and political capacity.[152]

Counterargument: Without what you derisively call veto points, much social progress in the *twentieth* century, such as eliminating legalized racial inequality, would not have occurred or at least not until much later and with much more struggle.

Response: This is a difficult counterfactual to puzzle through, but there are good reasons to make this argument the other way around. That is, much social progress, including racial progress, may have occurred sooner if it were not for veto points, which made it possible for a semiauthoritarian, white supremacist, subnational regime to persist in the southern United States for over a century after the Civil War.[153] What if at least some of the entrenched racial discrimination were itself a function of veto points? Consider the states of the former Confederacy, which have been resisting

147. *See* Peterkort, *supra* note 143, at 159.

148. *See* MICHENER, *supra* note 79, at 163.

149. *See id.* at 167–68.

150. *See, e.g.*, Steven Conen, *The States Resist Trump's Environmental Agenda*, ST. PLANET (May 7, 2018), blogs.ei.columbia.edu/2018/05/07/states-resist-trumps-environmental-agenda/ [https://perma.cc/PUU3-EFBA].

151. *See* MICHENER, *supra* note 79, at 167–68.

152. *See* MILLER, PERILS OF FEDERALISM, *supra* note 12, at 167.

153. *See* Francisco E. González & Desmond King, *The State and Democratization: The United States in Comparative Perspective*, 34 BRIT. J. POL. SCI. 193, 200 (2004) (discussing the importance of federalism in constraining racial progress); *see also* RIKER, *supra* note 5, at 151–55.

full equality for African Americans since the Battle of Appomattox; the system of apartheid established in these states is a direct function of U.S. federalism.[154] Moreover, veto points and veto players have allowed social policies to be highly unevenly distributed (e.g., the GI Bill) in ways that have distinctly disadvantaged African Americans.[155]

IV. CONCLUSION: LETTING GO OF MYTHS AND EMBRACING POWER

Amending structural features of the Constitution is extremely hard—perhaps well-nigh impossible.[156] But understanding how they work to organize and shape power and why the preferences of a majority of Americans so routinely go unaddressed can facilitate more effective efforts to overcome this extreme fragmentation.[157] Amendments may also become more likely if Americans better understood that our constitutional virtues are more mythical than real.

Moreover, we cannot amend the Constitution without a clear sense of the purpose of amending. Any change to the Constitution should promote more effective governance in the public interest, which means greater responsiveness to political majorities and a collective sense of politics as a legitimate venue for promoting the public good.

I conclude with a few proposals for reconstituting public discourse about the Constitution with ideas and language that more accurately reflect how it shapes political power:

Checks and balances are not the neutralization of power but the exercise of it. They are better understood as veto points, and veto points allow the powerful to block political majorities at crucial and often fragile moments when they are in agreement on social progress. In rethinking the Constitution, we should demand that lawmakers and advocates defend their use of vetoes or checks, not just assert the right to do so as though it has some a priori meaning.

154. *See* GUINIER, *supra* note 108, at 72–80; ROBERT MICKEY, PATHS OUT OF DIXIE: THE DEMOCRATIZATION OF AUTHORITARIAN ENCLAVES IN AMERICA'S DEEP SOUTH, 1994–1972, at 33–63 (2015).

155. *See* KATZNELSON, *supra* note 59, at 113–15.

156. *See* U.S. CONST. art. V.

157. *See, e.g.*, MICHENER, *supra* note 79, at 160–61.

States' rights are for losers.[158] The term is typically used by those on the losing end of national power, and it should be abolished from our national constitutional lexicon. Its origins and most common uses have been for the promotion of white supremacy, and on no less than three occasions in U.S. history, national political preferences have prevailed over those taking up the states' rights mantle (the Civil War, segregation, and the Civil Rights and Voting Rights Acts).[159] In addition, the term *states' rights* has no objective referent; it is a political commodity with no democratic value.[160] It also perpetuates a highly uneven distribution of basic social policy provisions across the United States.[161]

Tyranny of the majority, if such a thing exists, not only does not describe our political system; it reifies anti-statist ideas that interfere with collective action and popular sovereignty. Given the myriad ways in which the public will can be thwarted under our constitutional system, tyranny of the minority comes much closer to a descriptor of how our political system really functions.

The Electoral College is indefensibly undemocratic and should be abolished.[162]

Equal representation in the Senate is better understood as grossly undemocratic because it gives states with less than 1 percent of the U.S. population the same number of Senate seats as states with 12 percent.[163] The claim that low-population states need 2, 3, 4, let alone 50 times the representation of more populous states demands justification.[164] At a minimum, Washington D.C. (which has more people than 2 states) and Puerto Rico (with more people than 21 states) should each have two senators.

158. My inspiration for this is Mark A. Graber, whom I first heard use this term to describe the use of federal courts by those who lose in national politics. *Blogging from the AALS in New York: Who Is Federalism For?*, LEGAL THEORY BLOG (Jan. 5, 2008, 10:56 AM), https://lsolum.typepad.com/legaltheory/2008/01/blogging-from-1.html [https://perma.cc/E6UT-K7ZM].

159. *See* KATZNELSON, *supra* note 59, at 5–11.

160. *See* BARBER, *supra* note 103, at 24–29.

161. *See id.*

162. *See* DAHL, *supra* note 15, at 79–82.

163. *See* LEVINSON, *supra* note 2, at 50–52.

164. *See id.* at 50–51.

This Article is not aimed at any particular policy goal, though, as noted earlier. Constitutional myths probably disadvantage progressive interests more than conservative ones for the simple reason that veto points are inherently biased in favor of the status quo.[165] But this fact should not detract from the primary claim here, which is that terms such as *checks and balances*, *states' rights*, *government overreach*, and *tyranny of the majority* disadvantage ordinary Americans—regardless of partisanship—because they are devoid of meaning, absent the interests of those who make them. If we want to change our Constitution, let's first examine these myths and decide whether we want the government to be arbitrarily hamstrung in the ways that these myths facilitate or whether we want a genuine government for the people.

165. *See* Tsebelis, *supra* note 28, at 294; Wildavsky, *supra* 35, at 66–68; *see also* ALFRED C. STEPAN, ARGUING COMPARATIVE POLITICS 315–19 (2001).