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Democratic Constitutionalism

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Progressives used to conceptualize the Constitution as "living law,"[1] as a "living charter"[2] "capable of growth."[3] Believing that the Constitution was responsive to evolving social needs and to ideals of fundamental justice, they acted in the 1960s and 1970s to end school segregation, to secure fundamental fairness in the criminal justice system, to enforce the separation of church and state, and to recognize gender equality in work and family. By the 1980s, conservatives had united Americans estranged by these changes into a political movement that sought to roll back the rulings of the Warren and Burger Courts. Conservatives accused Congress of overreaching and the Court of legislating from the bench in ways that betrayed the founders' Constitution.

For decades now, progressives have sought to defend their constitutional understandings against this conservative mobilization. Even so, many on the left are intimidated by the charge that a living Constitution expresses political preferences instead of law. They avoid discussing constitutional law as responsive or as a warrant for significant social change, and they instead seek ways of demonstrating their fidelity to a Constitution that was created in the distant past. Some have set out to justify progressive commitments through forms of originalism advocated by the conservative movement, while others would insulate

the remains of Warren and Burger Court case law through theories of "superprecedents" or minimalism.

It is time to reconsider these defensive modes of reasoning. The American people have now elected a president with a mandate for change. In this chapter we ask what progressives might learn from the recent conservative insurgency without internalizing its modes of reasoning or its deep hostility to the achievements of the Warren and Burger Courts.

To explore this question, we draw on the theory of democratic constitutionalism that we have elsewhere elaborated at some length.[4] Our analysis is positive, not normative. The object of these brief reflections is to situate questions about interpretive method that have dominated constitutional theory in the last several decades in a dynamic understanding of our constitutional order. We begin in the first section by observing that important aspects of American constitutional law evolve in response to substantive constitutional visions that the American people have mobilized to realize. We argue that these responsive features of the law help sustain the Constitution's authority in history. We demonstrate in the second section that claims of originalism asserted in the late twentieth century expressed such a substantive and mobilizing constitutional vision, although the official ideology of originalism seeks to deny this historical fact.

Examining how originalism established its authority through the lens of democratic constitutionalism, we conclude in the third section that an essential prerequisite for a constitutional mobilization is the development of a motivating constitutional vision, as well as the confidence to act on it, which in part depends upon the capacity to express that constitutional vision as law. A theory of constitutional interpretation matters, but it is no substitute for a substantive constitutional vision. Progressives are not likely to act with the authority of the recent conservative mobilization until they have the vision and confidence to break from its premises.

The Theory of Democratic Constitutionalism

The Constitution serves many functions. Many of its provisions, like those that specify the minimum ages for representatives and senators, establish basic "rules of the game" for the government of the United States. The meaning of these rules is relatively specific and clear, and on the whole they tend not to be controversial. Other constitutional

provisions, by contrast, express general norms and standards. The enforcement of these provisions can generate intense political dispute. Constitutional provisions like the Due Process Clause, the First Amendment, and the Equal Protection Clause express national ideals; they establish a "realm of meaning"[5] that Robert Cover has memorably called "nomos."[6] Law embodying nomos matters because it expresses a national "identity."[7] Law embodying nomos is, however, controversial because the American people are heterogeneous in their understanding of national identity.

It is for this reason that ongoing struggles about constitutional meaning have shaped the content of our constitutional law.[8] Although these struggles might seem to threaten the Constitution's legitimacy, conflict can actually help to sustain the Constitution's authority when conducted in accordance with the understandings of American constitutional order. If courts were to impose the Constitution's meaning in matters about which citizens care deeply, the American people would soon become alienated and estranged. We would no longer be able to recognize the Constitution as "ours," as the expression of "We, the People." The legitimacy of the Constitution depends on this relation of recognition.

How, then, can our Constitution continue to inspire loyalty and commitment despite persistent disagreement about its content? Why do Americans remain faithful to their Constitution even when their constitutional views do not prevail? We suggest that this is because Americans believe in the possibility of persuading others—and therefore ultimately the Court—to embrace their views about constitutional meaning.

Trust in the responsiveness of the constitutional order plays a crucial role in preserving the Constitution's authority. When this trust exists, citizens can defer to authoritative judgments about the Constitution's meaning that diverge from their own. The maintenance of this trust depends upon citizens having meaningful opportunities to persuade each other to adopt alternative constitutional understandings. Paradoxically, the possibility of disagreement about the Constitution's meaning preserves constitutional authority, because it enables persons of very different convictions to view the Constitution as expressing their most fundamental commitments and to regard the Constitution as foundational law.

