

# Opinion | The Constitution Is Broken and Should Not Be Reclaimed - The New York Times

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## The Constitution Is Broken and Should Not Be Reclaimed

Aug. 19, 2022

Red Highlights are things that stuck out  
Yellow Highlights are my thoughts

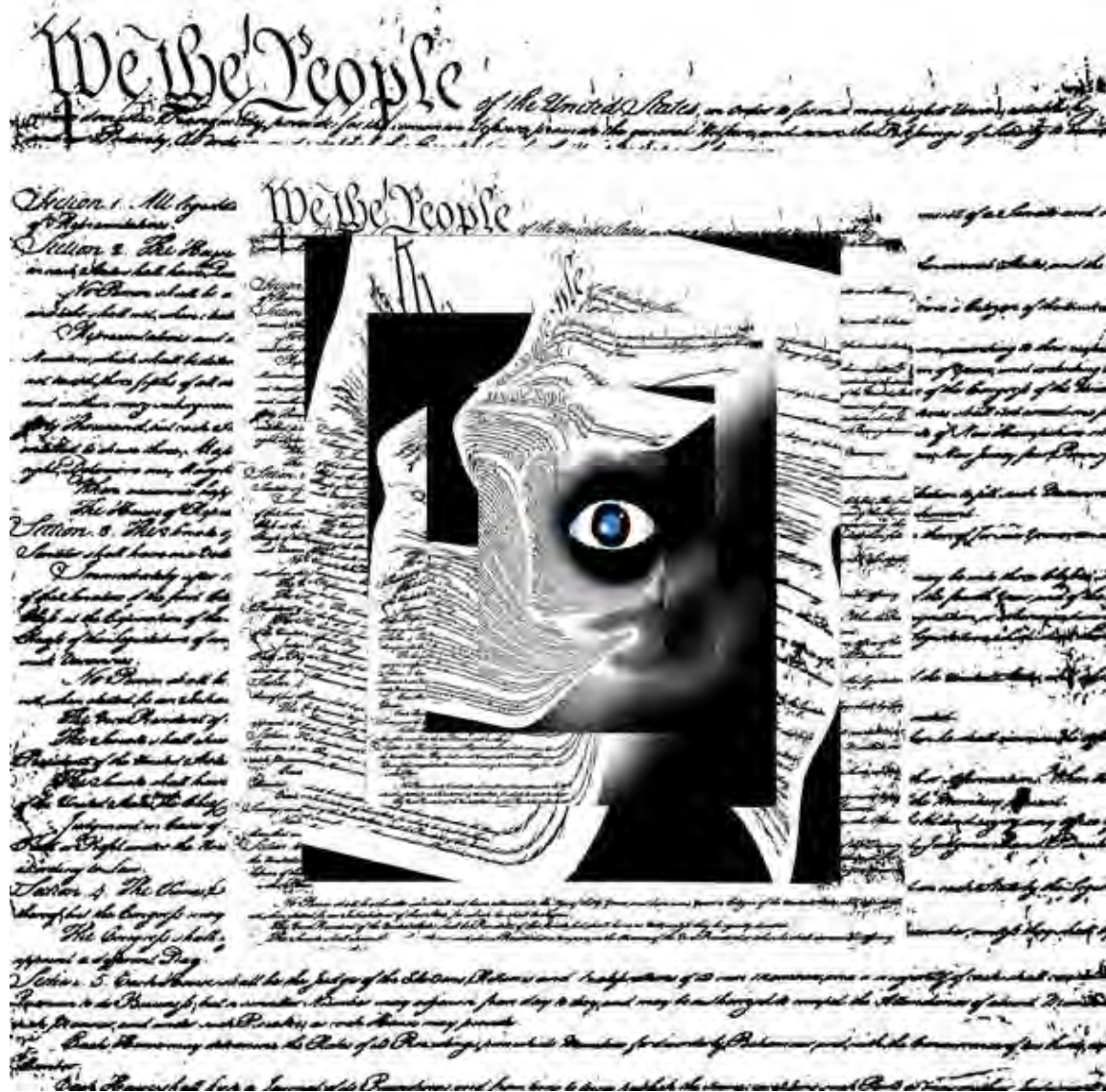


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By Ryan D. Doerfler and Samuel Moyn

Dr. Doerfler and Dr. Moyn teach law at Harvard and Yale.

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

Ryan Doerfler's research focuses on the role of the judiciary within a democratic system. His recent work includes a critical reassessment of the embrace of judicial review within the liberal legal tradition and an analysis of the relationship between theories of statutory and constitutional interpretation and a fundamental commitment to **democratic self-rule**. Ryan's academic work has been published in numerous leading law journals. His popular writing has appeared in the *Atlantic*, *Jacobin*, the *Nation*, the *New Republic*, the *New York Times*, and the *Washington Post*.

