Law & Social Inquiry (2026), 1–26
doi:10.1017/lsi.2026.10175

Law& Social Inquiry

REVIEW ESSAY

Partisan Teamsmanship and American Constitutionalism

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LAURA KALMAN. *FDR's Gambit: The Court-Packing Fight and the Rise of Legal Liberalism*. New York: Oxford University Press, 2022.
MARK A. GRABER. *Punish Treason and Reward Loyalty: The Forgotten Goals of Constitutional Reform after the Civil War*. Lawrence: University of Kansas Press, 2023.
doi:10.1017/lsi.2026.10175

(Received 20 September 2026 UTC; revised 20 September 2026 UTC; accepted 20 September 2026 UTC)

Abstract

It is often suggested that, in a constitutional democracy like that of the United States, doing law is distinct from doing politics, and so judges ought to put aside their partisan interests when rendering decisions. This review essay contests this view on two fronts. Bringing together Mark Graber's *Punish Treason and Reward Loyalty: The Forgotten Goals of Constitutional Reform after the Civil War* and Laura Kalman's *FDR's Gambit: The Court-Packing Fight and the Rise of Legal Liberalism*, I observe that during both Reconstruction and the New Deal, it was generally accepted by political elites inside and outside the judiciary that the dominant party ought to make constitutional decisions with their partisan consequences well in view. Working from this history, the essay then considers how this kind of partisan teamsmanship might apply to contemporary constitutional politics in the United States. It concludes that so long as parties remain institutional vehicles for vindicating core beliefs and principles held by the public, partisan teamsmanship by judges may be less dangerous to our constitutional system than contemporary critics of the US Supreme Court presume.

> I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country.
> — Representative David Lewis (R-NC), as quoted in *Rucho v. Common Cause*, 588 U.S. 684, 691 (2019)

Partisan polarization, and the rancor it generates, has come to define American politics (Pierson and Schickler 2024). Acrimony between majority and minority party

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members of Congress is now the norm, with bipartisan lawmaking—once routine—increasingly rare. Presidents are staking out vastly different policy positions than predecessors of the opposing party and rolling back their opponents' policy accomplishments wherever possible. And in the Supreme Court of the United States, decisions increasingly break along partisan lines, as justices appointed by Republican presidents band together against Democratic appointees and vice versa (Devins and Baum 2019; Epstein 2024). This last development has generated considerable public criticism. A majority of Americans say that members of the judiciary ought to remain above partisan politics (Vigers and Saad 2024; Jones 2025), and surveys report that across both parties more than four in five respondents agree that Supreme Court justices "should *not* bring their political views into decision-making" (Copeland 2025).

The US Supreme Court does not appear to be listening. Under Chief Justice John Roberts's stewardship, the court's Republican-appointed supermajority has consistently delivered high-profile victories to Republican interests across a range of policy areas, including election law,[1] administrative law,[2] and major social issues like abortion, affirmative action, and the rights of transgender individuals.[3] The ties of the Roberts court to the Republican Party are further evident in the justices' prior professional experience. Every member of the court's conservative majority has been active in the Federalist Society, the organization that has long anchored the conservative legal movement (Teles 2010). With the exception of Justice Amy Coney Barrett, the Republican appointees who voted to hold, in *Dobbs v. Jackson Women's Health Organization*, that the

[1] In *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), the Supreme Court held congressional limits on corporate campaign contributions unconstitutional—a ruling most observers believed would advantage Republican candidates because of their party's close ties to business groups. In *Shelby County v. Holder*, 570 U.S. 529 (2013), it invalidated Congress's requirements for "pre-clearing" electoral maps under section 5 of the Voting Rights Act, August 7, 1965, 79 Stat. 437, making it easier for Republican-dominated state legislatures to draw districts that disadvantage minority voters who typically vote for Democrats. In *Rucho v. Common Cause*, 588 U.S. 684 (2019), it concluded that political gerrymandering raised a nonjusticiable political question, sanctioning efforts by red-state legislatures to "crack" and "pack" districts to benefit their party in Congress. And in *Louisiana v. Callais*, 608 U.S. ___ (2026), it ruled that section 2 of the Voting Rights Act does not sanction so-called majority-minority districts, further liberating state lawmakers in Republican-majority states to redraw electoral maps to advantage co-partisans in Congress.

[2] In *Trump v. Slaughter*, 609 U.S. ___ (2026), building on *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 207 (2020), and *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), the Supreme Court endorsed the unitary executive theory, a constitutional doctrine that lawyers in the administration of President Ronald Reagan developed to give the president significant latitude to rein in the activities of independent federal regulators. And in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), it held that the Administrative Procedure Act, June 11, 1946, 60 Stat. 237, requires judges to independently interpret federal statutes without deference to federal agencies—a long-sought win for pro-business, anti-regulation Republicans.

[3] In *Dobbs v. Jackson Whole Women's Health Organization*, 597 U.S. 215 (2022), the Supreme Court held that the Due Process Clause of the Fourteenth Amendment does not confer a right to elective abortion—a ruling cheered by Republicans and decried by Democrats. In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023), it held that the Fourteenth Amendment's Equal Protection Clause prohibits university admission practices that give preference to members of certain racial minority groups—a position long held by conservative Republicans. And in *United States v. Skrmetti*, 605 U.S. 495 (2025), it held that the Equal Protection Clause does not sanction special consideration for transgender individuals—a position consistent with Republicans' growing hostility toward the cause of transgender rights.

Fourteenth Amendment does not confer an individual right to an elective abortion previously held executive branch positions under Republican presidents.[4] Three of these justices—Justice Barrett, along with Justice Brett Kavanaugh and the chief justice—helped to litigate *Bush v. Gore* (Biskupic 2020; Reinhard and Hamburger 2025).[5] And two of them—Justices Samuel Alito and Clarence Thomas—have maintained close personal relationships with prominent Republican donors and activists while on the bench (Kaplan, Elliott, and Mierjeski 2023; Kantor 2024).[6]

Like the public, many legal scholars worry about blurring the line between law and party politics. True, they recognize that judges' decision making is sometimes shaped by their ideologies—the beliefs and preferences they hold about the proper direction of public policy and the role of law in setting that course (Segal and Spaeth 2002). And they appreciate that the beliefs and preferences of even the most well-intentioned, independent-minded jurist will sometimes have a connection to that jurist's partisan affiliation. Republican appointees, for instance, are more likely to say that history and tradition should guide the identification of fundamental rights or question the continued utility of scrutiny as a constitutional concept. But legal scholars as a group tend to believe that judges should not issue decisions advancing the interests of their political party if their aim is to advance the interests of that party (Shaw 2024).[7]

For this reason, legal scholars have been quite critical of the Roberts court. Michael Klarman (2020, 224), for example, argues that under Chief Justice Roberts's leadership, the court's conservative majority has long "defended the interests of the Republican Party" at the expense of American democracy. So, too, Leah Litman (2025, 2) contends that the court's twenty-first-century record reflects Republican-appointed justices abandoning baseline norms of partisan impartiality. The court's conservatives, she suggests, are "fashioning the law based on [the] sentiments, political views, and general zeitgeist of a party that has become ensconced in conservative grievance and hell-bent on minority rule." Still others observe that the Roberts court has become the judicial vanguard of a conservative counterrevolution in American politics—in effect, the anti-Warren court (Re 2025).[8]

[4] *Dobbs*, 597 U.S.

[5] *Bush v. Gore*, 531 U.S. 98 (2000).

[6] To be sure, the Court's solicitude for the Republican Party should not be solely credited to justices' own behavior. Conservative members of Congress and their Federalist Society allies have worked tirelessly to staff the bench with justices who, at the time of their appointment, shared their partisan identity and were committed to advocating for their party's interests as justices of the court. Kentucky senator and longtime party leader Mitch McConnell, for instance, avowed that among his primary legislative goals was to craft a judiciary composed of agents faithful to the Republican Party. As he put it in an interview for CBS's *60 Minutes*, "I felt that the way to get lasting impact is to put the right kind of men and women on the courts who hopefully will be there for a while" (quoted in Farmer 2025).