We have elsewhere used the term "democratic constitutionalism" to express the paradox that constitutional authority depends on *both* its democratic responsiveness *and* its legitimacy as law.[9] Americans want their Constitution to have the authority of law, and they understand law to be distinct from politics. They understand that the rule of law

is rooted in professional practices that are distinct from popular politics and that will often require divergences between the Court's judgments about the Constitution and their own. Because Americans view the Court's interpretation of the Constitution as law, they will defer to judicial claims about the national nomos with which they disagree so long as they have some outlet for objection and the possibility of one day influencing the shape of the law. But if the Court's interpretation of the Constitution seems wholly unresponsive, the American people will in time come to regard it as illegitimate and oppressive, and they will act to repudiate it as they did during the New Deal.

How can the Constitution function as our fundamental law, as the limit and foundation of politics, and yet remain democratically responsive? The most familiar and uncontroversial mechanism for translating political values into constitutional law is the procedure for amending the Constitution contained in Article V. Article V amendments, however, are so very rare that they cannot provide an effective avenue for connecting constitutional law to popular commitments. Other mechanisms are needed to maintain trust in the responsiveness of constitutional law, especially in situations of aggravated dispute.

One such mechanism, well recognized by historians and political scientists, is the appointment of Supreme Court justices. Those opposed to Warren Court precedents, for example, were attracted to President Ronald Reagan's pledge to halt the slide toward "the radical egalitarianism and expansive civil libertarianism of the Warren Court."[10] They threw their support behind Reagan because he pledged to nominate justices who would adopt a "philosophy of judicial restraint."[11] It is well documented that the Reagan Justice Department self-consciously and successfully used judicial appointments to alter existing practices of constitutional interpretation and so to change constitutional meaning to bring it more into line with the beliefs of the supporters of the Reagan revolution.[12]

Presidential politics and Supreme Court nominations, however, are blunt and infrequent methods of affecting the content of constitutional law. A more broad-based and continuous pathway of change is the practice of norm contestation, which seeks to transform the values that underlie judicial interpretations of the Constitution. The Reagan administration, for example, used litigation and presidential rhetoric to challenge and discredit the basic values that had generated Warren Court precedents.[13]

Second-wave feminism offers a rich example of successful norm contestation. As late as 1970, it was thought that distinctions based upon sex

were natural and that government could reasonably enforce traditional sex roles. The Equal Protection Clause was accordingly interpreted to tolerate sex discrimination. But as movements joined in struggle over the legitimacy of these traditional understandings, common sense began to evolve. Discrimination based on sex came to seem unreasonable. Because judges interpret constitutional text to express their implicit understanding of the world, the Court began to read the Fourteenth Amendment to require elevated scrutiny for classifications based on sex. The Court altered its understanding of the Equal Protection Clause even though the Equal Rights Amendment, which proposed to use the procedures of Article V to amend the Constitution to prohibit discrimination based on sex, was never ratified.[14]

Originalism from the Standpoint of Democratic Constitutionalism

There are many ways in which constitutional meaning is rendered responsive to changing social values. Social values shape constitutional interpretation, even the interpretation of those who profess to read the Constitution in ways that claim to separate law from politics. The conservative originalism associated with Justices Antonin Scalia and Clarence Thomas is a good example.[15]

This form of originalism was first systematically articulated as a constitutional theory in the 1970s by prominent academics like Raoul Berger. Berger argued that the *only* legitimate way to interpret the Constitution was to remain faithful to its text and original understanding. The conservative movement employed this claim of methodological exclusivity to attack the liberal decisions and precedents of the Warren Court era. Because Reagan era conservatives could not reason from precedent as Southerners challenging *Brown* had done a generation earlier, they instead sought to discredit liberal precedents by arguing that text and original meaning were the sole legitimate pathways of constitutional interpretation. They insisted that the primary purpose of the Constitution was to *bind* judicial decision making to meanings created in discrete and limited moments of constitutional lawmaking, like the 1789 founding or the 1868 ratification of the Fourteenth Amendment.

The New Right claimed that the Supreme Court had enforced its own liberal preferences rather than the Constitution and that it was necessary to appoint judges who would reverse Warren and Burger Court decisions in order to extricate constitutional law from the contamination

of politics. Conservatives sought to justify constitutional change as fidelity to the rule of law. Yet liberal critics have repeatedly shown that originalism was inconsistently applied in practice and so provided a thinly disguised method of infusing constitutional law with conservative political values. For example, Justices Scalia and Thomas are each fervently committed to a color-blind Constitution, even though historians agree that the text and original understanding of the Fourteenth Amendment permitted government to offer race-based assistance to newly freed slaves.[16] Neither Thomas nor Scalia would permit the federal government to segregate schools in the District of Columbia, even though the only applicable constitutional provision is the Due Process Clause of the Fifth Amendment, which was ratified at a time when the Constitution contemplated slavery.[17] Selective, inconsistent, and issue-specific applications of originalism are easy to identify and have been repeatedly emphasized by originalism's liberal critics.[18]

