

# Lessons from the Right: Progressive Constitutionalism for the Twenty-first Century

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During the closing years of the twentieth century and the beginning of the twenty-first, ideological conservatives made significant progress in their efforts to transform constitutional meaning and the dominant sources and methods of constitutional interpretation. They accomplished substantial rightward shifts in the makeup of the federal courts and the constitutional doctrine those courts announced, as well as in the constitutional views and understandings held outside the courts—by presidents, Congress, and the American people.

For twenty-first-century progressives working to further their own constitutional vision, success will depend on the effective development and promotion of substantive views. Success will also require attention to perceptions of the underlying legitimacy of these progressive efforts. Those on the ideological right long have sought to undermine progressive constitutional interpretations not only on their merits, but as illegitimate attempts to “rewrite” the Constitution—even as the Right intentionally crafted and promoted its own agenda for radical constitutional change. After years of inadequate responses to these concerted attacks, this conservative message resonates with many Americans, even with some who strongly disagree with the Right’s substantive agenda.

How should we as a nation go about the essential work of determining constitutional meaning? Constitutional scholars have long wrestled with this question, and much good thinking and impressive academic writing already supports progressive interpretive principles. Yet the Right continues to gain ground. Progressives must articulate even more clearly and persuasively their own theories of constitutional interpretation and change, especially in ways that reach beyond academia to the public arena of debate and policy. The Right’s recent rise, through its widely recognized success in shaping public debate and, less appreciated, its development of legal theories, interpretive principles, and a detailed agenda for change, offers some useful guidance.

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## THE RIGHT'S RHETORIC

Judges should respect the rule of law. They should rule according to what the law says, not what they would prefer it to be. They should not legislate from the bench or impose their own social or political agenda. They should enforce the Constitution as written, including limits on federal power. They should not be judicial activists. Presidents and senators should nominate and confirm judges based on their competence and respect for the rule of law, not personal political preferences.

Such statements permeate the publications, speeches, and websites of the Federalist Society, the Heritage Foundation, the Republican Party, and other ideologically conservative organizations (to which I will refer collectively as “the Right,” while noting the inherent limitations of such labels).<sup>1</sup> Viewed outside the politically charged context of judicial confirmation battles and culture wars, these familiar statements seem to outline a largely uncontroversial view of the role of the federal judiciary and the rule of law in our constitutional system. Yet they have become the Right’s mantra in a battle so hot that it evoked Republican threats of a “nuclear option” to eliminate Senate filibusters of judicial nominees,<sup>2</sup> as well as an actual mini-filibuster by Republicans to protest the Democrats’ filibusters.<sup>3</sup>

Through decades of remarkable discipline and repetition, conservatives have imbued these carefully chosen, innocuous-sounding phrases with deeply contested and radical ideological content. When Presidents Ronald Reagan, George H. W. Bush, and George W. Bush decried judicial activists who legislate from the bench, they were not criticizing all vigorous judicial review of legislative action or advocating “conservatism” in the sense of strong deference to legislatures across issues. They sought to condemn judges who, for example, protect women’s right to reproductive liberty and privacy, but not judges who invalidate government affirmative action programs that promote diversity and reduce racial inequalities.<sup>4</sup> According to this brand of conservatism, federal laws that authorize victims of age or disability discrimination to sue state employers for money damages are beyond Congress’s authority,<sup>5</sup> but federal laws that benefit business by preempting state corporate regulation are not. Strict adherence

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<sup>1</sup> A striking compilation of video clips of President George W. Bush and other prominent government officials making such statements can be found in the documentary QUIET REVOLUTION (New View Films 2006) (commissioned and distributed by The Alliance for Justice), available at <http://www.afj.org/quietrevolution.html>.

<sup>2</sup> See Helen Dewar & Mike Allen, *GOP May Target Use of Filibuster: Senate Democrats Want To Retain the Right to Block Judicial Nominees*, WASH. POST, Dec. 13, 2004, at A1.

<sup>3</sup> 149 CONG. REC. S14528 (daily ed. Nov. 12, 2003) (statement of Sen. Frist).

<sup>4</sup> For one comprehensive version of the Right’s agenda, citing numerous cases both “consistent” and “inconsistent” with that agenda, see sources cited in *infra* notes 12, 16, & 21.

<sup>5</sup> See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (invalidating provision of the Americans with Disabilities Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (invalidating provision of Age Discrimination in Employment Act).

to the text precludes protecting reproductive liberty, but not the Boy Scouts' "right of association" to expel a scoutmaster because he was gay<sup>6</sup>—despite the absence of any mention of such a right in the constitutional text. In short, the Right's rhetoric seeks to disguise a far-reaching agenda for constitutional change that selectively supports judicial restraint and seeks to invalidate laws and precedents inconsistent with the Right's substantive goals. Republican-appointed judges, in fact, ended the twentieth century by invalidating congressional statutes at an extraordinary rate.<sup>7</sup>

Notwithstanding pervasive contradictions behind its rhetoric, the Right has achieved considerable success in shaping the terms of the public debate regarding constitutional interpretation and judicial appointments. Conservative senators routinely ask judicial nominees, "Will you interpret the law as written rather than impose your own values and legislate from the bench?" and nominees from across the political spectrum respond, "Yes." Ideological conservatives hold themselves out as faithful and strict constructionists and argue for their chosen interpretive methodologies—principally "textualism" and "originalism"—as a principled search for constitutional "truth" unrelated to particular substantive outcomes. They depict those who hold different legal views—progressives, liberals, moderates, indeed all those in the mainstream of legal thought—as unprincipled judicial activists, inappropriately driven to reach outcomes that coincide with "policy" preferences. Conservatives effectively shift focus away from particular substantive issues on which progressives often enjoy popular support to more abstract questions of theory, such as calls for "judicial restraint," "originalism," and "federalism," which conservatives apply selectively to reach desired outcomes. They then seek to reassure the public that rights might continue to be protected elsewhere—for example, that although constitutional protection for reproductive or sexual liberty conflicts with the role of the courts, state sovereignty, and the original intent of the constitutional framers, elected legislators remain free to reject "silly"<sup>8</sup> or undesirable laws that criminalize the use of contraception or abortion or sexual intimacy between consenting adults of the same sex.<sup>9</sup>

