

How Constitutional Theory Matters

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I. INTRODUCTION

It is impossible to understand the present moment in progressive constitutionalism without engaging a stock narrative given iconic articulation more than a decade ago by originalist scholar Randy Barnett.¹ According to this narrative, conservatives in the 1980s, prodded by Edwin Meese III's Justice Department, rallied around originalism, and particularly "original intentions" originalism, as a politically congenial and intellectually satisfying approach to constitutional interpretation.² They were defeated in the courts of academic and political opinion due in part to a series of unanswerable criticisms from liberal legal scholars such as Paul Brest and H. Jefferson Powell,³ and in part to the well-publicized failure of originalist judge Robert Bork to win confirmation to the Supreme Court.⁴

Led by Antonin Scalia, conservative academics, judges, and politicians then shifted to a new, more text-based form of originalism—"original meaning" or "new" originalism—that was responsive to academic criticisms of original intent, and that has drawn even liberal scholars such as Ronald Dworkin, Akhil Amar, and Jack Balkin to its embrace. As Barnett writes, "It takes a theory to beat a theory and, after a decade of trying, the opponents of originalism have never congealed around an appealing and practical alternative."⁵ The turn to originalism, thus universalized, has helped to influence the debate both in the political arena—in which non-originalism and non-textualism have been conflated with judicial activism—and in the courts themselves, as evidenced by

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¹ Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 *LOY. L. REV.* 611 (1999).

² See *id.* at 611–12; Jamal Greene, *Selling Originalism*, 97 *GEO. L.J.* 657, 680–81 (2009).

³ See Barnett, *supra* note 1, at 612–13.

⁴ See Greene, *supra* note 2, at 681.

⁵ See Barnett, *supra* note 1, at 617.

Justice Scalia's and Justice Stevens's dueling originalist opinions in *District of Columbia v. Heller*.⁶ We are all originalists now.

At about the same time Meese was doing his prodding, law professors Lino Graglia, Douglas Laycock, and Mark Tushnet were engaged in a comparatively obscure colloquy in the pages of the *Texas Law Review*.⁷ Their charge was to discuss whether constitutional theory "matters." Laycock basically said "yes" and Graglia and Tushnet basically said "no." Laycock argued that "[d]ifferent constitutional theories produce radically different results in real cases that affect real people in the world outside the universities."⁸ Graglia and Tushnet, political opposites, managed to agree that, at least in close cases tending to generate controversy, predetermined political outcomes inevitably create the need for Supreme Court Justices and their abettors in the legal academy to derive justificatory theoretical frameworks: Results produce theories, they said, not vice versa.⁹

If the stock narrative is correct, then so, it seems, is Laycock. Originalism is a constitutional theory, and it seems to have produced, at a minimum, a revolution in Second Amendment jurisprudence. But the stock story, if true, is also compatible with Tushnet's and Graglia's responses. It might be that theory matters, not because it directly produces doctrine, but because it influences our political and social life, which in turn either introduces new judicial interpretations or informs existing ones, which in turn affects doctrine.

This Article pursues that set of claims and explores their potential lessons for progressive constitutionalism. The question that concerns me here is not *whether* constitutional theory matters—it does, of course, or else I would be out of work—but *how* it matters. I argue, in sympathy if not harmony with Graglia, Tushnet, and others, that the primary function of constitutional theory is not to motivate constitutional doctrine but to validate it. Outcome indeed tends to precede a judge's choice and application of theory in close cases, and so theory does not "produce" results in the mine run of such cases. But at the same time, validation matters. It matters not just to the political salability, and therefore the retrospective legitimacy, of constitutional decisions, but also, and as importantly, to the capacity of judges, lawyers, academics, and ordinary citizens to experience their political commitments as either constitutionally compelled or tolerated. Moreover, validation matters differently, systematically, for conservatives and progressives, and so attention to its mechanics is necessary if one is to understand the possibilities and limitations of progressive constitutionalism.

⁶ 554 U.S. 570 (2008).

⁷ Lino A. Graglia, "Constitutional Theory": *The Attempted Justification for the Supreme Court's Liberal Political Program*, 65 TEX. L. REV. 789 (1987); Douglas Laycock, *Constitutional Theory Matters*, 65 TEX. L. REV. 767 (1987); Mark V. Tushnet, *Does Constitutional Theory Matter?: A Comment*, 65 TEX. L. REV. 777 (1987).

⁸ Laycock, *supra* note 7, at 767.

⁹ Graglia, *supra* note 7, at 789; Tushnet, *supra* note 7, at 778–79.

Part I critically assesses the stock story as a way of understanding the sense in which constitutional theory validates but does not motivate constitutional doctrine. I argue that the originalism movement has not produced hoped-for conservative legal doctrine, and that theories of constitutional interpretation generally lack the resources necessary to resolve constitutional conflict in cases that matter to ordinary citizens. Part II contends that constitutional theories are, however, able to fortify policy positions both by grounding them in fundamentalist rhetoric and by mitigating cognitive dissonance between political preferences and constitutional requirements. That process of validation is likely to matter more to political conservatives, who need constitutionalism as a response to progressive politics, than to political progressives, for whom constitutionalism may be useful but can be costly and even counterproductive. Part III outlines some limited ways in which constitutional theory may be useful to progressives, namely in the form of an emphasis on judicial minimalism and as a defense of progressive politics against conservative constitutionalism.