[7] Drawing on Phillip Bobbitt's (1982) idea of constitutional "modalities" of argument (for example, text, structure, history), David Pozen and Adam Samaha (2021, 731) suggest that explicitly partisan reasoning is an "anti-modality"—a form of argument forbidden by our legal culture. As they write, it is generally considered out of bounds to make "partisan arguments that prefer a social or political group not said to be singled out for special treatment by the canonical document."

[8] Critiques that the US Supreme Court leans too hard to the right and favors the interests of Republicans over Democrats predate the Roberts court. As Jack Balkin and Sanford Levinson (2001, 1061–62) alleged in a *Virginia Law Review* article, the court under Chief Justice William Rehnquist was

Underlying these critiques is a shared commitment to the idea that doing law is distinct from doing politics and that it therefore requires putting aside one's partisan interests. And if this is so, the judiciary's pursuit of partisan interests is rightly seen as dangerous to American constitutionalism. In this review essay, I push back against this view. Historically speaking, this kind of partisan behavior is not new. And, as a normative matter, the reality that members of the court's majority will sometimes seek to advance a rooting interest in their partisan team, and that other actors in the political system will sometimes expect them to do so, may actually benefit our constitutional order. To explore these ideas and their implications, I revisit two recent books that have done much to enhance our understanding of American constitutional history: Mark Graber's (2023) *Punish Treason and Reward Loyalty: The Forgotten Goals of Constitutional Reform after the Civil War* and Laura Kalman's (2022) *FDR's Gambit: The Court-Packing Fight and the Rise of Legal Liberalism*. Together, these books compel readers to grapple with the fact that Reconstruction and the New Deal, the two most transformative moments in American constitutional history since the country's founding, involved deliberate efforts across political institutions to reform the Constitution to benefit the dominant party, what I—following political scientist Frances Lee (2009)—will call partisan "teamsmanship."

Graber argues that, beginning with Reconstruction, a core aim of the post-Civil War constitutional project was to empower the Republican Party—the party of Abraham Lincoln and emancipation—at the expense of the Democratic Party, many of whose leaders had prodded the South into war. Central to his case are sections 2 and 3 of the Fourteenth Amendment, which authorized Congress to disqualify individuals deemed disloyal to the Union from holding elected office and to deny the Democrat-dominated former Confederate states representation in the House and Senate if they did not enfranchise their Black populations. In Graber's account, the "lawyer's" Fourteenth Amendment—section 1, with its cryptic incantations about privileges and immunities, due process, and equal protection—was not the main event. The real action was in the reconfiguration of national political structures so that the Republican Party could continue to protect the Union and what its soldiers had fought for: an end to race-based enslavement and the refounding of the United States as a multiracial democracy.

Moving forward to the New Deal, Kalman makes an equally compelling case that partisan teamsmanship played a critical role in twentieth-century constitutional politics. Franklin Delano Roosevelt and his Democratic allies, she argues, believed that court packing was essential to securing the promises of the New Deal and, with it, the party's legacy. In Kalman's (2022, 303) account, the scheme was "no reckless error" but, instead, a calculated move designed to prompt the court to abandon its oppositional stance to fundamental social-democratic reforms. And while it is impossible to know for certain whether Roosevelt's unconventional pressure campaign influenced the court's behavior, Kalman persuasively contends that it did.

For our purposes, these two works describe a similar political dynamic. During Reconstruction and again during the New Deal, entrepreneurial political actors understood that determining *what* the Constitution meant and *how* it would function

similarly "entrenching particular political principles" and even going so far as to "install[] particular persons in power."

in subsequent generations was too important to be left to their partisan rivals to help decide. Accordingly, members of each era's dominant party sought to make constitutional decisions with their partisan consequences well in view. Neither Graber nor Kalman dwell on how members of the judiciary understood their role in that endeavor. But, as this review essay suggests, it is not difficult to make the leap as a descriptive matter. Over the course of American history, judges have rarely been sealed off from the rough-and-tumble of politics (Shelden 2026). Rather, before—and even during—their time on the bench, they have tended to be integral participants in elite political life, sometimes serving as elected officials in their own right and, at other times, closely advising high-ranking politicians in the executive and legislative branches. And given that political elites, both inside and outside the judiciary, were not strongly committed to the modern view that judicial independence requires partisan neutrality, it seems quite likely that members of the Supreme Court were sometimes willing (if not eager) to help remake the Constitution to advantage their own party when they believed it appropriate.

Following this insight, the essay considers the implications of this history and the conditions under which it might apply to contemporary constitutional politics. "Partisanship at its highest and most noble," political theorist Russell Muirhead (2014, 213) argues, is a "connection between the details of policy and the moral character of the country." This seems like an apt description of the role that law and courts play in our democracy as well. Judicial reasoning links facts and principles. (That is what legal education is about—applying law to facts.) Those principles may legitimately come, and often do, from parties. But, more importantly, parties are the institutional vehicles through which constitutional principles are democratically vindicated; they are, as the great American political scientist E.E. Schattschneider ([1942] 2003, 3) put it, "the political entrepreneurs that have mobilized and organized the dynamic forces of American public life." If all of this remains true in our own time, I suggest, we should not reflexively reject the idea that it can be appropriate for judges to act on the belief that faithfully implementing their constitutional vision requires solicitude for the vehicle through which that vision will be implemented.

Before proceeding, I want to emphasize that my focus here is not on the world of workaday judicial decision making and the appropriate place of teamsmanship in that context. It is instead more narrowly centered on disputes about what the Constitution means (and who gets a say in making that determination). The case for constitutional law *qua law* is that it is supposed to prevent one party (or faction or social group) from seizing the reins of government to revise the Constitution to its own benefit. But if our constitutional tradition involves the opposite, particularly during those times in our history where the political stakes were highest, it is important to revisit what we think we know about the relationship between partisan teamsmanship and constitutionalism. The remainder of this essay unfolds in three parts. I first explore why scholars across political science, history, and law have tended to believe that partisan teamsmanship is inimical to constitutionalism. Next, drawing on Graber's and Kalman's historical accounts, I highlight the central role partisan teamsmanship played during Reconstruction and the New Deal. Finally, abstracting from these works, I suggest some reasons why partisan teamsmanship might not undermine constitutionalism and, indeed, why it might, at least sometimes, be a salutary feature of our constitutional system.

Situating partisanship in American constitutional thought

Over the past half-century, social scientists have distinguished between two expressions of partisanship. Ideology—the beliefs and preferences that officials or voters hold about the proper direction of public policy and the role of law in setting that course—is one (Lee 2009, 47). For legal scholars in the mold of Jeffrey Segal and Harold Spaeth (2002), ideology so defined drives judicial behavior.[9] As they see it, "the ideological attitudes and values of the justices" dictate how judges decide cases. The accepted modalities of doing law—determining the plain meaning of a text, for instance, or applying precedent—serve only "to cloak the reality" that judges are imposing their own, individually held policy preferences on the rest of us. Reflecting on the US Supreme Court's jurisprudence, Segal and Spaeth offer a straightforward, albeit not unchallenged,[10] conclusion: "[Chief Justice William] Rehnquist votes the way he does because he is extremely conservative; [Justice Thurgood] Marshall voted the way he did because he was extremely liberal" (86).

At least in theory, ideology need not be connected with a particular party. But scholars have generally found that a person's party affiliation is an important—if not the most important—input into their ideology. This relationship has become increasingly strong as the two major parties have sorted into distinct ideological camps, with self-identified conservatives sorting into the Republican Party and self-identified liberals counting themselves as Democrats. The upshot for understanding judicial behavior is that today's Republican justices are likely to be conservative and make conservative decisions, while Democratic justices are likely to be liberal and make liberal decisions (Hasen 2019).

Teamsmanship is another expression of partisanship, although it tends to appear in studies of legislative politics rather than studies of law and courts. As Lee (2009) explains, most political actors are not motivated exclusively by a desire to implement their policy preferences—that is, their ideological commitments. They also want to acquire and exercise power, and they understand political parties to be useful and appropriate vehicles to do so. In Congress, this means that legislators' decision making reflects both their "preexisting ideological preferences" and their "explicitly political calculations" about what will benefit their party (168).[11]

[9] For a short, accessible discussion of the long history of work that treats ideology as an independent variable in explaining judicial decision making, see Geyh 2012, 201–5.