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<sup>6</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

<sup>7</sup> See Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 80–81 (2001) (noting that the Rehnquist Court held that Congress exceeded its constitutional authority in twenty-nine cases between 1994 and 2001); Paul Gewirtz & Chad Golder, *So Who Are the Activists?*, N.Y. TIMES, July 6, 2005, at A19 ("Until 1991, the court struck down an average of one Congressional statute every two years."); *id.* (analyzing all cases between 1994 and 2005 and concluding that "those justices often considered more 'liberal' . . . vote least frequently to overturn Congressional statutes, while those often labeled 'conservative' vote more frequently to do so").

<sup>8</sup> *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting)).

<sup>9</sup> See, e.g., *id.* at 603–04 (Scalia, J., dissenting); *Stenberg v. Carhart*, 530 U.S. 914, 956 (2000) (Scalia, J., dissenting); *id.* at 980 (Thomas, J., dissenting); *Roe v. Wade*, 410 U.S. 113, 171 (1973) (Rehnquist, J., dissenting).

## LESSONS FROM THE RIGHT

How should progressives respond to the Right's rhetoric? Effective responses to date have included counter-charges of judicial activism against the Right and especially against a federal judiciary that, beginning with President Reagan's election in 1980 and continuing into the twenty-first century, has adopted significant pieces of the Right's agenda as judicially enforced constitutional doctrine. Journalists, public commentators, and legal academics have written of the inconsistency of the Right's judicial restraint and interpretive practices.<sup>10</sup> Progressives should continue to spotlight the Right's hypocrisy and insidious rhetoric designed to mislead and obfuscate while resisting temptations to commit similar sins in their own messages.<sup>11</sup>

Far more attention, though, is needed to nurture the affirmative progressive vision and to position progressives as the true guardians of an independent federal judiciary that appropriately respects legislatures and at the same time safeguards constitutional rights and the constitutional structure of government. Meaningful progressive constitutionalism requires coherent, compelling, and accessible substantive ideas and core principles, including theories of constitutional interpretation and change. This will not come as news to progressive legal academics, who have continued, through the decades of the Right's rise, to produce edifying works. Law journals and libraries are filled with the building blocks of an effective progressive constitutional agenda. The courts, too, continue to adhere to interpretive methodologies (and sometimes even reach substantive results) that are more accurately described as ideologically progressive than as ideologically conservative. Nonetheless, the Right has unquestionably made significant gains, and its momentum continues: in the courts and legal practice, in law schools and legal scholarship, in politics and government, and in the court of public opinion.

With the important caveat that what has worked in the past may not be suited for other times, circumstances, and ideologies, study of the Right can help guide progressives working to shape tomorrow's legal and political culture. Particularly worthy of study is the conservative icon President Ronald Reagan and his administration's extraordinary efforts to effect constitutional change: Reagan combined a substantive constitutional vision with the political power necessary to transform constitutional

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<sup>10</sup> See, e.g., William P. Marshall, *Response: The Empty Promise of Compassionate Conservatism: A Reply to Judge Wilkinson*, 90 VA. L. REV. 355 (2004) (arguing that claims that conservative jurisprudence is compassionate are false and hypocritical); William P. Marshall, *Conservatives and the Seven Sins of Judicial Activism*, 73 U. COLO. L. REV. 1217 (2002) (arguing that conservative jurisprudence is activist); cf. sources cited *infra* note 62.

<sup>11</sup> See Dawn E. Johnsen, *Should Ideology Matter in Selecting Federal Judges?: Ground Rules for the Debate*, 26 CARDOZO L. REV. 463 (2005) (recommending five ground rules to govern the debate over appropriate criteria for judicial selection).

doctrine. Highlighted below are five lessons progressives should take from the Right's successes. Implicit throughout is the reality that genuine progress toward realizing even the most brilliant, compelling, and detailed constitutional vision requires political power. Progressives must elect representatives committed to progressive constitutional principles and receptive to using their power to implement them. Some of the lessons below are most immediately relevant to different segments of the progressive community: judges, policymakers, lawyers, and academics. Ultimately, however, all of the lessons are directed to the entire progressive community and beyond, because success in promoting constitutional change will depend on the wider accessibility and political viability of these ideas.

LESSON ONE: DEVELOP A CONSTITUTIONAL VISION AND APPOINT JUDGES WHO SHARE THAT VISION

[I]t is hoped that this report will allow Members of Congress of both parties, pursuant to their constitutional responsibilities, to assess judicial nominees in the most thorough and informed manner possible. There are few factors that are more critical to determining the course of the Nation, and yet more often overlooked, than the values and philosophies of the men and women who populate the third co-equal branch of the national government—the federal judiciary.<sup>12</sup>

The Right's public rhetoric since President Reagan's election advocates an ideal of judicial decision-making wholly divorced from judges' own views. In Supreme Court confirmation hearings, conservative senators have instructed conservative nominees to refuse to answer questions about their legal views, suggesting most recently in now-Justice Samuel Alito's hearings that to answer would be not only inappropriate but perhaps unethical.<sup>13</sup> On this score, the Right's hypocrisy is particularly apparent. Elsewhere, conservatives' actions and more private positions acknowledge what they cannot seriously contest: a judicial nominee's legal views are deeply relevant to how he or she would fulfill the responsibilities of that lifetime appointment. Beginning with Reagan, conservatives have acted on this essential fact with far greater consistency and efficacy than progressives. Indeed, the Right's paramount lesson for progressives

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<sup>12</sup> OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, *THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION*, at v (1988) [hereinafter *CONSTITUTION IN 2000*].