II. HOW CONSTITUTIONAL THEORY DOES NOT MATTER

Progressives have not always been interested in constitutional theory. The original Progressives were heavily influenced by the minimalist James Bradley Thayer, who believed that judicial review of congressional statutes should occur at one remove, with a level of deference to Congress that would today be called rational basis review (that is, the kind without teeth).¹⁰ Thayer drew a firm distinction between judicial review of federal versus state legislation. His “clear mistake” rule as to the former was grounded in respect for a coordinate branch of government charged with its own constitutional responsibilities,¹¹ but he believed strongly in the need for federal judges reviewing state legislation to “guard [the Constitution] against any inroads from without.”¹²

Oliver Wendell Holmes, the first Thayerian to reach the Supreme Court, flattened Thayer’s dichotomy into an across-the-board rule of political Darwinism, writing famously in his *Lochner v. New York* dissent that judicial invalidation of *any* law under the Due Process Clause of the Fourteenth Amendment should require a finding that “a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.”¹³ Holmes passed the Thayerian baton to his friend and admirer Felix Frankfurter.

¹⁰James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

¹¹Under the rule, a court “can only disregard [a congressional act] when those who have the right to make laws have not merely made a mistake, but have made a very clear one[]— so clear that it is not open to rational question.” *Id.*

¹²*Id.* at 155; cf. *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 343–48 (1816) (discussing rationales for permitting Supreme Court review of state court adjudications of federal law).

¹³*Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

“To allow laws to stand is to allow laws to be made by those whose task it is to legislate,” Frankfurter wrote in *State Tax Commission v. Aldrich*.¹⁴ “The nullification of legislation on Constitutional grounds has been recognized from the beginning as a most ‘delicate’ function, not to be indulged in by this Court simply because it has formal power to do so, but only when compelling considerations leave no other choice.”¹⁵ This is not so much a theory as a rule of judicial abdication.

Abdication suited much of the Progressive political program, concerned as it was with the possibilities of targeted government intervention to address social and economic problems. But when their heirs on the American center-left turned their attentions to the struggle over civil rights for black Americans, for criminal suspects, and for women, government became the problem rather than the solution. The Warren Court did not advance any particular theory under which it should engage in judicial activism, nor did any evident academic movement precede and motivate the Court’s jurisprudential commitments. Rather, the Court was famously unambitious theoretically, so much so that it alienated many in the legal academy who otherwise supported its political program. Alexander Bickel wrote of the Court’s “refusal, too often, to submit to the discipline of the analytically tenable distinction.”¹⁶ John Hart Ely’s iconic academic defense of much of the Warren Court’s work, in *Democracy and Distrust*, was published six years after Earl Warren’s death.¹⁷

Matters are different today. In 2005 a group of progressive constitutional scholars, a “who’s who” of the liberal legal academy, gathered at Yale Law School to open a conversation about what U.S. constitutional law should look like in 2020.¹⁸ The conference produced a volume of essays devoted both to holistic theories of constitutional interpretation that were said to be consonant with progressive values and to specific constitutional doctrinal visions within a number of substantive areas, including social and economic rights, free speech, reproductive rights, and civil liberties. Two features of the project stand out as especially relevant to assessing the state of progressive constitutional theory in 2011. First, unlike Warren Court liberalism, much of the *Constitution in 2020* program is aspirational rather than justificatory. Progressives are mindful that they do not have the Court, and it is a goal of the project to create the space within which a progressive jurisprudential vision can flourish and both motivate and become available to progressive politics.

Second, unlike many Progressive Era liberals, the *Constitution in 2020* organizers care deeply about theory. One of the volume’s editors, Jack Balkin,

¹⁴ 316 U.S. 174, 185 (1942) (Frankfurter, J., concurring).

¹⁵ *Id.*

¹⁶ ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 81 (1978).

¹⁷ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

¹⁸ Jack M. Balkin & Reva B. Siegel, *Introduction to THE CONSTITUTION IN 2020*, at 1 (Jack M. Balkin & Reva B. Siegel eds., 2009).

has devoted several articles and a chapter of his recent book to defending his version of originalism, which he calls “framework originalism.”¹⁹ Other progressive constitutional scholars and academically-minded lawyers have also emphasized forms of what some refer to as new textualism—a more pluralist version of original-meaning originalism—as a means to doctrinal innovation. For example, Doug Kendall, a liberal lawyer and public intellectual, founded the Constitutional Accountability Center (CAC), a left-leaning think tank and law firm that, by its own lights, “seek[s] lasting victories rooted in the text and history of our Constitution.”²⁰ CAC has not only appeared as *amicus curiae* in numerous cases before federal appellate courts but it has published white papers and other quasi-academic writing promoting, for example, a generative vision of the Fourteenth Amendment Privileges or Immunities Clause grounded in original understandings. Goodwin Liu has argued, in parallel, for a reinvigoration of the Citizenship Clause that would enable a constitutional right to education,²¹ and Bruce Ackerman has argued that the same clause can be the source of a new brand of affirmative political rights.²²

Many, perhaps all, of these efforts are responsive, sometimes overtly and sometimes less so, to the real and perceived ascendancy of conservative originalism over the last three decades. Most, perhaps all, assume that the Right got something right, in process, in substance, or both, in how it went about promoting and defending originalism during this period. Most, perhaps all, at least tacitly assume a connection—even as they might disagree on its particular mechanics—between conservative legal doctrine and conservative jurisprudential energy and coordination. Any discussion of progressive theorists’ prospects for success must begin, then, by unearthing the nature of that connection.

To that end, the remainder of this Part makes two points. First, the social and political movement behind originalism has not directly produced any lasting and identifiable conservative victories at the Supreme Court. Second, no viable theory of interpretation has the resources to answer difficult constitutional questions in a way that is not question-begging. I take up each point in turn below.