[10] For a thoughtful discussion of when and how the attitudinal model falls short, see Devins and Baum 2019, 15–58. In the context of this review essay, one challenge with the overlap between party and ideology is that parties often bring together individuals and groups with competing ideologies. In the Trump era, for instance, the Republican Party has comprised traditional conservatives who believe that government involvement in the economy should be minimal and those, in the mold of President Donald Trump, who believe that certain forms of state intervention in the economy—purchasing stakes in key technology companies, for instance—are appropriate (Elinson 2026). It is also possible to suggest that a party may comprise multiple distinct teams. The Trump era, for instance, has witnessed divisions between a "Trump" or "MAGA" (make America great again) team and an "anti-Trump" or "establishment" team.

[11] In some cases, as Frances Lee (2009) notes, decisions based on ideology will be different from those based on teamsmanship. Imagine that Congress is preparing to vote on a bill subsidizing state childcare programs. When a lawmaker casts a vote in favor of the measure, the lawmaker is taking into consideration substantive ideas about how childcare programs should be funded and acting on those beliefs. If it happens that others in the party share those same (or similar) ideas—a fairly plausible

As is true of ideology, teamsmanship can motivate judicial behavior and shape legal outcomes. Like the legislature, the US Supreme Court is a majoritarian institution, as are the federal courts of appeals. As such, an individual justice's (or judge's) power is at its apex when that justice is a member of the court's majority, even if the justice is not always in agreement with fellow members of the majority. If ideology is not a perfect guarantee that a justice will be on the winning side—because not everyone agrees on everything all the time—how can justices best maximize their chances of being in the majority? The answer is to cast their vote with their fellow partisans, regardless of their level of agreement on an issue, and prioritize instead what they all can agree is best for their party. Using teamsmanship, rather than ideology, as a decision rule can make coalition building efficient and help to resolve internal differences—"when in doubt, vote the party line."

The effects are likely to magnify. A string of electoral victories by a justice's preferred party may embolden affiliated litigants—public interest law firms, for instance, on either the left or the right—to bring cases that further advance the party's agenda and thereby help to increase the justice's reach. And wins by fellow partisans elsewhere in the system may cause the justice's power to grow in subtler ways, including through public awareness that the justice has allies in other parts of the government and might even be able to influence those other actors' behavior. In these ways, justices may derive advantage from their partisan team's success even when their colleagues do not uniformly share their ideology. Originalist justices wield substantial influence not because all Republicans have embraced originalism but, rather, because, in securing legislative majorities and control of the White House, Republican officeholders are in a position to staff the judiciary with individuals who will serve as coalitional allies of originalists on the bench.

Why does any of this matter to constitutional law or constitutional politics? American constitutional thought has imbibed the Framers' general skepticism of political parties. Yet party-based ideology is still perceived by many as a form of "high

assumption given that today's parties have become better sorted on ideological grounds—the lawmaker and the lawmaker's colleagues will all cast their votes in support of the measure without need of coordination. Now imagine there is a different lawmaker who opposes the childcare measure, notwithstanding that fellow partisans by and large support it. This lawmaker might calculate that breaking from the party and opposing a program the lawmaker's colleagues support might do damage to their shared electoral fortunes, the party's collective reputation, or the lawmaker's own position within it. In this scenario, if the lawmaker votes in favor of the measure—or with the party on the procedural votes necessary to bring it before Congress—the lawmaker will be motivated by an interest in maintaining "the *power* to control the flow of [legislative] business" rather than "the ideological direction of public policy" (11; emphasis in original). In other instances, of course, decisions motivated by teamsmanship will be hard to distinguish from those motivated by ideology. If lawmakers sort into parties based in part on their values and beliefs and they are motivated by a sense of shared fate, they will take actions that satisfy both their preferences about policy and their guesses about what is good for their party. As Lee acknowledges, "[w]hat helps the Republican party win elections and wield power tends also to benefit conservative causes in American politics. What helps the Democratic party tends to advance a liberal agenda" (165). We can see this dynamic at play in the US Supreme Court and in courts more generally too. At least in our present moment, Republican presidents are likely to nominate, and Republican legislators to confirm, conservative-leaning judges; the same applies on the other side of the aisle (Devins and Baum 2019). This means that when a justice or judge decides a question in a way that satisfies that justice's or judge's conservative (or liberal) preference, it is also quite likely to yield an outcome that advantages the party that nominated the justice or judge.

politics" (Balkin and Levinson 2001; Shaw 2024), presumably because it is possible to understand ideologically motivated judicial decisions as reflecting beliefs and values. Even when their partisan commitments are front and center, justices can still be said to be engaging in the task of promoting "larger political principles" (Balkin and Levinson 2001, 1062). And if one justice happens to agree, consistently, with colleagues who share that justice's baseline political affiliation, this phenomenon is simply downstream of likeminded people seeing the world in a similar way (Krehbiel 1998).

Teamsmanship, by contrast, appears on its face to be a more concerning form of "low politics" (Balkin and Levinson 2001). In Katherine Shaw's (2024, 1572) words, there is a "striking consensus around the impermissibility of action taken to benefit or harm a particular political party—that is, overt and explicit partisanship." Indeed, as I have already suggested, critics of the Roberts court often take the position that its landmark decisions are wrongly decided because they reflect, and appear to have been motivated by, teamsmanship. "More and more," writes election law scholar Rick Hasen (2026, n.p.), "this Court shows itself to be little more than a partisan tool." The problem with teamsmanship for many seems to be that it is lawless, and certainly more so than ideology. One might say that, when judges prioritize the welfare of their own party over their partisan opponents, they are no longer keeping law separate from politics or respecting the difference between constitutionalism and majoritarianism. But beyond generating outcomes many in the academy would disagree with, what exactly is it about teamsmanship—distinct from ideology—that makes it so "crass" (Posner 2008, 369)?[12]

Neutral principles

One possible source of discomfort might be that teamsmanship runs counter to the ideal that constitutional outcomes be grounded in the application of "neutral principles." As the mid-twentieth-century Legal Process theorist Herbert Wechsler (1959, 15) famously argued, judging "must be genuinely principled," with the "reasons quite transcending the immediate result that is achieved." It is hard to see how teamsmanship would satisfy this standard. When a judge prioritizes partisan interest, the chances that the resulting decision could be explained by a generalizable rule go down significantly.[13] Licensing teamsmanship, in other words, collapses the distinction between law and politics by legitimizing the possibility that some people

[12] As Terri Peretti (1999, 80) has argued, "political motive in judicial decisionmaking is denigrated more by definition and labeling than by discussion, analysis, or provision of evidentiary support." Given the sometimes-elusive distinction between ideology and teamsmanship, however, Jack Balkin (2020) and Sanford Levinson (2021) have questioned the usefulness of their own, related distinction between high and low politics. As Levinson (2021, 567) writes, "the distinction might have outlived its use-by date, precisely because it is getting ever more difficult to separate the two realms." See also Balkin 2020, 125–26.

[13] Indeed, teamsmanship is at odds with Herbert Wechsler's (1959, 15) insistence that judges should not prioritize the "*ad hoc* in politics." *Bush v. Gore*—a case that many have suggested represents an important contemporary example of judicial teamsmanship—famously limited its application to "present circumstances" rather than announcing a more general rule. See *Bush*, 531 U.S., 109.

will win and others will lose only because "a particular group has been able to assemble the raw political power to obtain what it seeks" (Sunstein 1984, 1695).

Rule of law

A second possible source of discomfort is that teamsmanship is incompatible with the rule-of-law ideal. As an ideal, the rule of law resists the "indeterminacy" that judges, as individuals with "subjective views," bring to the table. When law is the rule, it is the law that governs the citizenry, not the "men or women who happen to be the judges" (Tamanaha 2004, 105). But if judges' partisan identities shape their decision making—with Republicans seeking to rule in a way that advantages Republicans and Democrats in a way that advantages Democrats—their subjective views may become as important as the law. Moreover, because advancing the welfare of one's party might look different at different moments in time or across different issues, teamsmanship would seem likely to introduce unwanted uncertainty into the legal process.[14] The ideal, as Charles Gardner Geyh (2012, 191) notes, remains a group of independent judges who "don their robes" and thereby "set aside their passions, prejudices, and interests and follow the law."