If the strength of originalism actually lay in its objective separation of law from politics, one would expect such reiterated and withering criticism to have had some effect. But it has not. Democratic constitutionalism suggests that the power of originalism in fact lies elsewhere, in the way it aligns constitutional vision and constitutional law. If one examines how the theory of originalism has been deployed outside the academy to mobilize support among the political constituencies responsible for electing conservative presidents like Reagan, George H. W. Bush, and George W. Bush, it becomes clear that originalism's appeal grows out of the conservative constitutional ideals it expresses.

Reagan conservatives denounced Warren and Burger Court precedents as threatening traditional American ways of life, and they used the theory of originalism to signify their intention to appoint a Court that would be faithful to the founders' Constitution and "restore" traditional understandings of religion, family, private property, and race to American constitutional law. What made originalism so compelling was the way its claims about interpretive method conveyed a motivating constitutional vision and the authority to assert that vision as law. The association of the originalist interpretive method with a particular substantive vision was not an accidental but an essential feature of its popular appeal.[19]

Originalism was not successful because of its objectivity or its certainty, but because, as we have demonstrated in detail elsewhere, it served as a "living constitutionalism" for the right.[20] That is why it has been useless for liberals to attack the inconsistencies of originalism. What has powered originalism all along has been the attraction of its

substantive constitutional vision, its nomos. The constitutional vision conservatives embrace as "original" expresses fundamental ideals that conservatives believe should define America. Conservative originalists do not merely believe that the Constitution is law; they believe it is *good* law. The genius of originalism is that it gave conservatives confidence to claim that their ideals were law that entitled them to overthrow Warren and Burger Court precedents and to impose conservative constitutional values on Americans who disagreed with them.

Implications for Progressive Constitutionalism

The saga of originalism offers important lessons for progressives. First, Americans mobilize because they care about constitutional ideals. 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." Academic arguments may ultimately help transmute practical aspirations and grievances into legal form, but constitutional mobilization begins far outside the domain of jurisprudence. Just as the New Right advanced a constitutional nomos rooted in images of family, religion, and social control, so progressives need to articulate a convincing vision that will express their own distinctive commitments.

Second, progressives must be able to express these commitments in the language of law. The capacity to assert constitutional vision as constitutional law creates the uniquely American kind of authority that empowers citizens to challenge the judgments of government officials and to insist that others in the community accept or accommodate their constitutional views. It is striking how stories about the founding gave conservatives confidence to assert that their ideals represented the law of the Constitution, which conservatives were prepared to impose on the entire nation.

Third, progressives can make claims on the founding without elevating the founding over other forms of constitutional authority in the ways that conservatives have. They can instead select from among the traditional modalities of interpretation those which are the best suited to give authoritative legal expression to their constitutional understandings—just as conservatives have. Throughout our history Americans have made claims about the Constitution's meaning in diverse ways. They have appealed to legal precedent, historical experience, constitutional

structure, normative traditions, constitutional purposes, and fundamental legal and ethical principles. Constitutional debate frequently involves struggle for control over the collective recollection of crucial and traumatic events like the Civil War or the New Deal. In debates over the reach of Congress's Commerce Clause power, for example, progressives and conservatives argue about the meaning of the Great Depression, not the founding.

It would be a great and ironic mistake for progressives to credit originalism's claim to methodological exclusivity, for even the foremost exponents of originalism on the Court appeal to many modalities of constitutional argument; they invoke the post-ratification history of the Constitution with as much confidence as they appeal to its ratification history. In *Parents Involved in Community Schools v. Seattle School District #1*,[21] for example, liberals and conservatives on the Court divided on the question of whether school districts could engage in voluntary school integration. Neither liberal nor conservative justices bothered to discuss the original understanding of the Fourteenth Amendment; debate instead centered on the meaning and legacy of *Brown*.[22] Contrast *Parents Involved* to the Court's decision last term in *District of Columbia v. Heller*,[23] where the Court split along nearly identical lines in a case concerning the right to carry firearms. In *Heller* both liberal and conservative justices debated the original meaning of the text of the Second Amendment. Reading *Heller* alongside of *Parents Involved* demonstrates that sometimes constitutional law is minted in the coin of original meaning, but sometimes it plainly is not. Even those justices who insist that originalism is the only appropriate way to interpret the Constitution will instead appeal to post-ratification history if that history better conveys their constitutional vision. The question for progressives is how their distinctive constitutional vision may best be transmuted into claims of constitutional law. This in turn depends on the substance of that vision. It is not a question that can be answered in the abstract.