<sup>13</sup> See, e.g., *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the Sen. Comm. on the Judiciary*, 109th Cong. 8–9, 20–21 (2006) (opening statements of Sens. Hatch & Kyl) (citing canons of judicial ethics and urging Alito not to answer questions that could reveal how he would vote on cases that might come before the Court).

comes in two related parts: (1) develop a detailed agenda for constitutional (and other legal) change, and (2) appoint judges who are likely to implement that agenda.

The above quotation bears repeating, for there the Reagan administration exhorted the Senate “to assess judicial nominees in the most thorough and informed manner possible,” because “the values and philosophies” of federal judges are “critical to determining the course of the Nation.”<sup>14</sup> This statement appears in the introduction to a 199-page report on *The Constitution in 2000*. Reagan’s Department of Justice, under the direction of Attorney General Edwin Meese, issued this 1988 report for the express purpose of persuading all those involved in the judicial selection process—the public and the press, as well as the President and Senate—that judicial nominees’ substantive views matter tremendously to our Nation’s future.

*The Constitution in 2000*, along with several other lengthy reports in the Reagan/Meese series, also laid out the substance of the legal interpretations the Reagan administration wanted judges to adopt. The reports detailed goals for changes in constitutional and other legal doctrine on the great issues of the day: congressional power, federalism, racial and gender equality, abortion, affirmative action, and access to courts. They presented these views within the framework of originalism—the drive to limit constitutional meaning to the specific meaning the Framers had in mind at the time of drafting and ratification. Many of the positions advocated, including the call for originalism, fell far outside of what was then the doctrinal mainstream. The titles of some other reports in the series, all of which were little known at the time, reveal their aims: *Original Meaning Jurisprudence: A Sourcebook* (1987), *Redefining Discrimination: Disparate Impact and the Institutionalization of Affirmative Action* (1987), *Wrong Turns on the Road to Judicial Activism* (1987), and *Justice Without Law: A Reconsideration of the ‘Broad Equitable Powers’ of the Federal Courts* (1988).<sup>15</sup>

Another Reagan/Meese report, *Guidelines on Constitutional Litigation*, directed all federal government lawyers to urge courts to adopt administration-approved constitutional interpretations.<sup>16</sup> In many areas, Supreme Court precedent flatly contradicted the endorsed position, and the report directed government lawyers to seek the overruling of such Court cases.<sup>17</sup> Separate sections at the conclusion of each chapter listed the Court

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<sup>14</sup> CONSTITUTION IN 2000, *supra* note 12, at v.

<sup>15</sup> See Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363 (2003) (discussing the Reagan/Meese reports and in particular their agenda with regard to congressional power and federalism); Dawn E. Johnsen, *Tipping the Scale*, WASH. MONTHLY, July-Aug. 2002, at 15 (discussing Reagan/Meese reports and judicial appointments).

<sup>16</sup> OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION (1988) [hereinafter GUIDELINES].

<sup>17</sup> *Id.* at 3 (acknowledging government attorneys’ difficulty in arguing contrary to Su-

decisions the Reagan administration had targeted as “inconsistent” with the Reagan vision. For example, with regard to the right to personal privacy and autonomy, government lawyers were to seek to overturn not only *Roe v. Wade*,<sup>18</sup> but the entire line of cases protecting the fundamental right to privacy, back to the right to use contraception in *Griswold v. Connecticut*<sup>19</sup> and the right not to be forcibly sterilized in *Skinner v. Oklahoma*.<sup>20</sup> The Reagan administration also sought to diminish Congress’s power to protect rights and other vital interests, such as the environment, by transforming Supreme Court doctrine on major sources of congressional power: the Commerce Clause, the Spending Clause, and Section Five of the Fourteenth Amendment.<sup>21</sup>

Reagan’s efforts to use judicial appointments to change constitutional doctrine were hardly unprecedented. Presidents before and since Reagan, from across the political spectrum, have signaled the views they sought in federal judges. Most famously, President Franklin D. Roosevelt selected Justices who would halt the Court’s repeated invalidation of his policies.<sup>22</sup> More recently, President George W. Bush identified Justices Antonin Scalia and Clarence Thomas as his model Justices for future appointments.<sup>23</sup> Ironically, Reagan-appointed Justice Scalia provided perhaps the best rebuttal to Republican Senators who have argued that judicial nominees risk ethical conflicts if they reveal their views. In the 2002 case *Republican Party of Minnesota v. White*, the state Republican Party successfully challenged a Minnesota canon of judicial conduct that prohibited candidates for judicial office from announcing their views on disputed legal or political issues.<sup>24</sup> Justice Scalia, writing for the Court, explained that this prohibition reached speech “‘at the core of our First Amendment freedoms’—speech about the qualifications of candidates for

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preme Court precedent before lower courts and explaining their “obligation” in such cases “to educate lower courts . . . on the original meaning of the relevant constitutional or statutory provision[s]” and “prevent the courts from compounding existing errors”).

<sup>18</sup> 410 U.S. 113 (1973).

<sup>19</sup> 381 U.S. 479 (1965).

<sup>20</sup> 316 U.S. 535 (1942). See GUIDELINES, *supra* note 16, at 8–9, 82–83 (listing these opinions as inconsistent with the administration’s views).

<sup>21</sup> Among the Supreme Court opinions “inconsistent” with the Reagan goal of diminished congressional power, the GUIDELINES listed *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *City of Rome v. United States*, 446 U.S. 156 (1980); *Perez v. United States*, 402 U.S. 146 (1971); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Pike v. Bruce Church*, 397 U.S. 137 (1970); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); and *Wickard v. Filburn*, 317 U.S. 111 (1942). See GUIDELINES, *supra* note 16, at 46–59 (citing preceding cases); OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK 58–65 (1987) [hereinafter ORIGINAL MEANING SOURCEBOOK] (citing cases that illustrate “non-interpretivist jurisprudence” and “failures . . . to identify and apply the original meaning of the Constitution”).