Role morality

Still a third possibility is that the act of judging requires one to set aside one's rooting interests, even (or perhaps especially) when they are strongly felt. As Richard Fallon (2023, 293; emphasis added; internal quotation marks and citation omitted) notes, judges are thought to have "role-based obligations to reach their decisions by *legal* reasoning even in the absence of determinate rules." In this regard, teamsmanship is analogous to nepotism. Just as we would not want judges to decide cases involving friends or family differently than they would a stranger, so too we would not want judges deciding cases involving their partisan team in ways they would not otherwise. The justification is both principled and utilitarian. As the American Bar Association's (2020, n.p.) *Model Code of Judicial Conduct* puts it, "[c]onfidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences" (see also Geyh 2012).

All of these ideas have at their core the shared normative expectation that judges should not engage in teamsmanship and that other actors in the constitutional system, officials and citizens alike, should not want them to. And to the extent that teamsmanship by judges is forbidden, the institutions and practices in which judges are embedded—from the separation of powers on down to the day-to-day work of deciding cases—should work to prevent them from doing so.

Partisan teamsmanship during Reconstruction and the New Deal

These normative objections to teamsmanship are understandable. The trouble is that, as an empirical matter, they do not match how American constitutional history has

[14] It is possible that teamsmanship makes law more predictable because, conditional on knowing who the judges are, we should better know what the outcome will be. But this certainty arises only once a judge has been assigned to a case.

unfolded during its most important—and, indeed, most celebrated—"moments" (Ackerman 1991). Nor is it the case that normative objections to teamsmanship have always been standard in American judicial politics. Quite the opposite. Legal historian Rachel Shelden (2026, 9) has documented that throughout the nineteenth century, independence was understood not as "an absence of political affiliation" but, instead, as "a freedom from obligation or indebtedness (financial or otherwise) that allowed a public servant to devote himself to the public good."

Punish Treason, Reward Loyalty

The history that Graber traverses in *Punish Treason, Reward Loyalty* makes a powerful case that teamsmanship was integral to Reconstruction. The book's thesis is that the primary constitutional reform intended by federal lawmakers in the wake of the Civil War was to prevent "rebel rule" by those Southern Democratic planter elites who had most benefited from, and labored to preserve, the institution of slavery (Graber 2023, xxvii). As Graber notes, the congressional Republicans responsible for drafting and enacting the Fourteenth Amendment were skeptical that the Confederacy's surrender had altered Southern leaders' "commitment to the principles that inspired secession"—most importantly, white supremacy and the corresponding need to legalize and justify chattel slavery (73). Speaking for many of his colleagues, Kentucky representative Samuel McKee lamented that "these late rebellious States have elected and put into the highest offices men who are the most odious traitors" (75). Still others publicly doubted the professed loyalty of Southern states like Virginia, whose legislature loudly cheered Confederate commanding general Robert E. Lee, or Alabama, where another "rebel general" had been elected to serve as governor. Indeed, the fact that many states across the former Confederacy elected "notorious, defiant rebels" to serve in Congress provided little assurance to Republicans that southerners were genuine in their surrender (75).

As Graber carefully documents, Reconstruction Republicans were deeply concerned that the South's fidelity to secessionist principles meant that bipartisan political competition alone could not fortify the multiracial democracy that they hoped to establish. Counterintuitively, they worried most about the Thirteenth Amendment's extinguishment of the original Constitution's three-fifths clause. Absent a concrete representative guarantee to undergird Black political participation, the white Southern elite could exploit the extension of formal political equality to freedmen to "restore to local and national power a revived coalition of former slaveholders, white supremacists, and Northern Democrats" (Graber 2023, xxviii). Their response was to elevate partisanship to the level of constitutional principle. The goal was a "series of constitutional reforms aimed at protecting and empowering those persons, white and Black, who remained loyal to the United States during the Civil War"—that is, the core constituencies of the Republican Party (xxvii–xxviii).

For Reconstruction Republicans, Graber argues, constitutions were meant to structure politics in ways that were deemed salutary rather than to set categorical limits on what officials could do. The idea was to ensure that the right kinds of people—"privileged coalitions," in his terminology—would be in a position to dictate "the future interpretation and implementation of constitutional limitations and powers" (Graber 2023, xxxi). Only those who had been loyal to the Union could be

entrusted to make decisions about its Constitution going forward. For Republicans in Congress, "[t]he Republican Party *and only the Republican Party*" comprised that group of people (98; emphasis added). Parties, on this account, were essential vehicles for constitutional change and guarantors of its durability. As Massachusetts senator Henry Wilson declared, the Republican Party was for all intents and purposes the instrument of "Almighty God," established "to represent the higher and better sentiments of Christian America, to bear the flag of patriotism and liberty, of justice and humanity" (104–5). And it was imperative for constitutional politics to be structured in such a way as to "entrench in government the Republican Party as the party of the people who remained loyal to the Union during the Civil War" (116). Thaddeus Stevens, an avowed abolitionist and most determined champion of Black enfranchisement, explicitly equated the power of the capital-R Republican Party with the continued health of small-r republican government. He urged his fellow partisans to "secure perpetual ascendancy to the party of the Union; and so as to render our republican Government firm and stable forever" (117).

So much for abstractions. The constitutional changes Reconstruction Republicans promoted were designed to advance their goals in several ways. They tended, Graber (2023, 137) argues, to insist on Black suffrage and "bans on racial discrimination in the civil and criminal laws." They thought it was a good idea to require the repayment of the Union's war debt and to bar both the federal government and the states from repaying the debts of the Confederacy (141). And they were "adamant that former Confederate states not be allocated representatives ... based on disenfranchised persons of color" (144) and "favored restricting political participation by former rebels" (148). Language to realize each of these goals was incorporated into the Fourteenth Amendment. Section 2 authorizes a reduction in federal representation of any state that "denie[s]" or "abridge[s]" the "right to vote of any male inhabitant being twenty-one years of age, and citizens of the United States ... except for participation in rebellion or other crime." Section 3 prohibits those who "shall have engaged in insurrection or rebellion against [the United States], or given aid or comfort to the enemies thereof" from holding federal office. And section 4 both guarantees the debt of the United States and makes "illegal and void" the assumption or payment of "any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave."[15]

Embedded in Graber's account is a critique directed at contemporary constitutional theorists and historians. Graber argues that it is an error to focus on what a particular open-textured constitutional provision—the due process clause, for instance, or the equal protection clause—meant during Reconstruction. Rather, the key question animating Reconstruction-era political actors was "*who* would interpret and implement those phrases in the foreseeable future" (Graber 2023, xxxiii; emphasis added). "Modern obsessions with Republican commitments to legal guarantees for racial equality and fundamental rights," he writes, "obscure the far more robust and far more crucial debates that members of the Thirty-Ninth Congress

[15] Mark Graber (2023) suggests that the fact that these provisions are grouped in one amendment rather than the subjects of separate amendments is a "historical accident." But, he contends, "[t]he post-Civil War Constitution ... was likely to encompass some financial and political guarantees" along these lines (161).

engaged in over the ... proposed constitutional reforms that eventually became Sections 2, 3, and 4 of the Fourteenth Amendment" (218). The Reconstruction Congress's solution to the problem that rights, as James Madison ([1788] 2003) once feared, might be reduced to "mere demarcation[s] on parchment" was to design "political arrangements that entrenched the Republican Party—the party of the loyal" (Graber 2023, 219).

Notwithstanding Graber's critique, and his concomitant view that traditional constitutional law was a secondary concern to structural politics during Reconstruction, he says relatively little about how justices were expected to navigate the changes Republicans in Congress had wrought. But it is possible to make some sensible inferences. To begin, we know that a majority of the justices were ideologically aligned with their Republican colleagues in Congress. Chief Justice Salmon Chase, for instance, worked closely with congressional Republicans—including the same Henry Wilson who had extolled the virtues of the Republican Party—on the text of Reconstruction-era measures, including drafts of what would become the Fourteenth Amendment (Shelden 2026, 210, 214). The record also suggests that at least some Republican-appointed justices on the bench were committed to advancing their party's interests. Justice Samuel Freeman Miller, one of Lincoln's wartime appointees, is instructive. Like Chief Justice Chase, Miller was committed to the Union's cause and disdained the Southern states' "fiendish hatred ... for the negro." He was also a fierce, if sometimes contrarian, partisan. Self-identifying as "a member of the dominant party, yet not one of its most ... acquiescing," Justice Miller told confidantes that the Republican Party was "the only" party that gave him "any hope." And, as he later reflected, it was his responsibility through "faithful irreproachable service" to "pa[y] the party to whom I owe my place" (as quoted in Elinson 2017, 24–36).