Fourth, it would also be a mistake for progressives to embrace minimalism, a theory that invites judges to construe the Constitution in narrow and shallow ways. Minimalism is aimed at judicial interpreters and counsels against change. It seems unlikely to mobilize progressives to "take back the Court" or to orient the judiciary to break with the conservative constitutional premises that have been incorporated into doctrine in the last several decades. Minimalism cannot endow current generations of Americans with the confidence or role authority to assert their own understanding of the Constitution's meaning. Minimalism may offer *stare decisis* justifications for preserving achievements of the

Warren and Burger Courts, but it could never produce decisions like those challenging race and sex discrimination in *Brown* and *Frontiero*.[24] Had citizens and judges heeded minimalism's counsel in the past, there would have been no *Brown* or *Frontiero*. To adopt minimalist premises now is to foreswear such decisions in the coming decades—a problematic constraint for those who believe the nation has not yet fully honored its constitutional commitments.

Embrace of a general interpretive method cannot substitute for a substantive constitutional vision, and in some circumstances might even encumber its expression. The recent conservative mobilization teaches that authority flows to those who can relate the Constitution's fundamental commitments to the beliefs and concerns that animate the American people and who can identify the modes of argument that give this vision its most powerful legal form.

Notes

1. Louis D. Brandeis, *The Living Law*, 10 Ill. L. Rev. 461 (1916).

2. *Michael H. v. Gerald D.*, 491 U.S. 110, 141 (1989) (Brennan, J., dissenting).

3. Brandeis Papers (Harvard University) (draft of Brandeis's dissent in *United States v. Moreland*, 258 U.S. 433 (1922)).

4. Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 Harv. Civil-Rights Civil-Lib. L. Rev. 373 (2007).

5. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4, 28 (1983).

6. *Id*. at 4 (emphasis omitted).

7. *Id*. at 28.

8. Any historian or political scientist knows that our "[c]onstitutional law is historically conditioned and politically shaped." H. Jefferson Powell, *A Community Built on Words: The Constitution in History and Politics* 6 (2002).

9. Post & Siegel, *supra* note.

10. Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. Tex. L. Rev. 455, 464 (1986).

11. Ronald Reagan, *Statement on Senate Confirmation of Sandra Day O'Connor as an Associate Justice of the Supreme Court of the United States*, 1981 Pub. Papers 819 (Sept. 21, 1981), available at http://www.presidency.ucsb.edu/ws/index.php?pid=44281.

12. *See* Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 Ind. L.J. 363 (2003).

13. *See* Office of Legal Pol'y, U.S. Dep't of Justice, Guidelines on Constitutional Litigation 3 (Feb. 19, 1988), available at http://islandia.law.yale.edu/acs/conference/meese-memos/guidelines.pdf; Edwin Meese III, *A Return to the Founders*, Nat'l L.J., June 28, 2004, at 22.

14. *See* Reva B. Siegel, 2005–06 Brennan Center Symposium Lecture, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 Cal. L. Rev. 1323 (2006).

15. The argument of this section is elaborated in greater depth in Robert Post & Reva B. Siegel, *Originalism as a Political Practice: The Right's Living Constitutionalism*, 75 Fordham L. Rev. 545 (2006); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 Harv. L. Rev. 191 (2008).

16. Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753, 754 (1985); Jed Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427, 428–30 (1997).

17. To get some idea of how distant originalism is from any actual historical understanding of the Constitution, one need only contemplate Justice Thomas's remarkable affirmation, "I take my stand firmly with Frederick Douglass, who defied Americans to find a single pro-slavery clause" in the Constitution. Clarence Thomas, *The Higher Law Background of the Privileges or Immuni*ties Clause *of the Fourteenth Amendment*, 12 Harv. J.L. & Pub. Pol'y 63, 64 (1989).

18. Mark Graber, *Clarence Thomas and the Perils of Amateur History*, in *Rehnquist Justice: Understanding the Court Dynamic* 70–71 (Earl M. Maltz, ed., 2003).

19. For a political and social history of originalism in the late twentieth century, see Siegel, *supra* note 15 (tracing the spread of originalist claims about the Second Amendment).

20. Post & Siegel, *supra* note 15.

21. *Parents Involved in Community Schools v. Seattle School District #1*, 127 S.Ct. 2738 (2007).

22. *Brown v. Board of Education*, 347 U.S. 483 (1954).

23. *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008).

24. *Frontiero v. Richardson*, 411 U.S. 677 (1973).