<sup>22</sup> See Johnsen, *Ronald Reagan and the Rehnquist Court*, *supra* note 15, at 370–77, and sources cited therein.

<sup>23</sup> See Neil A. Lewis & David Johnston, *Bush Would Sever Law Group’s Role in Screening Judges*, N.Y. TIMES, Mar. 17, 2001, at A1.

<sup>24</sup> 536 U.S. 765 (2002).

public office”<sup>25</sup> and rejected Minnesota’s argument that the canon promoted judicial impartiality:

[W]hen a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. *Any* party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly . . . . “Proof that a Justice’s mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.”<sup>26</sup>

That judges decide cases in part based on their preexisting legal views and that presidents and senators may consider such views when selecting judges should be beyond dispute. Professor Laurence H. Tribe made the definitive case back in 1985 in a broadly accessible book, *God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History*.<sup>27</sup> Perhaps repetition of that same message, but using the words of the Reagan administration (and later, Reagan’s appointee Justice Scalia), can help rebut the Right’s cynical attacks when progressives seek to consider the legal views of judicial nominees: “[F]ew factors . . . are more critical to determining the course of the Nation . . . than the values and philosophies of the men and women who populate . . . the federal judiciary.”<sup>28</sup>

Although the practice of considering prospective judges’ views is far from a recent development, the Reagan/Meese reports stand out as unprecedented in their combination of great specificity, comprehensiveness, and sheer ambition. They represent the culmination of years of work by conservative organizations and thinkers. The reports frequently cite to the work

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<sup>25</sup> *Id.* at 774 (quoting Republican Party of Minnesota v. Kelly, 247 F.3d 854, 861, 863 (8th Cir. 2001)).

<sup>26</sup> *Id.* at 776–78 (quoting Laird v. Tatum, 409 U.S. 824, 835 (1972) (mem. of Rehnquist, J.) (emphasis in original) (citation omitted)).

<sup>27</sup> LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* (1985). Professor Tribe’s book is particularly notable for its accessibility to an audience far broader than the readers of law journals. The progressive constitutional agenda must aim at this broader audience, and constitutional scholars must be part of that effort. *See also* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001) (providing an accessible account of a theory of “partisan entrenchment” by which the American people influence constitutional meaning through their choice of presidents and senators, who in turn choose federal judges). The academic literature contains numerous valuable works that progressives could cite for additional support. *See, e.g.*, CHARLES L. BLACK, JR., *DECISION ACCORDING TO LAW* 26 (1981) (discussing the concept of “decision according to law” and stating “the judge who decides the cases under law *cannot avoid* making—and acting upon—judgments of justice, morality, expediency, fitness”).

<sup>28</sup> CONSTITUTION IN 2000, *supra* note 12, at v.

of conservative academics, such as Robert Bork, and to the dissenting and concurring opinions of Justices who had urged the majority to adopt positions more to the liking of the Reagan administration, such as then-Justice William Rehnquist on federalism and limits on congressional power.<sup>29</sup>

Reagan understood well the value of having a comprehensive constitutional agenda and of intentionally selecting judicial nominees who shared that vision. Through his appointment of judges who continue to reshape constitutional doctrine long after he left office, Reagan proved that the views and philosophies of judges matter greatly. Progressives should appreciate that the Right's successes flow not only from the smoke and mirrors of masterful rhetoric, but also from decades of hard and serious thinking and the strategic use of the appointment power.

#### LESSON TWO: CONSTITUTIONAL INTERPRETATION IS NOT ONLY FOR COURTS

Once we understand the distinction between constitutional law and the Constitution, once we see that constitutional decisions need not be seen as the last words in constitutional construction . . . we can grasp a correlative point: constitutional interpretation is not the business of the Court only, but also properly the business of all branches of government.<sup>30</sup>

While his Department of Justice was hard at work privately drafting the Reagan administration's detailed legal agenda—including its many disagreements with the Court's interpretations—Attorney General Meese became embroiled in controversy when he publicly defended the legitimacy of such efforts in non-judicial constitutional interpretation. Then, as now, public debate regarding constitutional interpretation centered overwhelmingly on the role of the courts and the appropriate interpretive stance of federal judges. Meese challenged that focus. He stressed the difference between the Constitution, which is the supreme law of the land, and constitutional law, which is how the courts interpret the Constitution. To underscore that the courts sometimes make bad decisions that do not adhere to the Constitution as best interpreted, he cited the Court's infamous decisions in *Dred Scott* and *Plessy v. Ferguson*.<sup>31</sup>

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<sup>29</sup> See GUIDELINES, *supra* note 16, at 47–49, 54–55; see also OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, BIBLIOGRAPHY OF ORIGINAL MEANING OF THE UNITED STATES CONSTITUTION (1988) (listing books, articles, and judicial opinions that promote and adhere to original meaning); ORIGINAL MEANING SOURCEBOOK, *supra* note 21, at 50–57, 73–76 (same).

<sup>30</sup> Edwin Meese III, Attorney General, The Law of the Constitution, Address at Tulane University, in 61 TUL. L. REV. 979, 985 (1987); see also Edwin Meese III, *The Tulane Speech: What I Meant*, 61 TUL. L. REV. 1003 (1987).

<sup>31</sup> Meese, The Law of the Constitution, *supra* note 30, at 983–85 (discussing *Dred*

More controversially, Meese emphasized the related point that constitutional interpretation is not the exclusive domain of the courts, but also “properly the business of all branches of government.”<sup>32</sup> Meese’s position sparked great consternation, no doubt exacerbated by grave concerns about the substance of Reagan’s constitutional agenda. Meese’s specific goal was to establish Reagan’s authority to disagree with the Court—to adopt and advance constitutional and other legal positions flatly at odds with the Court’s interpretations, like those in the detailed reports being written, out of the public eye, by the Reagan/Meese Department of Justice.