Of equal importance, these kinds of partisan bonds were considered neither inappropriate nor undesirable. As one editorial in *Harper's Weekly* declaimed in 1867, the Supreme Court did its representative duty when it refused to enjoin President Andrew Johnson from implementing the Reconstruction Act.[16] "The loyal people who won in the war would no more allow the Supreme Court to reverse their victory than they have the President" (as quoted in Graber 2023, 215). Partisanship by the justices was so widely accepted that the justices were understood to be "political actors who were closely tied to presidential elections." As Shelden (2026, 233) observes, members of the Reconstruction Court "serve[d] as candidates, ... advocate[d] for favorites, and ... closely follow[ed] campaigns." Indeed, in 1867, Chase was considered by many to be an "obvious candidate" for the Republican presidential nomination, although that honor was ultimately bestowed on the Union war hero, Ulysses Grant (217).

Consistent with Graber's account, this evidence suggests that judges, no less than political actors outside the Supreme Court, believed that partisanship—and, specifically, loyal Republicanism—was essential to reconstructing a constitutional republic after the rupture occasioned by the Civil War. Together, they were engaged in a reform project, with the Republican Party serving as the instrument for ensuring their success.

[16] Military Reconstruction Act, March 2, 1867, 14 Stat. 428.

FDR's Gambit

Not quite a century later, Kalman's account of Roosevelt's court-packing plan makes a similar case that teamsmanship was central to remaking Americans' constitutional order. It begins with the Supreme Court's opposition to the New Deal, which Roosevelt and his fellow Democrats had made the centerpiece of their campaign for office. After the court made "mince-meat" out of the National Industrial Recovery Act—legislation authorizing the drafting of sector-specific industrial codes to facilitate cooperation between labor and management—the president and congressional Democrats went on the offensive (Kalman 2022, 33).[17] Deriding the court's "horse-and-buggy definition of interstate commerce" in its 1935 *Schechter Poultry* decision as both wrongheaded and anti-majoritarian, Roosevelt warned that "so many suggestions have come in" from members of the public proposing possible judicial reforms that he had "asked the suggesters to send their suggestions to a central source—the Solicitor General and the Attorney General—in order that they might be digested" (35).[18]

Roosevelt's frustration with the Supreme Court would only grow with subsequent decisions the year after *Schechter Poultry* was decided: *United States v. Butler*, which struck down federal regulations that had proven effective in stabilizing farm prices; *Carter v. Carter Coal*, which struck down federal legislation designed to facilitate labor-management negotiations over wages, prices, and working conditions in the coal industry; and *Morehead v. New York ex rel. Tipaldo*, which struck down New York's minimum wage statute for women.[19] Determined to lay blame for these setbacks where he believed it due, Roosevelt resolved to put the Supreme Court "on trial" during his 1936 presidential campaign (Kalman 2022, 58). As the president saw it, the issue before the public was the court's obstinate refusal to endorse the reforms enacted by the people's representatives: his Democratic administration and the large Democratic majorities in Congress. The electorate's verdict was close to unanimous. Roosevelt won nearly two-thirds of the popular vote and the electoral college votes of all but two states. Moreover, the New Deal proved so popular that the Democrats' legislative majorities grew. "The new Senate," Kalman notes, "included a paltry sixteen Republicans; the House, just eighty-nine" (61).

With the benefit of their near-unilateral control of the federal government, Roosevelt and his Democratic allies sought to "liberalize the court and the judiciary" (Kalman 2022, 71). The approach they chose was to "move against the five or six Justices who were so stubbornly opposed to any Government regulation that nothing could be done to strengthen the still devastated economy of the nation" (63). They knew how the Supreme Court should decide major constitutional questions; they just had to find the right people—Democrats loyal to the New Deal—to render them. As the president put it in his 1937 State of the Union address, "[m]eans must be found to adapt our legal forms and our judicial interpretation to the actual present needs of the largest progressive democracy in the modern world" (78). Linking the success of small-d democratic (and, implicitly, capital-D Democratic) government to the

[17] National Industrial Recovery Act, June 16, 1933, 48 Stat. 195.

[18] *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[19] *United States v. Butler*, 297 U.S. 1 (1936); *Carter v. Carter Coal*, 298 U.S. 238 (1936); *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936).

resolution of the economic challenges facing the nation, Roosevelt called upon the judiciary to "do its part in making democracy successful" (78).[20] The message, as Kalman underscores, was clear. As the *Washington Evening Star* put it, the president's initiative could best be understood as an "effort . . . to pack the court with judges who will support his legislative proposals" (90).

Seeking to force the hand of his opponents on the bench, Roosevelt proposed to increase the Supreme Court's size and, in so doing, create up to six seats for new appointees. As Kalman (2022, 84) explains, the president and his legislative allies sought to "permanently enlarge the court to up to fifteen justices by providing supplements for the six justices on the court currently over seventy years and six months who did not leave within thirty days after the law became effective."[21] The mechanism was deliberately baroque. The idea was to put the onus on the older conservative justices who had invalidated New Deal statutes to resign or find their vote diluted. Indiana Senator Sherman Minton—the president's close ally in the Senate (and, later, one of President Harry S. Truman's appointees to the court)—wryly suggested that the "statesmanship of this proposition is left right in the lap of the Supreme Court itself. If these six aged justices think that a Court of fifteen is too many, they may step aside with full pay." Otherwise, they could "remain on the Court and have the assistance of six young and vigorous associates" (84).

This much is likely familiar to readers versed in the history of the New Deal Supreme Court. Kalman's innovation is to reject the conventional wisdom that the president's court-packing plan was either an ill-conceived sideshow or a political lark. Instead, she argues that the proposal was both central to his post-1936 political aims and politically viable. Altering the partisan balance on the Supreme Court, Kalman argues, was fully consistent with Roosevelt's understanding of the separation of powers. In a speech in early 1937, for instance, Roosevelt "compared the branches of government to 'three well-matched horses . . . put to the task of ploughing up a field where the going is heavy and the team of three pull as one'" (Kalman 2022, 134). The courts, no less than the legislature, were meant to be loyal to the New Deal reform program that voters, overwhelmingly supporting the Democratic ticket, had endorsed. Simply put, what Roosevelt sought was "judicial subservience" to the goals of the Democratic Party (215).

Given the judiciary's refusal to ratify the New Deal, Kalman (2022, 259) writes that "playing 'constitutional hardball' by calling for a court of as many as fifteen justices . . . would have appeared a good gamble. No one could be certain that Congress, with its enormous Democratic majorities, would embarrass him." Indeed, she suggests that

[20] Although Franklin Delano Roosevelt and his aides contemplated a package of constitutional reforms to give the federal government more generalized regulatory powers over the economy, or to strip the Court of the power of judicial review, they ultimately concluded that court-packing was a more "feasible" alternative (Kalman 2022, 66). Laura Kalman (2022) suggests that this position might have been a mistake, either legally or politically.

[21] The proposal also "sought authority to nominate up to forty-four new judges to the lower federal courts when those on the bench reached the milestone of age seventy years and six months without resigning or retiring within a month of the plan's enactment" (Kalman 2022, 85). Other proposed reforms included granting the chief justice of the United States the authority to "transfer new judges from one circuit to another" and providing for "immediate and direct appeal to the Supreme Court after any lower court determined a case raised an issue of federal legislation's constitutionality" (85).

the "initial expectation [was] of complete administration success" (90). As Kalman reminds us, Roosevelt—fresh off his 1936 victory—had "patronage to dispense" and the full backing of powerful organized interests, including the farm lobby and organized labor, to dispense it (111). Of course, Roosevelt did not prevail. Congressional conservatives from both parties balked at the prospect of reform, and the Court obviated the need for change by changing itself. In early 1937, the justices declared in *West Coast Hotel v. Parrish* that a Washington state minimum wage law for women was compatible with the Fourteenth Amendment's due process guarantee (despite striking down a similar law the previous year in *Tipaldo*).[22] Shortly thereafter, in *National Labor Relations Board v. Jones & Laughlin Steel*, the Supreme Court upheld the National Labor Relations Act—the successor to the National Industrial Recovery Act struck down in *Schechter Poultry* and the foundation of contemporary labor law—as a constitutional exercise of the commerce power.[23] This celebrated "switch in time" began the process of "constitutionaliz[ing]" the New Deal (Kalman 2022, 168).