In 1988 the U.S. Justice Department’s Office of Legal Policy published a report addressed to Attorney General Meese entitled “The Constitution in the

¹⁹ Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 550 (2009); see also JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION* 226–50 (2011).

²⁰ *About Us*, CONST. ACCOUNTABILITY CENTER, <http://www.theusconstitution.org/page.php?id=5> (last visited Nov. 17, 2011).

²¹ Goodwin Liu, *National Citizenship and the Promise of Equal Educational Opportunity*, in *THE CONSTITUTION IN 2020*, *supra* note 18, at 119.

²² Bruce Ackerman, *The Citizenship Agenda*, in *THE CONSTITUTION IN 2020*, *supra* note 18, at 109.

Year 2000: Choices Ahead in Constitutional Interpretation.”²³ The report canvasses fifteen specific areas of constitutional law in which the Administration wished to push doctrine in a more conservative direction, including abortion rights, affirmative action, private property rights, and criminal procedure.²⁴ The report does not couch its aspirations in overtly political terms. Rather, as explained in its introduction, the report suggests that doctrinal outcomes depend directly on a judge’s choice of “judicial philosoph[y],” whether “defined in terms of interpretivism vs. non-interpretivism or strict interpretation vs. liberal interpretation or commitment to original meaning vs. commitment to an evolving constitution.”²⁵ In a series of speeches in 1985 and 1986, Meese had argued that a return to a “jurisprudence of original intention” would enable the Court to reach what he believed to be the singularly correct outcomes in a number of constitutional controversies.²⁶ The “Constitution in 2000” report shared that premise.

The Constitution in 2000 is the Constitution in 2020’s but-for cause, its *raison d’être*. And yet, if we take its metric for success to be a return to a jurisprudence of original intentions as a means to the political outcomes identified in the report, the Constitution in 2000 project has been an unqualified failure. To be sure, constitutional doctrine has drifted rightward in some of the areas identified in the report: the constitutional right to abortion is subject to more restrictions today than it was in 1988;²⁷ the Tenth Amendment, *sub rosa*, has limited the scope of federal regulatory power;²⁸ remedial race-conscious government decision making has been limited;²⁹ and fears of constitutional protections against wealth discrimination or disparate impact laws have proven

²³ OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, *THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION* (1988).

²⁴ *Id.*

²⁵ *Id.* at iii.

²⁶ Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 465 (1986).

²⁷ See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 133 (2007) (rejecting a facial challenge to a congressional statute prohibiting a type of abortion procedure even though it lacked a health exception); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 881–85 (1992) (plurality opinion) (broadening the ability of states to require a 24-hour waiting period and “informed consent” before an abortion, beyond what was permitted in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986)).

²⁸ See *Printz v. United States*, 521 U.S. 898, 935 (1997) (invalidating a provision of the Brady Handgun Violence Prevention Act that required state executive officials to conduct criminal background checks); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (invalidating the Gun-Free School Zones Act of 1990, which prohibited possession of a firearm within 1000 feet of a school).

²⁹ See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 735, 747–48 (2007) (invalidating two voluntary public school integration plans for failing to satisfy strict scrutiny); *Adarand Constrs. Inc. v. Pena*, 515 U.S. 200, 227 (1995) (holding that strict scrutiny applies to both state and federal racial classifications, whether designed to be inclusive or exclusive).

spectacularly exaggerated. But in several other areas of concern in the report, doctrinal trends have more closely tracked liberal political commitments: The Court has been receptive to claims of discrimination brought by gays and lesbians;³⁰ it has rejected claims for religious exemption from facially neutral laws of general applicability;³¹ it has turned away arguments for using the Takings Clause to invalidate land transfers to private developers;³² it has refused to defer to the Executive in its post-September 11 detention-related decisions;³³ and it recently permitted a federal district court to use its equity powers to order the State of California to release more than 30,000 inmates from its prisons.³⁴

Moreover, and significantly, few of the conservative political victories at the Court have invoked originalist principles, and some of the progressive victories have specifically considered and rejected originalism. Since the Constitution in 2000 report was issued, no abortion-related or affirmative action majority opinion has invoked original intentions, meanings, or understandings. Certain of the Court's state's rights opinions, such as *Printz v. United States*³⁵ and *Alden v. Maine*,³⁶ have adopted an originalist cast. But others have not. Chief Justice Rehnquist refused, in *United States v. Lopez*,³⁷ to reject the validity of *Wickard v. Filburn*'s decidedly nonoriginalist approach to the Commerce Clause,³⁸ and *Filburn* formed the basis for the Court's later opinion in *Gonzales v. Raich* upholding the federal government's power to reach local medical marijuana growers.³⁹ Justice Kennedy's majority opinion in *Boumediene v. Bush*, holding that the privilege of the writ of habeas corpus extends to noncitizen detainees being held at Guantánamo Bay, argued that the original understanding of the writ was not conclusive.⁴⁰ That skepticism is consistent with his methodological stance in *Lawrence v. Texas*, in which he wrote that a history of state-level anti-sodomy laws had to yield to an "emerging

³⁰ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986) (invalidating a state anti-sodomy statute); *Romer v. Evans*, 517 U.S. 620, 623 (1996) (striking down a state constitutional amendment that prevented gays and lesbians from benefiting from antidiscrimination legislation).

³¹ See *Emp't Div. v. Smith*, 494 U.S. 872, 890 (1990).

³² See *Kelo v. City of New London*, 545 U.S. 469, 489–90 (2005).