In the years since Meese’s speech, legal scholarship on the Constitution outside the courts has grown extraordinarily vibrant and productive among scholars across the ideological spectrum.<sup>33</sup> The legal culture and practice, however, have kept pace with the academic literature and remain overly court-centered. Progressives historically have used the courts to protect constitutional rights and values, and have established an impressive network of legal advocacy organizations and law firms to help them do so. Efforts to build and implement a progressive constitutional vision should certainly maintain that litigation expertise and continue to promote the special role the courts appropriately play in constitutional interpretation. But special role does not mean exclusive role. The progressive agenda should focus more attention outside the courts, on the roles political actors play in constitutional interpretation and enforcement and on the substance of the positions the President and Congress promote.

The need for progressive attention to non-judicial, and especially presidential, legal interpretation has never been greater than at the outset of the twenty-first century. Regarding some of the domestic issues that were central to the Reagan/Meese agenda, such as reproductive and sexual liberty and personal privacy, the Bush administration (as well as many

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Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) and Plessy v. Ferguson, 163 U.S. 537 (1896)).

<sup>32</sup> *Id.* at 985.

<sup>33</sup> For citations and discussion of many examples of prominent and illuminating scholarship on political branch (presidential and congressional) constitutional interpretation, see Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 *LAW & CONTEMP. PROBS* 105 (2004). For the role of social movements, see, e.g., Jack M. Balkin, *How Social Movements Change (or Fail To Change) the Constitution: The Case of the New Departure*, 39 *SUFFOLK U. L. REV.* 27 (2005); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 *COLUM. L. REV.* 1436 (2005); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 *U. PA. L. REV.* 297 (2001). For a debate over the merits of popular constitutionalism as a strategy for progressives, see David J. Barron, *What’s Wrong With Conservative Constitutionalism? Two Styles of Progressive Constitutional Critique and the Choice They Present*, 1 *HARV. L. & POL’Y REV.* (Online) (Sept. 18, 2006), [http://www.hlpronline.com/2006/07/barron\\_01.html](http://www.hlpronline.com/2006/07/barron_01.html), and Robert Post and Reva Siegel, *Democratic Constitutionalism: A Reply to Professor Barron*, 1 *HARV. L. & POL’Y REV.* (Online) (Sept. 18, 2006), [http://www.hlpronline.com/2006/06/post\\_siegel\\_01.html](http://www.hlpronline.com/2006/06/post_siegel_01.html).

elected representatives in Congress and the states) continues to challenge the Court's doctrine and authority to protect rights. The Bush administration has also provided new cause for alarm: a series of constitutional and statutory interpretations on a host of issues arising out of both traditional armed conflicts (in Afghanistan and Iraq) and an indefinite "war" on terrorism that President Bush asserts makes him a war-time President with expansive commander-in-chief powers. The Bush administration's extreme claims of presidential power have included executive authority—unchecked by the Court or Congress—to establish military tribunals, to detain private citizens indefinitely as "enemy combatants," and to engage in coercive interrogations and even torture. Bush has also issued an unprecedented number of signing statements when signing bills into law—statements that announce he will enforce (or in some cases, not enforce) the statute consistent with his own constitutional views, some of which would radically restructure the constitutional balance of powers in his favor.

The Court, in fact, has rejected some of the Bush administration's extreme claims, which demonstrates the Court's continued vitality in constitutional enforcement. Even so, much remains in the hands of the President and Congress, both before and after the Court acts and when the Court cannot or will not act (for example, due to justiciability limitations). The progressive constitutional agenda should include strategies, beyond court challenges, for influencing political branch constitutional interpretation and enforcement—strategies that respect political branch involvement in the development of constitutional meaning but that monitor and shape the substance of the positions the President and Congress adopt.

Neither the Reagan nor the Bush administration acted illegitimately, or even inappropriately, in simply devising and announcing a constitutional agenda or even constitutional positions that conflict with judicial doctrine.<sup>34</sup> Where both Reagan and Bush went terribly wrong was in the substance of their views. Lesson One above calls upon progressives to do much of what the Reagan/Meese Department of Justice did: develop their own constitutional agenda, and so much the better if they have political power behind them. Progressives should adhere to a principled approach to presidential power. Regardless of the political affiliation or leanings of the current President, they should encourage structural safeguards and vehicles, such as legal opinions, signing statements, and other writings, by which the President informs the public of the constitutional and other legal views that inform executive action. Such transparency is critical to ensuring that the President acts within the law. Then, progressives should bring the same energy and commitment they bring to constitutional liti-

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<sup>34</sup> In my view, the Reagan/Meese reports did cross some lines, for example, in directing government litigators to attack Congress's power in contravention of—and without even acknowledging—the executive branch's longstanding practice of defending federal laws against constitutional challenge.

gation to convincing the political branches to adhere to the rule of law and to take the positions progressives support.

Meese's basic point about non-judicial constitutional interpretation was correct. Professor Sanford Levinson, a leading proponent of the importance of non-judicial interpretation, wrote at the time: "Just as a stopped clock is right twice a day, so Attorney General Meese can be a source of insight."<sup>35</sup> Not only judges, but also Presidents and members of Congress take oaths to uphold the Constitution. Fulfilling these oaths requires interpretation—sometimes without the aid of judicial precedent or review, and sometimes in the face of judicial doctrine that seems very wrong. The development of constitutional meaning generally benefits from the involvement of, and sometimes vehement disagreement among, all three branches and those outside the government, including academics, voters, and advocates for legal and social change. Meese himself cited the most powerful example when arguing constitutional interpretation is not the business of the Court alone: then-president-elect Abraham Lincoln's attacks on *Dred Scott*. Lincoln eloquently explained:

[I]f the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.<sup>36</sup>

Thomas Jefferson similarly explained his pardons of those who violated the Sedition Act of 1798, which Jefferson believed was unconstitutional notwithstanding contrary lower court precedent and the absence of supporting Supreme Court precedent until well over a century later: "You seem to think it devolved on the judges to decide on the validity of the sedition law. But nothing in the Constitution has given them a right to decide for the Executive, more than to the Executive to decide for them."<sup>37</sup>

These examples from Lincoln and Jefferson obviously lie at one extreme, not the least because they both represent presidential efforts to advance individual rights. Presidential and congressional efforts at constitutional change will often be dangerous, wrong-headed, and self-aggrandizing. Progressives must therefore be vigilant against undesirable efforts at change. That vigilance, moreover, should be combined with a principled

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<sup>35</sup> Sanford Levinson, *Could Meese Be Right This Time?*, 61 TUL. L. REV. 1071, 1078 (1987).