Like Graber, Kalman is critical of the conventional wisdom—in her case, that we should read Roosevelt's intervention as a failed one. True, the Supreme Court was not expanded. Yet on the dimension the president most cared about—the justices' endorsement of the Democratic Party's New Deal program as constitutional—he very much succeeded. Moreover, it seems clear that Roosevelt's determination to bring the court to heel had a meaningful effect on the justices' behavior. As Kalman (2022, 181) argues, it was widely believed at the time that the Court's two median justices feared that continuing to "nullif[y] . . . the legislative program demanded by the people and their representatives" would both "undermine the independence and prestige of the federal judiciary" and lead the public to "accept[] . . . the President's Court plan." Roosevelt was certainly of the view that "the Court yielded" (260). Kalman is more measured, observing that the "case that 'politics' influenced the justices is strong" (260).[24]

Although Roosevelt's court-packing plan fizzled, the president made substantial changes to the Supreme Court by more traditional means. Between 1937 and 1943, the president appointed eight new justices—all committed New Dealers, with four then serving in the executive branch (William Douglas, Robert Jackson, Frank Murphy, and Stanley Reed), one closely advising and helping to staff it (Felix Frankfurter) and two responsible for shepherding the passage of key legislation in Congress (Hugo Black

[22] *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

[23] *National Labor Relations Board v. Jones & Laughlin Steel*, 301 U.S. 1 (1937); National Labor Relations Act, July 5, 1935, 49 Stat. 449.

[24] It is worth noting that the 1920s and 1930s inaugurated a period of low polarization in American politics. It is also true that during this period the ideological orientation of US Supreme Court justices did not necessarily track their partisan political affiliation. Both the liberal Louis Brandeis and the conservative James Clark McReynolds were appointed by Woodrow Wilson, a Democrat; so, too, both the liberal Benjamin Cardozo and the conservatives Pierce Butler, George Sutherland, and Willis Van Devanter were appointed by Republican presidents. Nevertheless, the New Deal reform program was associated with the Democratic Party, and its critics were principally Republicans. As Sean Farhang and Ira Katznelson (2005, 2) argue, conservative southern Democrats in Congress "joined their Democratic Party brethren, most often against the opposition of Republicans," in efforts to combat the economic effects of the Great Depression.

and James Byrnes).[25] Kalman does not expound on how these men viewed the relationship between their previous roles as partisan officeholders or policy makers and their new jobs on the court. But, as in Reconstruction, we can make some reasonable inferences. Like their Reconstruction-era counterparts, even those among Roosevelt's justices who had not held elected office participated in Democratic Party politics throughout their lifetimes. Jackson, for instance, had made "[p]roselytizing for Democratic candidates ... a habitual activity" since joining a club of Woodrow Wilson supporters while in law school (White 2025, 31). As mayor of Detroit, Frank Murphy, too, organized Roosevelt clubs during Roosevelt's 1932 campaign, believing that the "Republican Party had utterly failed the American people in the first years of the Depression" (Wolfinger 2002, 381). And many of Roosevelt's appointees remained politically active after joining the court, with several floated as candidates for the vice-presidency in 1940 and 1944 and others considered for Cabinet positions in subsequent Roosevelt administrations (Harrison 1984).

By and large, Roosevelt's justices were also critical of the Supreme Court's early hostility to the New Deal and both publicly and privately supported the president's plan to expand the court (Harrison 1984, 208). As solicitor general, Justice Reed was one of the first members of the administration to have learned of the plan, and his approval, as a "sober and steady" lawyer, "likely carried great weight" with the president (178). Meanwhile, Justice Frankfurter helped Roosevelt write speeches justifying the plan and participated in strategy sessions to coordinate its defense (181, 204).[26] Justice Jackson advocated for the plan in Congress and elsewhere, despite some disagreement with the details of Roosevelt's approach to changing the court's course (White 2025). Not surprisingly, it was Justice Byrnes—a Democratic senator from South Carolina and Roosevelt's close confidante—who was more explicit in linking the court-packing plan to the Democratic Party, warning his colleagues that the party would "disillusion" the "new recruits" that it had gained by defending farmers and flood victims if Congress failed to adopt Roosevelt's "common sense" reform proposal.[27]

Given that Republicans tended to oppose the New Deal and Democrats to support it, it does not seem so great a stretch to imagine that Roosevelt's appointees to the Supreme Court understood that their responsibility was not simply to promote a shared ideology but also to promote their party's shared interests.[28]

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[25] Roosevelt's eighth appointment, Justice Wiley Rutledge, advocated for the New Deal while serving as dean of the law schools at Washington University in St. Louis and the University of Iowa. He replaced Justice James Byrnes, who resigned from the Supreme Court to head Roosevelt's Office of Economic Stabilization.

[26] Admittedly, Justice Robert Jackson did suggest at the end of his life that deciding a case involving the United States on the basis of whether the judge supported the administration would be grounds for impeachment (Harrison 1984, 201).

[27] Congressional Record, 75th Cong., 1st Sess., February 19, 1937.

[28] This is not to say, of course, that the members of the US Supreme Court during Roosevelt's presidency always agreed on what would best advantage the party to which they had pledged their professional lives. As Kevin McMahon (2004) has documented, Roosevelt's Supreme Court disagreed internally about how and whether their light-touch review of economic regulations translated to other Democratic priorities, including civil rights.

Befitting their joint ambition, both books have received considerable praise from scholars across the related domains of law, political science, history, and sociology. In the spirit of critical engagement, however, readers of *Punish Treason* and *FDR's Gambit* have raised similar objections to both books. Perhaps most importantly, they have expressed skepticism that the conventional wisdoms that Graber and Kalman take issue with are quite so wrong. Graber's critics, for instance, say that he downplays the importance of section 1 of the Fourteenth Amendment and Republicans' commitment to the principle of racial equality far too much (Bernick 2024; Smith 2024; Brandwein 2025).[29] Reconstruction was about the success of the Republican Party and about ensuring racial equality. So too, recent scholars of Roosevelt's presidency have sought to remake the more traditional case that Roosevelt's court-packing gamble was a hubristic error, not the calculated political risk that Kalman wants it to be (Nelson 2023). The Supreme Court, some suggest, might have gotten to *Parrish* and *Jones & Laughlin Steel* on its own. For our purposes, resolving these debates may appropriately be left to the specialists. Even if the critics are right, and the teamsmanship advocated by Reconstruction Republicans and New Deal Democrats was not as central as Graber and Kalman suggest, these two works mount a powerful challenge to the view that teamsmanship is antithetical to American constitutionalism.

Partisan Constitutionalism

Reconstruction and the New Deal are widely recognized as moments of seismic constitutional change. As Bruce Ackerman (1991, 58) observes, "both Reconstruction Republicans and New Deal Democrats appear as the equals of the Founding Federalists in creating new higher lawmaking processes and substantive solutions in the name of We the People." But, while these eras are exceptional—after all, we do not often experience such dramatic or rapid constitutional shifts—they are also instructive. As critical junctures in our constitutional order, they can help us to better understand what puts American-style constitutionalism at risk and what might help to sustain it. To begin, while some critics of the Roberts Supreme Court imply that injecting greater partisanship into the process of deciding constitutional cases benefits only conservative and antidemocratic causes, the history of Reconstruction and the New Deal provides evidence to the contrary. Graber's and Kalman's accounts demonstrate that partisan teamsmanship can be an important vehicle for progressive and democracy-enhancing aims. Recall, as Graber teaches, that Reconstruction Republicans sought to make and remake governing arrangements to ensure that the Democratic Party could not roll back the Union's political achievements. Their purpose was to make both secession and legalized race-based enslavement a legal and practical impossibility. For her part, Kalman shows that the New Deal's core social-democratic objectives—bringing labor-management relations into balance by sanctioning trade unions and softening the edges of capitalism by creating a modern

[29] Some critics have also focused on Graber's reliance on public speeches—principally, those made by members of Congress and recorded in the *Congressional Globe*. As Rachel Shelden (2024) has argued, these remarks (known as buncombe) were sometimes ghostwritten political appeals often inserted directly into the *Globe* rather than "accurate accounts of . . . debates in the Capitol."

regulatory and welfare state—were achieved by direct threats to the court's partisan neutrality.