³³ See *Boumediene v. Bush*, 553 U.S. 723, 733 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004); *Rasul v. Bush*, 542 U.S. 466, 485 (2004).

³⁴ See *Brown v. Plata*, 131 S. Ct. 1910, 1923, 1947 (2011).

³⁵ 521 U.S. 898, 935 (1997) (holding that the Brady Handgun Violence Prevention Act, 18 U.S.C. § 922(s)(2) (1994), unconstitutionally compelled state executive officers to perform federal functions).

³⁶ 527 U.S. 706, 754 (1999) (holding that Congress may not subject nonconsenting states to suit on a federal cause of action in state court under its Article I powers).

³⁷ 514 U.S. 549, 554 (1995).

³⁸ 317 U.S. 111 (1942).

³⁹ 545 U.S. 1, 17–20 (2005).

⁴⁰ 553 U.S. 723, 752 (2008).

awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”⁴¹

It is tempting to attribute Meese’s failure to the simple and serendipitous fact that neither of the Court’s swing Justices for the last quarter century, Justice O’Connor and Justice Kennedy, is an originalist. But to succumb to that temptation is, I think, to confuse cause and effect. The Supreme Court is not, as Judge Bork once called it, an “intellectual feast” for the Justices who matter most;⁴² one does not become a swing Justice through consistency with a top-down, doctrinaire approach to constitutional interpretation. This becomes obvious when one attempts to describe the “methodologies” of O’Connor, Kennedy, Lewis Powell, Potter Stewart, Tom Clark, Stanley Reed, or Owen Roberts. The Court’s swing justice is, almost by definition, the one who knows it when he sees it.

Doctrinaire originalists are particularly unlikely to attract a majority of the Court. No serious legal professional can be originalist in the way in which originalism’s promoters in the public sphere usually mean it: that constitutional interpretation will be dictated by the expectations of the ratifying generation. Most women like their equality just fine, thank you. And so originalists, to be taken seriously, must water the doctrine down so as not to unsettle too much the vast architecture of settled law that is inconsistent with original understandings.⁴³ The hard work of Supreme Court judging is not syllogism but reconciliation of existing doctrine with first principles, whether sourced in some totalizing theory or simply in an intuition, a “law sense,” about the right outcome in a hard case. That process of reconciliation, a version of what Richard Fallon has called “constructivist coherence,”⁴⁴ is a necessary step in all constitutional cases, but it cannot be dictated by the totalizing theory itself, which is why many academic originalists have found it necessary to distinguish between constitutional interpretation, the hermeneutic work to which originalism may usefully apply, and constitutional construction, the adjudicative work to which it may not.⁴⁵ Originalism is so frequently indeterminate, then, not because history is itself inchoate or able to support any proposition (as some

⁴¹ 539 U.S. 558, 572 (2003).

⁴² *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong. 854 (1987).

⁴³ See Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 724–39 (1988); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989).

⁴⁴ Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1189 (1987).

⁴⁵ See, e.g., KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 7–8 (1999); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 933–34 (2009).

originalism opponents overstate), but because constitutional law is invariably pluralist.⁴⁶

Indeterminacy is especially troublesome for originalists because originalism is so frequently promoted as uniquely capable of restraining judges, but uncertainty in ultimate application is a feature of any theory of constitutional interpretation that aspires to be deployed in actual constitutional cases. This is not, again, the usual claim that politics invariably preselects the outcomes in constitutional cases, rendering the supportive theories as post hoc window-dressing, but rather that any number of considerations—*stare decisis*, policy issues, prudential concerns, and, yes, politics—limit the predictive power of constitutional theory. If constitutional theory matters, then, it is not because it “produces” results in the usual way in which we mean that word.

III. VALIDATION AND THE PROGRESSIVE PROJECT

Are modern progressives therefore barking up the wrong tree? Is the originalism movement a poor or even counterproductive model for progressive constitutionalism? Perhaps so, but we need to do more work in order to reach that conclusion. Even if originalism has not been the engine of conservative doctrinal change, it is difficult to dispute that constitutional doctrine has become more conservative during a time in which originalism has been ascendant academically and within popular discourse. We have already discussed limitations on abortion rights and racial preferences, expansions in state sovereign immunity, and limitations on federal regulatory power.⁴⁷ We could add to this list limits on standing,⁴⁸ campaign finance reform,⁴⁹ and gun control.⁵⁰ The last of these, moreover, seems to have been enabled by a renewed focus on originalist arguments; the majority opinions in both *District of Columbia v. Heller*⁵¹ and *McDonald v. City of Chicago*⁵² included strong,

⁴⁶ See Adam M. Samaha, *Low Stakes and Constitutional Interpretation*, 13 U. PA. J. CONST. L. 305, 313–15, 316–17 (2010).

⁴⁷ See *supra* notes 27–29 and accompanying text.

⁴⁸ See *Hein v. Freedom from Religion Found.*, 551 U.S. 587, 609 (2007) (holding that, although taxpayer standing is cognizable to challenge congressional appropriations as violating the Establishment Clause under *Flast v. Cohen*, 392 U.S. 83, 106 (1968), that rationale does not extend to discretionary expenditures by the executive branch); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (holding that Congress may not confer standing by providing a cause of action that amounts to a generalized grievance).

⁴⁹ See *Citizens United v. FEC*, 130 S. Ct. 876, 886, 913 (2010) (overruling *McConnell v. FEC*, 540 U.S. 93 (2003)), and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), to hold that a prohibition on the use of corporate and union general treasury funds for certain electioneering communications violates the First Amendment).