<sup>36</sup> President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 9 (James D. Richardson ed., 1900).

<sup>37</sup> Memorandum from Thomas Jefferson to Abigail Adams, (Sept. 11, 1804), in 8 THE WORKS OF THOMAS JEFFERSON 311 (Paul Leicester Ford ed., 1897).

approach to interpretive authority that takes care not to attack the very authority of the political branches to interpret the Constitution (or the legitimacy of the vehicles used to announce constitutional views) when the true disagreement concerns the substance of interpretations. Misguided attacks that question too broadly and abstractly the President's authority to engage in legitimate, even necessary, constitutional interpretation can prove counter-productive. Presidents will not—at times cannot—stop acting on their constitutional views. Instead, misplaced attacks on the Presidents' very authority to engage in legal interpretation could create incentives for Presidents to operate in secrecy and without public oversight. This risk inheres, for example, in attacks on President Bush's use of signing statements to announce controversial constitutional positions: the true problem is the content of those views and not the vehicle used to express them. Progressives should promote processes and standards that will encourage the President and executive branch lawyers to reach correct interpretations—interpretations that constrain rather than justify legal transgressions and presidential overreaching. Transparency and public accountability should top that list.<sup>38</sup>

#### LESSON THREE: RESPECT THE CONSTITUTIONAL TEXT

[W]e must never forget that it is a constitution we are expounding.

[A] constitution, intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.

Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.<sup>39</sup>

Even as growing numbers of Republican-appointed judges continue to adopt the Right's desired interpretations, federal judges are still commonly derided as "liberal judicial activists." Conservatives seek to avoid charges of hypocrisy and distinguish their own efforts at radical change on the grounds that their preferred interpretations are faithful to the constitutional text and structure. The Reagan/Meese *Guidelines on Constitutional Litigation*, for example, stress that "the aim of any extratextual analysis is only to elucidate the meaning of the actual constitutional text at issue."<sup>40</sup> Behind conservatives' calls for judges who will apply the Consti-

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<sup>38</sup> See Dawn Johnsen, *Guidelines for the President's Legal Advisors*, introducing *Principles to Guide the Office of Legal Counsel*, 81 IND L.J. 1345 (2006) (coauthored by former Office of Legal Counsel attorneys, recommending ten principles to guide government lawyers who counsel the President about the legality of contemplated executive action).

<sup>39</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 415 (1819) (emphasis omitted).

<sup>40</sup> GUIDELINES, *supra* note 16, at 4 (emphasis omitted).

tution as written is the accusation that “liberal” judges have failed in this essential regard and are making up rights according to contemporary values and their own preferences, rather than legitimately interpreting constitutional text.<sup>41</sup>

Progressives should emphasize, far more than they typically do, their fidelity to constitutional text and structure, and that they, no less than conservatives, seek to give meaning to the words and design of that great document. Beyond that (and unlike conservatives), progressives should promote understanding of the nature of the constitutional text. Constitutional interpretation should be grounded in text, but the text (of course) must be interpreted.

The Supreme Court has long recognized that constitutional analysis begins with the relevant text, but that text often provides only the starting point. The “nature” of the Constitution, in the words of the 1819 *McCulloch* Court, “requires[ ] that only its great outlines should be marked.”<sup>42</sup> The remarkable brevity of this founding document contributes to many of its successes and controversies. To read the document is to recognize that interpretation and contested interpretations are inherent in “a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.”<sup>43</sup>

On some matters, the constitutional text provides relatively clear and specific direction. According to the Reagan/Meese Department of Justice, the bulk of the original Constitution that deals with the structure of the national government “speaks in clear, unambiguous terms.”<sup>44</sup> The text directs which branch possesses the authority to declare war,<sup>45</sup> how a federal law must be enacted,<sup>46</sup> how a President must be chosen and contested elections resolved,<sup>47</sup> and how federal judges and officers of the United States must be appointed.<sup>48</sup> This list readily reveals that even where the text is most detailed and specific, interpretation requires the exercise of judgment. Witness the plethora of “wars” without declarations, the legislative and line item vetoes, *Bush v. Gore* and the Court’s resolution of a presidential election,<sup>49</sup> and continued battles over the constitutional proc-

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<sup>41</sup> See, e.g., The Federalist Society, *The Conservative and Libertarian Pre-Law Reading List: An Introduction to American Law for Undergraduates and Others*, <http://www.fed-soc.org/Publications/readinglist/readinglist.htm> (last visited Nov. 5, 2006) (“There are two kinds of constitutional lawyers: those who take the text of the Constitution seriously, and those who don’t. Much of what is wrong with the American polity today is traceable, directly or indirectly, to the latter, who greatly outnumber the former. Those who wish to bolster the ranks of the good guys must begin by reading . . . the Constitution.”).

<sup>42</sup> 17 U.S. at 407.

<sup>43</sup> *Id.* at 415 (emphasis omitted).

<sup>44</sup> GUIDELINES, *supra* note 16, at 4.

<sup>45</sup> U.S. CONST. art. I, § 8, cl. 11.

<sup>46</sup> *Id.* art. I, § 7.

<sup>47</sup> *Id.* art. II, § 1; *id.* amend. XII.