Juxtaposing left-leaning critiques of the Roberts court with the historical accounts offered by Graber and Kalman helps to expose an important tension in contemporary progressive constitutional thought. Many critical perspectives on the Roberts court adopt an elegiac tone, lamenting the loss of a bygone era in American constitutionalism. Their diagnosis is that the Supreme Court's shift toward teamsmanship is of relatively recent vintage—perhaps traceable to conservatives gaining a supermajority on the court in 2020 or to the result of post-1970s developments in American legal politics, including the rise of the conservative legal movement, changes in the coalitional composition of the Republican Party, growing income inequality, and shifts in the media landscape (Klarman 2020; Litman 2025). Their prescribed solution is to return to a time when judges were not in the thrall of partisan politics.

But progressives should feel some unease when they express nostalgia for the governance norms of the second third of the twentieth century. As Muirhead (2014, 22) writes, this kind of longing "represent[s] a constriction of the political imagination, perhaps even a desire to escape politics" altogether. The shared heritage of progressive political movements is that the future can, and should, be an improvement on the past—be it on economic issues, social ones, or both (Moyn 2023). For contemporary critics of the Roberts court, taking the history of Reconstruction and the New Deal into account ought to occasion more skepticism that there is a less partisan past to return to. Rather, if progressive critics of the Roberts court are dissatisfied with the Supreme Court's record, they might embrace parties as a vehicle to steer the justices in a new direction.

Endorsing constitutional teamsmanship might also help to redirect the energies of left-affiliated constitutional theorists who have struggled in recent decades to articulate a method for interpreting the Constitution that might rival originalism's influence (TerBeek 2021). "Living constitutionalism"—the left's traditional-covering constitutional theory—has gained little traction, notwithstanding the myriad of academic critiques of originalism (Johnsen 2007; Ryan 2011). The Supreme Court's liberal wing no longer appears to advocate for the merits of living constitutionalism as a constitutional theory, and its academic development has, quite understandably, stalled. Scholars on the left have struggled to respond to the charge that living constitutionalism endorses the imposition of judges' own views about contested social issues on the rest of the country. As David Singh Grewal and Jedediah Purdy (2018, 667) conclude, "today's living constitutionalism fails in both theory and practice to avoid de facto constitutional lawmaking by officials and elites, fairly inviting charges of usurpation."[30]

As an alternative to living constitutionalism, scholars have sought to identify particular values (whether procedural or substantive) to guide constitutional interpretation. Likely the best known is John Hart Ely's (1980) theory that the courts should work to ensure that the political process functions fairly. Of more recent vintage is Joseph Fishkin and William Forbath's (2024) contention that the

[30] Perhaps in response, many prominent commentators have simply eschewed the label in favor of arguably a-theoretical alternatives like eclecticism, pluralism, or pragmatism (Nourse 2018).

Constitution enshrines a "democracy-of-opportunity" tradition and thus necessarily regards the concentration of economic and political power with great skepticism.

But there is an inherent arbitrariness in identifying these (or similar) principles as authentically reflected in the Constitution. As Jonathan Gould (2022, 2081) asks, "[w]hat, precisely, distinguishes matters of constitutional significance from ordinary policy?" Alternatively, we might wonder: why these principles and not others? Neither the Constitution's famously open-ended nature, nor our complex, multi-layered political history, seems capable of resolving debates about what progressive values our founding document institutionalized. And in a political climate where even ostensibly neutral, procedural values like Ely's representation reinforcement are contested, it is hard to imagine that such values would command durable support.[31] What, then, are left-leaning constitutional theorists to do? The history of Reconstruction and the New Deal, as told by Graber and Kalman, offers some answers. Their respective accounts suggest that nonpartisan constitutional theory is unnecessary.

It may suffice to say that what the Constitution means and does is what the parties have said it means and does. Endorsing partisan constitutionalism in this way has the virtue of linking constitutional interpretation and reasoning to small-d democratic processes—the very challenge that living constitutionalism has strained to address. Moreover, it avoids the problems associated with having academics or other commentators pick and choose constitutional values that the Constitution might colorably, but not necessarily, embody. To paraphrase Justice Hugo Black's dissent in *Griswold v. Connecticut*, the Supreme Court need not develop "machinery with which to take a Gallup Poll" or invent a "gadget . . . to determine what traditions are rooted in the collective conscience of our people."[32] Rather, the justices may fairly and appropriately channel the values and policy positions of the party that put them on the bench (Peretti 1999).

The lessons of these two works, however, apply beyond the task of developing a progressive constitutionalism. For one, the history of both eras makes clear that partisan teamsmanship has sometimes been required to involve the people in giving the Constitution meaning—what legal scholars refer to as popular constitutionalism. The idea that the task of working out the Constitution's meaning is too important to be left to the courts alone has a long pedigree. "American constitutionalism," Larry Kramer (2004, 8) writes, has always "assigned ordinary citizens a central and pivotal role in implementing their Constitution." But being assigned such a role does not mean that ordinary citizens have the requisite capacity to act on it—far from it. As Graber and Kalman help to illustrate, parties are usually necessary to articulate and transmit big constitutional ideas through time and to propose them for ratification by voters. They are, as Jack Balkin and Sanford Levinson (2001, 1074) write, "sites for working out their adherents' views about constitutional politics. They collect, filter,

[31] It is fair to say that Joseph Fishkin and William Forbath's (2024) project sounds more in the "constitutional rhetoric and imagination of legislation and movements" than in the language of concrete constitutional interpretation (Purdy 2016). But if that is so, then it cannot do the work that living constitutionalism (or originalism, for conservatives) purports to do.

[32] *Griswold v. Connecticut*, 381 U.S. 479, 519 (1965) (Justice Hugo Black dissenting; quotation marks omitted).

co-opt and accumulate the constitutional beliefs and aspirations of the party faithful, of prospective voters, and, perhaps equally crucially, of social movements."[33]

Against this backdrop, what we might take away from Graber's account of Reconstruction and Kalman's discussion of the New Deal is that popular efforts to reform the Constitution—sustained struggles backed by substantial majorities to change its text or to change how it is read and understood—have been successful when they work through political parties rather than outside of them. And given the importance of partisanship in these defining historical events, these two books compel us to ask whether partisanship might actually be necessary for the people to take control of their Constitution (see Tushnet 2000). Graber's and Kalman's contributions should also prompt further thinking about how different a world of popular constitutionalism is from one like our own where judicial supremacy is the norm. Particularly on the political left, critics of the Roberts court have accused it of juristocracy—rule by courts rather than by the people or their democratically elected representatives (Bowie and Renan 2022, 2026).[34] But if parties are likely to shape—and, in some cases, dictate—what the Supreme Court does, it is not apparent that much would change by taking power away from the judiciary.[35] Instead, those unhappy with the status quo might do better to encourage the court to pursue a partisan program—in Roosevelt's language, to plough the field together with their counterparts in the legislative and executive branches. Teamsmanship, on this model, would function as a constraint, tethering jurists to other officeholders and the public rather than isolating them from the will of the people.[36]

This same history might also prompt us to explore whether broad-based, popular movements to alter the Constitution's text or its interpretation are more likely to find success when they are motivated by partisan goals. As Graber reminds us, Reconstruction Republicans sought to change the Constitution in order to preserve

[33] Outside the study of law and courts, it is broadly accepted that modern democratic politics is "unthinkable save in terms of parties" (Schattschneider [1942] 2003, 1). And among law and courts scholars, the idea that political parties help to structure constitutional politics has slowly been gaining acceptance (see, for example, Levinson and Pildes 2006; Bulman-Pozen 2013). This point will hopefully be intuitive to anyone conversant with contemporary constitutional politics in the United States. Democrats tend to favor interpreting the Constitution to permit a right to elective abortion; Republicans do not. Democrats tend to adopt interpretations of the Fourth Amendment that privilege the rights of criminal defendants; Republicans do the opposite, and so on. If party rivalry, as political theorist Nancy Rosenblum (2008, 457) argues, is "constitutive," it should necessarily shape fights about what the Constitution is meant to achieve.