⁵⁰ See *Dist. of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (holding that the Second Amendment protects an individual right to possess a handgun for self-defense in the home against infringement by the federal government); see also *McDonald v. City of Chi.*, 130 S. Ct. 3020, 3026 (2010) (extending *Heller* to state and local governments).

⁵¹ 554 U.S. at 576–619.

identifiably originalist appeals to history. The fact that judicial opinions deploy originalist or other theory-based arguments does not, however, resolve whether they are motivated by originalism or by the particular theory. An alternative possibility, already discussed in part, is that the theory is either purely or mostly justificatory. That is, a judge reaches a preferred result through some process independent of the top-down theory and then uses the theory in the course of opinion-writing in order to provide a legalistic or monist basis for the decision.

This suggestion sounds cynical, even sinister, at first blush, but it need not be so. Much of the discourse around judicial decision making presupposes a dichotomy between law influencing politics and politics influencing law. The colloquy among Graglia, Laycock, and Tushnet fits this general description, with Laycock arguing that constitutional theory can be exogenous of the outcomes it produces and Graglia and Tushnet skeptical of that possibility.⁵³ There is a third way, however, namely that both politics and law (in the sense of legal theory) are influenced by a common variable. For purposes of exposition, we can call that variable “values.” We know from survey data that both originalism and conservative politics are linked to a set of values, namely moral traditionalism and local control. That is, controlling for demographic variables, an individual’s level of moral traditionalism—her relative aversion to change and to moral relativism—and her level of localism—her relative affinity for small government—are strong predictors of her relative level of originalism.⁵⁴ If we assume by hypothesis that these variables also lead individuals to support conservative political outcomes, then the reality of cognitive dissonance suggests that the progression from theory to result will be secure in the individual’s mind regardless of the actual direction of influence. A “conservative” constitutional approach—the indistinct *mélange* of originalism, interpretivism, and strict constructionism referred to in the Constitution in 2000 report—then becomes the only psychologically stable justificatory framework for conservative political outcomes, and conservative political outcomes become the only psychologically stable result of a conservative judicial philosophy.⁵⁵

Note that I have elided originalism with other conservative approaches that are either distinguishable, underspecified, or meaningless to serious academics. It is telling, though, that that complaint does not tend to surface in public discourse or even in judicial opinions. This is because originalism’s persuasive power, its usefulness as a justificatory framework, only arises insofar as it is a value-laden rather than a purely academic construct. The set of values with which originalism is associated is no mystery. Originalism is a symbolic language that promotes and helps to constitute narratives of political and social

⁵² 130 S. Ct. at 3036–44.

⁵³ See *supra* text accompanying notes 8–9.

⁵⁴ See Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356, 409 (2011).

⁵⁵ See Jamal Greene, *Guns, Originalism, and Cultural Cognition*, 13 U. PA. J. CONST. L. 511, 514 (2010).

restoration, religious and cultural protestantism, anti-elitism, reductionism, and assimilation.⁵⁶ These are contested narratives, stakes in the fight over American cultural identity, that align reliably with a conservative political agenda but also align with an academically validated theory of constitutional meaning. That academic validation remains useful to conservative partisans even if the particular form of originalism that academics support does not align with the untheorized version that has entered the public lexicon.

Originalism matters, then, because it ties conservative politics to what Edward Corwin called “the Constitution as symbol.”⁵⁷ The tie is reinforced, as discussed, through the powerful bonds of cognitive dissonance. The experience of constitutional validation tends, then, to fortify and to radicalize the political view. Consider, for example, the reaction of slave-sympathizing papers in the South to the Court’s announcement, in the *Dred Scott* case,⁵⁸ that forbidding slavery in federal territories violated the Constitution. The *Augusta* (Georgia) *Constitutionalist* wrote that “opposition to southern opinion upon [slavery in the territories] is now opposition to the Constitution, and morally treason against the Government.”⁵⁹ Constitutionalizing a political program stirs its adherents to action and sanctifies its standard-bearers. The opposition, reduced to the milquetoast argument that the Constitution permits but does not require its political preferences, is less motivated to dig in its heels.

We can now view *Heller* through fresh eyes. Originalism does not resonate with gun rights advocates because Justice Scalia’s arguments are correct as a matter of legal history. Indeed, interested eighteenth-century historians are nearly unanimous that no one of significance believed the Second Amendment guaranteed a right of individuals not suitable for militia service to defy otherwise valid criminal firearms regulations.⁶⁰ Rather, originalism resonates with gun rights advocates because moral traditionalism, localism, religious fundamentalism, and reductionism resonate with gun rights advocates.⁶¹ It was not difficult for entrepreneurs in legal academia, in think tanks, and within advocacy groups to persuade gun rights proponents that originalist arguments not only supported their position but also made it the only constitutionally supportable position. Originalism was thus a powerful tool of political advocacy that contributed to movement energy on the right. That energy contributed to political victories in ways that are difficult to quantify. As relevant to the

⁵⁶ See Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 62–82 (2009).

⁵⁷ Edward S. Corwin, *The Constitution as Instrument and as Symbol*, 30 AM. POL. SCI. REV. 1071, 1071–72 (1936).

⁵⁸ 60 U.S. (19 How.) 393, 405–06 (1857).

⁵⁹ AUGUSTA CONSTITUTIONALIST, Mar. 15, 1857, quoted in DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 418 (2001).

⁶⁰ See Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 255–57 (2008).

⁶¹ See Greene, *supra* note 55; cf. Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291 (2003) (arguing that cultural worldview shapes individual positions on gun control).

judiciary, that energy made the federal court appointments process a far more significant part of the right's political platform. The constitutional validation of the conservative political program helped make shaping the courts a part of a conservative President and a conservative Senator's political mandate.