<sup>48</sup> *Id.* art. II, § 2, cl. 2.

<sup>49</sup> 531 U.S. 98 (2000).

esses of appointments (with one such appointment power dispute providing the grounds for President Andrew Johnson's impeachment and another leading to threats to go "nuclear").<sup>50</sup>

And these are the "easy" questions. On many of the great issues of today and throughout our history, the text provides even less direction. The Eighth Amendment protects against "cruel and unusual punishment." Does that impose any judicially enforceable limits on whom the government may execute? Is the Court right, in order to give content to what is "cruel and unusual," to look to "evolving standards of decency that mark the progress of a maturing society," as the Court did to invalidate the execution of minors and the mentally retarded?<sup>51</sup> Or did Justice Scalia have the better argument in dissent, that the Court should have looked to the original meaning of the Eighth Amendment in 1791 when the Bill of Rights was adopted, a time when "the death penalty could theoretically be imposed for the crime of a 7-year-old, though there was a rebuttable presumption of incapacity to commit a capital (or other) felony until the age of 14?"<sup>52</sup>

Another example: The Fourteenth Amendment protects all persons from certain harmful governmental action, but determining which individual freedoms and rights are protected and how they are protected requires interpreting the meaning of "liberty" and "equal protection of the laws" and the "privileges" and "immunities" of citizenship.<sup>53</sup> Critics of *Griswold v. Connecticut*<sup>54</sup> and *Roe v. Wade*<sup>55</sup> repeat ad nauseum that the Constitution does not expressly protect the right to privacy. That, however, begs the question of whether a woman's freedom to decide when and whether to bear a child without government mandate or coercion is a protected "liberty" or "privilege[ ] or immunit[y]" or an aspect of "equal protection of the laws." Was the Court correct to hold that personal decisions about abortion, contraception, sterilization, and medical treatment are protected from government compulsion by the guarantee of "liberty?" Was the Rehnquist Court correct in 1992 in *Planned Parenthood v. Casey*<sup>56</sup> to preserve at least a weakened version of *Roe*? Or did the two dissenters in *Roe* and the four in *Casey* have the better interpretation,<sup>57</sup> and if so, was it because the framers of the Fourteenth Amendment did not contemplate any such liberties for women in 1868 and, indeed, believed women's "natu-

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<sup>50</sup> See Dewar & Allen, *supra* note 2.

<sup>51</sup> See *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1953)); *Atkins v. Virginia*, 536 U.S. 304, 312 (2002).

<sup>52</sup> *Roper*, 543 U.S. at 609 n.1 (Scalia, J., dissenting).

<sup>53</sup> U.S. CONST. amend. XIV, § 1.

<sup>54</sup> 381 U.S. 479 (1965).

<sup>55</sup> 410 U.S. 113 (1973).

<sup>56</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>57</sup> *Roe*, 410 U.S. at 172-74 (Rehnquist, J., dissenting); *Casey*, 505 U.S. at 951-53 (Rehnquist, C.J., dissenting); *id.* at 981-94 (Scalia, J., dissenting).

ral” role as mothers justified laws that excluded women from public life, including paid work and self-government?<sup>58</sup>

Ideological disagreement sharply divides the Court and the public on many specific constitutional questions, but we should accurately identify points of both consensus and disagreement, especially about appropriate interpretive processes. All interpreters seek to give meaning to the same textual terms and constitutional design. No one can claim to have the only plausible definition of “liberty,” “equal protection,” or “cruel and unusual punishment.” The fundamental, enduring challenge is *how* to give meaning to such terms. How, if at all, should meaning adapt over time to changed circumstances? What are the legitimate processes for constitutional change? Who are the appropriate participants in the formulation of constitutional meaning and how should that debate proceed? As progressives seek to reorient constitutional meaning and interpretive methods, they should take great care to respect the text and avoid inadvertently advancing conservatives’ false claims to superior textual fidelity.<sup>59</sup>

#### LESSON FOUR: ARTICULATE A COMPELLING, ACCESSIBLE INTERPRETIVE THEORY

[T]hey say in politics you can’t beat somebody with nobody, it’s the same thing with principles of legal interpretation. If you don’t believe in originalism, then you need some other principle of interpretation. Being a nonoriginalist is not enough.

—Speech delivered by Supreme Court Justice Antonin Scalia,  
Woodrow Wilson International Center for Scholars,  
Washington, D.C., March 14, 2005.<sup>60</sup>

While conservatives place great emphasis on the text (to their great advantage), in the end they acknowledge—as they must—that the text must be interpreted. The only interpretive principle the Reagan/Meese reports (and many on the Right) endorse, beyond examination of the constitutional text and structure, is a search for the Framers’ “original meaning” at an extremely narrow level of specificity. How did those who drafted and ratified the particular constitutional provision at issue intend the provision to be read? What did the words mean to them at that time? Even though only a single Justice on the Supreme Court during the Reagan ad-

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<sup>58</sup> For more on originalism, see *infra* Lesson Four.

<sup>59</sup> Many prominent progressive scholars have stressed the importance of fidelity to the text and structure. See, e.g., CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995).

<sup>60</sup> Antonin Scalia, Supreme Court Justice, Speech delivered to the Woodrow Wilson International Center for Scholars, Washington, D.C. (Mar. 14, 2005), available at [http://www.cfif.org/htdocs/freedomline/current/guest\\_commentary/scalia-constitutional-speech.htm](http://www.cfif.org/htdocs/freedomline/current/guest_commentary/scalia-constitutional-speech.htm).

ministration—Justice Scalia—possibly could be described as an originalist (and not consistently so), Reagan’s Department of Justice directed government lawyers to “advance constitutional arguments based only on ‘original meaning’” and recommended the inclusion in government briefs of a separate original meaning section.<sup>61</sup>

Justice Scalia’s admonition in his 2005 speech that “being a nonoriginalist is not enough” is not self-evident. Progressives understandably might be tempted to argue that originalism fails so miserably that it actually can be beaten without reference to an alternative. The Senate, after all, refused to confirm President Reagan’s Supreme Court nominee Robert Bork—the icon of originalism and the intellectual inspiration behind much of the Reagan/Meese vision—after exploring how radically originalism differed from the Court’s traditional interpretive methods and how radically its adoption would change constitutional doctrine.