[34] Under President Joe Biden, calls to limit the Supreme Court's influence grew sufficiently loud that a Presidential Commission on the Supreme Court of the United States was convened to consider potential changes to the court's structure and practices.

[35] That is not to say that, in the short run, given the Roberts court's conservative supermajority, reducing the court's power would not have an observable policy effect.

[36] For their part, for instance, Nikolas Bowie and Daphna Renan (2022, 2110) argue in favor of "a shift in the locus of authoritative decisions on the separation of powers from the judiciary to the political process." But they do not say much about how the political process is constituted. In Larry Kramer's (2004) account, the rise of parties actually contributed to the demise of a truly popular constitutionalism. As he puts it, by the 1830s, "[p]opular politics was, in effect, swallowed up by party politics: and because party politics was all about winning office, popular politics started to lose its salience as a check operating form outside to control political institutions" (168). Kramer does acknowledge, however, that Jacksonian Democrats helped to preserve the principle of popular constitutionalism.

the civil rights advances secured by the Union's victory. Likewise, as Kalman chronicles, Democrats during the New Deal championed changes to the Constitution they believed would validate the party's social-democratic reforms. How might we make sense of this possibility? No less than in other domains of political activity, constitutional politics "is about the exercise of authority" (Hacker and Pierson 2014, 648). Actors who seek to influence what the Constitution is thought to mean usually have a policy end in mind. In constitutional politics, as in ordinary politics, "the goal is not short-term shifts in advantage, but durable victories won through the reconfiguration of governance" (645).

Appreciating this point might help us to think differently about the valence of partisan teamsmanship by judges. As we have seen, critics of partisan teamsmanship tend to suggest that it is fundamentally selfish. As Terri Peretti (1999, 80) puts it, "[a] Court that is driven by ... political loyalties" is likely to be accused of reaching decisions that "constitute 'personal fiat' or 'whim' rather than reason." But teamsmanship can also help to translate collectively held political ideas into action! Both Graber's Reconstruction Republicans and Kalman's New Deal Democrats relied on their respective parties to serve as instruments of collective social improvement. From this, we might conclude that ideas rarely (if ever) exist outside of partisan competition. Indeed, it is thought to be a feature of strong party competition that compelling ideas find a party host. Partisan competition, on this account, can help to ensure that good ideas—whatever their origin—make their way into our governing institutions, where parties help to coordinate activity across the branches (Highsmith 2019).

To be sure, shared ideology may sometimes be enough to motivate like-minded officeholders to translate public preferences into policy and to coordinate its implementation across the branches. But it is possible, given the history of Reconstruction and the New Deal, that at other times a shared interest in gaining and holding power will also be necessary to motivate officeholders to do this work. When this is the case, teamsmanship might be better understood as both empathetic and self-effacing. It requires "trimming [individuals'] own convictions to accommodate their fellow partisans" and, in so doing, helping to constitute "a group that is large and stable enough to possess democratic legitimacy" (Muirhead 2014, 19). It also implies reciprocity—that is, trust that others on the partisan team will do the same.

For judges, then, teamsmanship might serve as a kind of insurance that their ideas about what the Constitution should do—how the structures of government that it establishes ought to work and what protections it might offer to individuals—will be faithfully implemented by others in the political system. This is arguably the essence of Reconstruction Republicans' insistence on partisan identity as a heuristic for loyalty to the multiracial constitutional system that they, and those who died in service of the Union, had labored so hard to create. Those who had witnessed firsthand the treachery and ruin wrought by Southern secessionists were understandably reluctant to entrust in their opponents the power to subvert the constitutional project to which they had committed themselves and the nation. The same is true for New Deal Democrats. The premise of Roosevelt's court-packing scheme was to ensure that Democratic loyalists made it onto the bench, where they could ensure that the policies essential to America's recovery were determined to be in accord with the Constitution.

Crucially, the cases of Reconstruction and the New Deal imply some natural limits to partisan teamsmanship, for its legitimacy would seem to hinge on whether the danger of subversion is real or illusory. With the benefit of hindsight, most readers would likely understand, and even share, Reconstruction Republicans' skepticism that the Democratic Party of that era—and, in particular, Democrats from the former Confederacy—could be relied on to help construct and subsequently honor the new, multiracial democracy they sought to build. So, too, readers might have sympathy for New Deal Democrats who, in their efforts to bring about the economic recovery that the public profoundly desired, harbored doubts that the opposition would faithfully join them in that cause, particularly given how fiercely Republicans had fought the New Deal's passage and implementation. As we have seen, many similarly appear to find the apparent constitutional teamsmanship of the Roberts court to be worthy of criticism. Their uneasiness, given Graber's and Kalman's history, might be profitably reframed. The problem is not that judges may sometimes engage in teamsmanship but, instead, that they should do so only where there is good reason to doubt the other side's good faith.

These reflections are sure to provoke a variety of responses. One I think necessary to address here concerns the applicability of these ideas to contemporary times. The dominant political phenomenon of the twenty-first century's first few decades is what Lee (2016) calls "insecure majorities"—slim electoral margins of victory and regularly alternating patterns of control of both Congress and the White House. This is a departure from much of our history. Throughout the twentieth century, party control was rarely in doubt. Republicans dominated national politics from the end of the Civil War until Roosevelt's election in 1932; Democrats from then until the mid-1960s and in Congress through the early 1990s. Today, however, partisan control flips with nearly every election, typically yielding a change in majority status in at least one chamber of the Congress or the White House. Given this new normal, it is worth considering whether the constitutional lessons of Reconstruction and the New Deal—periods of one-party dominance—have any resonance today. Indeed, one might argue that, in contrast to contemporary majorities, Reconstruction- and New Deal-era officeholders had clear license to remake the constitutional order because they could credibly speak for "we, the people"—a people who had demonstrably lost faith in the opposition and thus issued majoritarian warrants for change.

There is real merit to this objection. But I think it is a mistake to imagine that the highest highs of our constitutional history have nothing to teach because they are unrepresentative of our politics today. Reconstruction and the New Deal are monuments to what it is possible to achieve in our constitutional democracy. And it is no better to develop enduring theories of judicial behavior in reliance on contemporary facts that may themselves look anachronistic sometime in the near future. If anything, that these accomplishments were propelled by deep partisan allegiance should be an object lesson in our own era that partisan teamsmanship has sometimes shaped our democracy for the better. Nevertheless, the incentives that insecure majorities confer on everyone in the political system to amplify their differences might make it appear that our political system today more closely mirrors the breakdown in trust that is characteristic of Reconstruction and the New Deal than it in fact does.

Conclusion

This review essay has exposed and sought to grapple with a tension in the way we think about constitutionalism and political parties. On the one hand, scholars tend to be critical of judges who evidence explicit partisan loyalties. On the other, partisan teamsmanship appears, as a matter of history, to be an inextricable part of the American constitutional tradition—at least at its most important moments. Reasoning from the descriptive to the normative is famously fraught. And perhaps there is value in maintaining the fiction that constitutional law should be outside or above politics, even if it has not been historically—in no small part because this is an illusion that the public finds appealing. As Geyh (2012) has suggested, there are significant costs to abandoning the "ermine myth" for the acknowledgment that "extralegal factors influence judicial decision making." Doing so risks "gut[ting] the raison d'etre for the judiciary's independence in one fell swoop" (238). At the same time, if teamsmanship is embedded in our constitutional tradition, it might be time to stop trying so hard to disentangle parties from the law. In a time of institutional stagnation, we could do worse than try something ambitious like Reconstruction or the New Deal again.

Acknowledgments. For especially helpful comments and suggestions, the author thanks Jack Balkin, Beau Baumann, Evan Bernick, Ruth Bloch Rubin, Josh Braver, Leigha Crout, Howie Erlanger, Mark Graber, Jon Gould, Peter Ormerod, and Calvin TerBeek as well as participants in the Northern Illinois University College of Law faculty writing workshop.

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Cite this article: Elinson, G. (2026). 'Partisan Teamsmanship and American Constitutionalism'. *Law & Social Inquiry*. https://doi.org/10.1017/lsi.2026.10175