The difficulty in commandeering this process for progressive ends should by now be relatively clear. First, originalism cannot easily be appropriated to progressive constitutional arguments. Originalism has a distinct set of meanings that vary across social, cultural, and professional space. The open-ended and progressive conception that scholars like Jack Balkin and lawyers like Doug Kendall support may share a name and a conceptual origin with the narrow, results-oriented conception that has entered public discourse, but it is no more related than Barack Obama is to Dick Cheney.⁶² Political conservatives will not experience progressive originalist arguments as true and, more importantly, neither will political liberals. Grounding one's political arguments in the symbolic authority of the political vision of long-deceased slaveholding misogynists creates its own kind of cognitive dissonance for progressives.⁶³ This is particularly so given the amount of time and energy progressives have already spent, with some successes (see, e.g., Bork), vigorously tying originalism to a politics of regression.

Second, as Robin West and others have argued, constitutionalism itself—at least in its adjudicative form—is more compatible with conservative than with progressive political validation.⁶⁴ The degree to which this claim is true depends on our place in history and in political time. But the broad claim has much to commend it, and the contingent claim is at least true in our own time. West argues that judicial constitutionalism is inherently authoritarian; it demands reference to a positive source of existing law.⁶⁵ This authoritarianism attracts conservatives to constitutionalism because many favor hierarchical social ordering, but it is less compatible with a political vision that wishes to leave open the possibility of change and contestation of existing social ordering. Adjudicative law is structured towards corrective rather than distributive justice precisely for this reason: adjudication requires a point of reference that commands the conceptual agreement of the parties—a rule of recognition, if you will. A politics of redemption rather than restoration cannot easily supply that rule.⁶⁶

⁶² See generally Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713 (2011) (arguing that defensible academic versions of originalism lack public appeal).

⁶³ It is in part for this reason, no doubt, that CAC scrupulously avoids using the term “originalist” in describing its arguments, preferring instead to refer to arguments from “text and history.” See *About Us*, CONSTITUTIONAL ACCOUNTABILITY CENTER, *supra* note 20.

⁶⁴ See generally ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT (1994); Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641 (1990) [hereinafter West, *Progressive and Conservative Constitutionalism*].

⁶⁵ See West, *Progressive and Conservative Constitutionalism*, *supra* note 64, at 714.

⁶⁶ See *id.* at 714–15.

The contingent claim may be confirmed by thinking carefully about the content of the mainstream conservative and progressive political agendas. Conservatives typically wish to restrict abortion rights, gun control, affirmative action programs, campaign finance laws, and federal regulatory authority in matters such as health care and the environment, plus expand executive detention authority and reintroduce religion into public space. Progressives typically wish to preserve and expand each of the rights or laws that conservatives wish to curtail, plus reform the criminal justice system by, for example, abolishing the death penalty and reducing prison populations. Certainly, control of the federal judiciary would be useful to either agenda, but it is far more vital to the conservative one. Much of the progressive program is available through the legislative process, whereas much of the conservative one is either unavailable entirely—for example, restrictions on abortion rights, expansion of school prayer, or increasing executive power—or is politically unpopular, either nationally or in the relevant jurisdictions—for example, abolition of the Affordable Care Act (ACA), limits on campaign finance, and restrictions on urban gun regulation. The judge is invoked when politics has failed.

Part of the reason for this ideological asymmetry is *stare decisis*. Much of the conservative legal agenda is a reaction to the Warren and Burger Courts, and so conservative argument is trained on developing a theory that views previous constitutional decisions as erroneous. The progressive agenda, by contrast, is devoted on one hand to preserving those earlier decisions and on the other to advancing a forward-looking legislative agenda. The progressive posture, generally, is therefore either purely defensive or oriented towards a vision that does not, in the first instance, require constitutional validation.

To this it might be objected that some of the most visible progressive political victories in recent years—limitations on capital punishment for minors,⁶⁷ the mentally retarded,⁶⁸ and those who commit neither murder nor crimes against the state,⁶⁹ as well as additional protections for the rights of gays and lesbians⁷⁰—have occurred in dialogue with doctrinal arguments framed expressly in constitutional terms. But these examples do more to prove my point than to refute it. There were no executions in the United States between 1967 and the Supreme Court's divided 1972 decision in *Furman v. Georgia*, which imposed a nationwide moratorium on capital punishment.⁷¹ The number of executions had declined steadily since the 1930s, when there were, on average, 167 executions *per year*.⁷² But some thirty-five states passed new death penalty laws between *Furman* and *Gregg v. Georgia*, which reinstated capital

⁶⁷ *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

⁶⁸ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

⁶⁹ *Kennedy v. Louisiana*, 554 U.S. 407, 446 (2008).

⁷⁰ *See supra* note 30.

⁷¹ 408 U.S. 238, 239–40 (1972).

⁷² *Id.* at 291 (Brennan, J., concurring).

punishment in 1976.⁷³ There was an average of thirty-six executions per year in the thirty-six years from the decision in *Gregg* to June 2011.⁷⁴ On the question of whether it is or remains sensible for the courts to be the locus for political energy in opposition to capital punishment, proponents of constitutionalizing the issue face a heavy burden of persuasion.