Ryan graduated from Wake Forest University with a BA in philosophy. He then received a PhD in philosophy from Harvard University and a JD from Harvard Law School. Prior to joining the Harvard faculty, Ryan was a Professor of Law at the University of Chicago. Before that, he was an Assistant Professor of Law at the University of Pennsylvania. **AKA Socialist**

Samuel Moyn is a Professor of Law at Yale Law School and a Professor of History at Yale University. His areas of interest in legal scholarship include international law, human rights, the law of war, and legal thought, in both historical and current perspective. In intellectual history, he has worked on a diverse range of subjects, especially 20th-century European moral and political theory. He was previously Jeremiah Smith, Jr. Professor of Law and Professor of History at Harvard. He began his teaching career at Columbia University, where he taught for 13 years in the history department, ending as Bryce Professor of European Legal History. **AKA Obama Fanboy**

Moyn has written several books in his fields of European intellectual history and human rights history, including *The Last Utopia: Human Rights in History* (Harvard University Press, 2010). More recently, he gave Mellon Distinguished Lectures at the University of Pennsylvania in 2014 that appeared as *Christian Human Rights* (University of Pennsylvania Press, 2015). He is a co-editor of the journal *Humanity*, and is currently finishing a book for Harvard University Press on the relationship between human rights and distributive justice in modern times.

Moyn received a doctorate in modern European history from the University of California-Berkeley in 2000 and a law degree from Harvard University in 2001.

The idea of constitutionalism is that there needs to be some higher law that is more difficult to change than the rest of the legal order. Having a constitution is about setting more sacrosanct (**most sacred or holy or treated as if holy : immune from criticism or violation**) rules than the ones the legislature can pass day to day. Our

Constitution's guarantee of two senators to each state is an example. And ever since the American founders were forced to add a Bill of Rights to get their handiwork passed, national constitutions have been associated with some set of basic freedoms and values that transient majorities might otherwise trample. So they believe humans are more suited to rule over other humans. Slavery anyone?

But constitutions — especially the broken one we have now — inevitably orient us to the past and misdirect the present into a dispute over what people agreed on once upon a time, not on what the present and future demand for and from those who live now. This aids the right, which insists on sticking with what it claims to be the original meaning of the past. If you don't like it AMEND IT! The Constitution provides that an amendment may be proposed either by the Congress with a two-thirds majority vote in both the House of Representatives and the Senate or by a constitutional convention called for by two-thirds of the State legislatures. None of the 27 amendments to the Constitution have been proposed by constitutional convention. Arming for war over the Constitution concedes in advance that the left must translate its politics into something consistent with the past. But liberals have been attempting to reclaim the Constitution for 50 years — with agonizingly little to show for it. It's time for them to radically alter the basic rules of the game.

In making calls to regain ownership of our founding charter, progressives have disagreed about strategy and tactics more than about this crucial goal. Proposals to increase the number of justices, strip the Supreme Court's jurisdiction to invalidate federal law or otherwise soften the blow of judicial review frequently come together with the assurance that the problem is not the Constitution; only the Supreme Court's hijacking of it is. And even when progressives concede that the Constitution is at the root of our situation, typically the call is for some new constitutionalism.

Since the Supreme Court began to drift right in the 1970s, liberals have proposed better ways of reading the Constitution.

The drifting "right" they are speaking of was necessary to ratify the Civil Right Act of 1964 which struggled to be enforced. The tipping point to gain national support was the assassination of Martin Luther King, Jr. in 1968. Without the "drifting right" or proper interpretation of the constitution would we have progressed as far as we have? The conservative Federalist Society engaged in a successful attempt to remake constitutional law by brainstorming ideas, creating networks of potential judges and

eventually helping to guide the selection of President Donald Trump's nominees. It was revealing that liberals responded by founding (in 2001) an organization called the American Constitution Society, which produced the book "[Keeping Faith With the Constitution](#)." And when liberal law professors got together in the mid-2000s to dream of a different America, that yielded the book "[The Constitution in 2020](#)." But since then — with the death of Ruth Bader Ginsburg, the consolidation of right-wing control of constitutional law and the overturning of Roe and other disasters this term — the damage has only worsened.