As to gay and lesbian rights, there is a consensus on the left that the Constitution not only tolerates but compels additional rights for gays and lesbians in marriage, adoption, and in other state-controlled institutions of civil society. In that sense, gay and lesbian rights appear to be *sui generis*: there is no other contemporary political issue as to which the left is unified that the Constitution requires, but has not yet been judicially recognized as requiring, a progressive policy position. The list of conservative positions fitting that description is much longer; even conservative arguments in favor of the power of the state often invoke the Tenth Amendment as an affirmative constitutional mandate.⁷⁵ This kind of consensus among partisans is a precondition to building constitutional resonance, and it is *contra* the left's usual *modus operandi*.

Which raises the third difficulty with progressive constitutionalism: constitutionalism cannot validate a political program in the absence of a political program. The Constitution in 2000 project was a top-down exercise in political messaging. Many of its goals were formulated in think tanks and at the grassroots level, but they were centralized and announced without qualification by the Department of Justice. The Constitution in 2020 program is an exercise in political imagination developed from the bottom-up by law professors and public intellectuals. From a liberal perspective this is a virtue of the project, not a vice, but as the organizers recognize, "It is exactly backward to argue that the most important need of progressives is for a method of constitutional interpretation. Academic theories of legal justification do not mobilize public opinion; they do not inspire popular political campaigns to 'take back the Court.'"⁷⁶

The lesson of originalism is not that it takes a theory to beat a theory, but rather that a theory enters the popular domain only in the instrumental service of a political program with which it resonates. Developing and coalescing around a political program is not the comparative advantage of law professors. It is a frequent criticism of American liberalism, no less true today, that its existential aversion towards hierarchy undermines its efforts at political organization. It may take a mobilizing crisis on the order of the Great Depression, the Nazi threat, or the Cold War for progressives to cohere around a forward-looking political program fit to call progressive jurisprudence to service.

⁷³ 428 U.S. 153, 179–80 (1976) (joint opinion).

⁷⁴ *Executions by Year Since 1976*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/executions-year> (last visited Aug. 17, 2011).

⁷⁵ See, e.g., *U.S. Term Limits v. Thornton*, 514 U.S. 779, 847–48 (1995) (Thomas, J., dissenting).

⁷⁶ Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020*, *supra* note 18, at 25, 31.

Fourth, emphasizing constitutionalism, especially as practiced in the courts, carries significant costs for progressives that may outweigh its limited benefits. For one thing, framing constitutional debates in conventionally legal form risks calcifying forms of action and remedies—for example, focusing on justiciable controversies, purely negative rights, and compensation as against injunction—that cohere with the judiciary’s institutional constraints but are likely to obstruct progressive goals. Judges cannot make politics happen, and progressives, more than conservatives, need politics to happen. For another thing, emphasizing constitutionalism devotes resources to a project that many progressives do not believe in. For some, the professional practice of law requires transformation of claims into a foreign, and therefore alienating, language. West writes, “As anyone who has ever been unwillingly caught in the process knows, adjudication is profoundly elitist, hierarchic, and nonparticipatory.”⁷⁷ Others reject altogether the idea that constitutional meaning is determinate, not just in the sense that it does not determine the result in actual cases,⁷⁸ but in the more critical sense that it is socially constructed. Framing a political claim in terms of constitutional requisites does not enable someone holding that view to internalize the argument and to experience it as theirs. In short, for many progressives, freedom finds refuge in a jurisprudence of doubt.

IV. MAKING PROGRESSIVE CONSTITUTIONALISM MATTER

If this sounds like gloomy news for progressive constitutionalism, then I have made myself understood. The ultimate prescription for constructing and promoting a progressive political program, it seems, is not to emphasize the Constitution, or at least to emphasize it much more selectively than conservatives tend to. It may seem as though such a stance at best leaves money on the table and at worst cedes an invaluable asset to one’s political opponents. The problem, though, is that if the arguments in Parts II and III are correct, constitutionalizing political discourse itself feeds into a conservative political agenda. It is not, again, that a fair reading of the Constitution does not support or even compel progressive outcomes, but rather that the language of constitutionalism tends, on balance, to weaken rather than strengthen progressive political arguments.

Consider, for example, the recent debate over the ACA.⁷⁹ Many conservatives emphasized and have continued to emphasize what they have argued is the incompatibility of the individual health insurance mandate with the scope of congressional power under the Commerce Clause. One can imagine a liberal argument for deeming affordable health insurance a constitutionally guaranteed right. An advocate for such a view might place such

⁷⁷ West, *Progressive and Conservative Constitutionalism*, *supra* note 64, at 715.

⁷⁸ See *supra* Part I.

⁷⁹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

an argument into contemporary constitutional form by suggesting that it would deny due process for a judge either to enforce a judgment against a patient whose insurer refused to pay for needed but non-emergency medical care, or to deny a tort claim brought by a patient against a physician or hospital refusing to provide such service on financial grounds. Either argument faces any number of seemingly insurmountable doctrinal obstacles, but so too does the constitutional argument against the individual mandate. Should progressives have relentlessly pursued a constitutional framing in parallel to the conservative argument, largely via ipse dixit, that the individual mandate exceeds Congress's power under the Commerce Clause?

To ask the question is almost to answer it. My strong sense is that introducing the language of constitutionalism into the progressive argument in favor of a national health care plan would have felt desperate and disingenuous in a way in which the conservative argument does not. Invoking the Constitution in support of the progressive argument feels forced and strategic—why not simply make a moral claim? One reason for the progressive-conservative imbalance is that the progressive argument is aspirational whereas the conservative argument is restorative. We have no shared point of reference from which to evaluate an argument in favor of a constitutional right to health insurance, whereas our shared past may easily be marshaled against expansive federal power. Put otherwise, the progressive argument does not (or, rather, does not yet) engage our constitutional instincts precisely because it is *progressive*.

Framing the pro-ACA argument in constitutional terms need not, of course, entail the claim that a judge in a civil dispute should base a decision on the existence of a constitutional right to affordable health care. One might concede that such a decision would go beyond the judicial ken but nonetheless believe that members of Congress should discuss the need for health care reform in a constitutional register. That discussion would then, like the debates over the Louisiana Purchase, the Bank of the United States, or the Civil Rights Act of 1964, become an example of legislative constitutionalism. Legislative constitutionalism has been suggested by some, including West most prominently, as a more productive site for progressive mobilization than the judicial constitutionalism with which most law professors are familiar.⁸⁰

Legislative constitutionalism defies easy definition and recognition, in part for the very reasons why it is not a promising solution to the problems I have identified. Constitutionalism is most useful to a political program that it compels rather than simply permits. There is nothing illogical about the possibility that the Constitution compels certain legislation, but any statute that the Constitution plausibly *requires* is also quite likely to be required by

⁸⁰ See Robin West, *The Missing Jurisprudence of the Legislated Constitution*, in THE CONSTITUTION IN 2020, *supra* note 18, at 79; see also Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1946–47 (2003).

morality, justice, democracy, or common sense. If those are not sufficient to get the legislation passed, a constitutional argument has very little to add. Someone who argues that a morally required piece of legislation is also constitutionally required seems to protest too much.

Arguments from morality, justice, democracy, or common sense are sometimes conflated with constitutional arguments, which is why it can be difficult to know when or how legislative constitutionalism is at play. It may be that legislative constitutionalism is identifiable only in retrospect, when sufficient political reinforcement satisfies some rule of recognition for converting political victory into constitutional mandate. Alas, we do not agree on what that rule of recognition is. Various indicia of constitutionally salient legislative debate might even be incompatible. Do we, for example, see constitutional status in hard-fought bipartisanship or in a partisan political mandate; in dialogue that is responsive to judicial pushback or in raw political muscle that is dismissive of it? I fear, for these reasons, that legislative constitutionalism is more an academic talking point (one, I should add, to which I subscribe) than a strategy for progressive political mobilization.

More promising is a return to the original Progressive strategy of judicial minimalism. Minimalism can mean many things, which I take to be a strength rather than a weakness. A protean disposition is necessary for a methodology to successfully validate a diverse set of political objectives with equilibria in both our past and our future. Like originalism, minimalism has academic pedigree—forms of minimalism are championed by Tushnet,⁸¹ Larry Kramer,⁸² Cass Sunstein,⁸³ and Jeremy Waldron,⁸⁴ among others—and also, independently, grafts on to important cultural values of political agency and anti-elitism. In praising minimalism, I do not mean to suggest that progressives should abandon judicial review but to say that they should discourage judicial innovation. Activism on this view does not inhere in every refusal to defer to ordinary politics but rather entails alteration of the status quo: a brew of *stare decisis* mixed with abdication is easy on the progressive stomach. One does not, of course, build an affirmative political program around minimalism—it is inherently defensive—but that is indeed the point. As I have emphasized, constitutional theory should have little to no role to play in constructing a progressive political program. For the foreseeable future, progressives will be best off if judges generally get out of the way.

That said, I am not a self-hating constitutional theorist. As I mentioned in the Introduction, I do believe that constitutional theory matters, if for no other reason than that I and many of my colleagues write about it and take it

⁸¹ See generally MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (2000).

⁸² See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

⁸³ See generally CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2006).

⁸⁴ See generally JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

seriously. We do so not just to collect a paycheck or to engage in an academic exercise but also because it helps us to make constitutional sense of our own political commitments. Ely, a former Warren clerk, wrote *Democracy and Distrust* because he needed to satisfy himself that some (not all) of the Warren Court's constitutional outcomes were either constitutionally required or justified.⁸⁵ No less than conservatives, progressives are constantly in search of constitutional arguments they can believe in. The deconstructive tradition complicates the search but does not obviate the need for it. Even if progressive constitutional arguments often lack synergies with public constitutional values, that is no reason for constitutional theorists and other legal professionals to stop persuading themselves (and, perhaps, their students) that they are right.

There may also be value in hitting the ground running, so to speak, in the event that the Court again comes under the control of forward-thinking judges inclined to advance progressive ends through Court decisions. Ely's book, published a decade after the Warren Court had completed its major work, came too late. It is unlikely that any justificatory theory, Ely's included, could have prevented the titanic conservative backlash against the Warren Court, but certainly it did not help matters that someone like Bickel, a progressive who never found his justificatory theory, did not receive an iconic response in his lifetime. Work on constitutional theory in the shadow of a conservative Court might prevent history from repeating itself, though I have my doubts.

V. CONCLUSION

The revolution, then, will not be theorized, at least not in advance. Law professors will continue to play the role they have played in recent memory. When political movements capture the Court we will be their rear guard, offering justificatory theories meant to fight off the still dangerous, still calculating elements of the defeated or, in grimmer times, protecting the retreating front lines from mortal attack. Rear-guard actions need not always be last stands, like the Greeks at Thermopylae or the Japanese at Iwo Jima; sometimes, though not often, their work matters intimately to a movement's ultimate success. Academic support in justification of originalism's bona fides, though ex post, has nonetheless been vital to the originalist revival. To cement progressive constitutional outcomes into higher law, we, like academic originalists, will need to find value in leading from behind.

⁸⁵ See Michael C. Dorf, *The Aspirational Constitution*, 77 GEO. WASH. L. REV. 1631, 1664 (2009).