One reason for these woeful outcomes is that our current Constitution is inadequate, which is why it serves reactionaries so well. Starting with a text that is famously undemocratic, progressives are forced to navigate hard-wired features, like the Electoral College and the Senate, designed as impediments to [redistributive change](#) while drawing on much vaguer and more malleable resources like commitments to due process and equal protection — resources that a conservative Supreme Court has used over the years to invalidate things like abortion rights and [child labor laws](#) and might use in the coming term to prohibit [affirmative action](#). Where did the term redistributive change come from and what is it rooted in? "I would now be able to sit at the lunch counter and order as long as I could pay for it I'd be okay. But, the Supreme Court never ventured into the issues of [redistribution of wealth](#), and of more basic issues such as [political and economic justice](#) in the society." - Obama

Sometimes reclaiming the Constitution is presented as a much-needed step toward empowering the people and their elected representatives. In a new book, the law professors Joseph Fishkin and William Forbath [urge](#) progressives to stop treating constitutional law as an "autonomous" domain, "separate from politics." In contrast with [earlier efforts](#) among liberals, which, as Jedediah Purdy put it in a 2018 Times guest essay, [put forward](#) a "vivid picture of what judges should do with the power of the courts," [such exercises in progressive constitutionalism call on Congress and other nonjudicial actors to claim some amount of authority to interpret the Constitution for themselves](#). What is Progressive Constitutionalism? Book by Robin L. West After much intellectual speak the book's summary was wrapped up with this statement - *Progressive Constitutionalism* urges a substantive, institutional, and jurisprudential reorientation of our understanding of the Fourteenth Amendment, one that would necessarily be pursued through Congressional rather than judicial channels. In doing so, with attention to history and both feminist and critical race

scholarship, it should reinvigorate our politics and our constitutional conversations—and, perhaps, point us toward a more just society.

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

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

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

By leaving democracy hostage to constraints that are harder to change than the rest of the legal order, constitutionalism of any sort demands extraordinary consensus for meaningful progress. Federal Constitution is an alignment to ensure the State Constitutions don't impede on the residences rights. So the real mechanism for change relies on State Constitutions. State constitutions are more open to amendments. Amendments can be proposed by legislature, a constitutional commission or citizens' petition and can be accepted by referendum. For example. the constitution of Massachusetts has been amended one hundred and twenty times. The constitution of Georgia has even been replaced altogether as many as ten times. It conditions democracy in which majority rule always must matter most on surviving vetoes from powerful minorities that invoke the constitutional past to obstruct a new future.

After failing to get the Constitution interpreted in an egalitarian way for so long, the way to seek real freedom will be to use procedures consistent with popular rule. It will

not be easy, but a new way of fighting within American democracy must start with a more open politics of altering our fundamental law, perhaps in the first place by making the Constitution more amendable than it is now. So now it's a popularity contest with fallen humans that default to fleshly desires.

In a second stage, though, Americans could learn simply to do politics through ordinary statute rather than staging constant wars over who controls the heavy weaponry of constitutional law from the past. If legislatures just passed rules and protected values majorities believe in, the distinction between "higher law" and everyday politics effectively disappears. Hmmm well isn't that the premise of the whole constitution since it's foundation came from the Bible? Oh so you just don't like moral values?

One way to get to this more democratic world is to pack the Union with new states. Doing so would allow Americans to then use the formal amendment process to alter the basic rules of the politics and break the false deadlock that the Constitution imposes through the Electoral College and Senate on the country, in which substantial majorities are foiled on issue after issue. Yeah that pesky Electoral College that makes sure you don't pack states with illegal immigrants to ensure you candidates that will do you bidding gets elected.

More aggressively, Congress could simply pass a Congress Act, reorganizing our legislature in ways that are more fairly representative of where people actually live and vote, and perhaps even reducing the Senate to a mere "council of revision" (a term Jamelle Bouie used to describe the Canadian Senate), without the power to obstruct laws. Sure let's take the advise of a government that is stripping citizens of their rights for the sake of power.

In so doing, Congress would be pretty openly defying the Constitution to get to a more democratic order — and for that reason would need to insulate the law from judicial review. Fundamental values like racial equality or environmental justice would be protected not by law that stands apart from politics but — as they typically are — by ordinary expressions of popular will. And the basic structure of government, like whether to elect the president by majority vote or to limit judges to fixed terms, would be decided by the present electorate, as opposed to one from some foggy past. We are a REPUBLIC (pledge of allegiance anyone?) What is a Republic? It is a government in which supreme power resides in a body of citizens entitled to vote and is exercised by elected officers and representatives responsible to them and governing according

to law. We facilitate this process through a Democratic process. WE ARE NOT A DEMOCRACY!

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

Ryan D. Doerfler of Harvard and Samuel Moyn of Yale are law professors.

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