The academic literature contains many persuasive and detailed critiques of originalism.<sup>62</sup> A very brief summary: Originalism fails on its own terms because the Framers did not intend to constrain future generations in this way; moreover, the Framers simply lacked any single original intent for constitutional text that they deliberately chose to draft at a level of abstraction capable of adaptation “for ages to come.”<sup>63</sup> Critics also chronicle the selectivity and inconsistencies of originalists, who often prove quite willing to choose selectively among historical sources or to look to non-originalist sources to support preferred outcomes or avoid entirely unacceptable ones. For example, neither *Brown v. Board of Education*’s<sup>64</sup> condemnation of public school racial segregation nor *Griswold v. Connecticut*’s<sup>65</sup> invalidation of the criminalization of contraceptive use can be reconciled with an originalist reading of the Fourteenth Amendment that looks to nothing more than the intent of its framers, if that intent is evaluated at a very narrow level of specificity. Yet the confirmation hearings for Robert Bork and subsequent nominees teach that the Senate

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<sup>61</sup> GUIDELINES, *supra* note 16, at 3.

<sup>62</sup> The literature critical of originalism is enormous. I list here just a few examples. See, e.g., JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 6 (1996) (noting difficulty of “divining the true intentions or understandings of the roughly two thousand actors who served in the various conventions that framed and ratified the Constitution, much less the larger electorate that they claimed to represent”); *id.* at 9–10 (“[B]ehind the textual brevity of any clause there once lay a spectrum of complex views and different shadings of opinion.”); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (arguing that the Constitution’s framers did not intend the document to be interpreted according to their intentions, as modern originalists would seek to divine those intentions); H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987) (arguing that originalism also requires the exercise of judgment, creativity, and interpretive choice on the part of the originalist interpreter).

<sup>63</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

<sup>64</sup> 347 U.S. 483 (1954).

<sup>65</sup> 381 U.S. 479 (1965).

will not confirm any nominee to the Supreme Court who expresses his or her disagreement with the holding of either *Brown* or *Griswold*.

Notwithstanding originalism's vulnerabilities and constitutional scholars' devastating critiques, progressives should heed Justice Scalia's advice: take originalism's threat seriously and offer a compelling and (to the extent possible) popularly accessible alternative. Originalism retains strong public and political appeal, largely because of its apparent simplicity. It helps the Right paint progressives as unprincipled and outcome-driven. Originalism attracts support and admiration even among those who disagree with the conservative legal agenda (just as voters sometimes reelect representatives with extreme and unpopular views because they admire what they perceive as adherence to deep principle). Progressive judges, officials, and academics of course do adhere to principles of constitutional interpretation—principles still in the legal mainstream. But the public perception is otherwise, such that two decades after he led the Reagan administration's crusade for originalism, Meese could almost plausibly claim that "[t]here really isn't an academic alternative to originalism."<sup>66</sup> Although progressives have clearly offered persuasive "academic alternative[s]" to originalism, they have not yet developed a political alternative, and originalism's successes are best viewed as political.<sup>67</sup>

Progressives cannot hope to provide an alternative interpretive methodology that satisfies originalism's false promise to answer all difficult questions by resorting to a single value-neutral source—but neither does originalism. Prominent scholars have written persuasively about the need for and the legitimacy of the range of interpretive sources and methods (or modes or modalities of interpretation) that the Court traditionally uses, including not only constitutional text, structure, and history (including original meaning), but also judicial precedent, political branch practice, the consequences of differing interpretations, and the nation's tradition, ethos, and values.<sup>68</sup> The so-called "conservative" agenda to de-legitimize

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<sup>66</sup> Edwin Meese III, *The Case for Originalism*, KNIGHT-RIDDER TRIB. WIRE, June 6, 2005, <http://www.heritage.org/Press/Commentary/ed060605a.cfm?Render>.

<sup>67</sup> See Robert C. Post & Reva B. Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. (forthcoming 2006–07) (arguing that originalism's ascendancy is due not to the analytic force of its jurisprudence, but to its capacity to promote a political movement).

<sup>68</sup> Professor Bobbitt lists as the six modalities of constitutional argument: historical, textual, structural, doctrinal, ethical, and prudential. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991). Professor Tribe describes the modes of constitutional interpretation as including "text, structure, history, the nation's values or ethos, and doctrine." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 85 (3rd ed. 2000); see also *id.* at 30–89. Professor Powell urges the following similar formulation, which he describes as "common ground" and a "constitutional first principle": "In constitutional argument it is legitimate to invoke text, constitutional structure, original meaning, original intent, judicial precedent and doctrine, political-branch practice and doctrine, settled expectations, the ethos of American constitutionalism, the traditions of our law and our people, and the consequences of differing interpretations of the Constitution." H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS 205, 208

interpretive methods deeply rooted in our constitutional tradition is better seen as “a proposal for radical reform.”<sup>69</sup> Progressives should embrace the inclusion of original meaning on the list of appropriate interpretive methods,<sup>70</sup> and then explain why, consistent with longstanding tradition, it does not exhaust the list.

As existing constitutional scholarship ably elaborates at tremendous length and detail, the traditional interpretive methods support judicial and other constitutional interpretations that uphold progressive constitutional principles and applications, from the protection of individual rights and liberties to the proper allocation of governmental power. Perhaps most critically, progressives must find ways to translate strong academic work into more widely accessible and politically persuasive forms. As Professor Rebecca Brown has observed, a new name would be helpful, one that avoids “the stigma of identification by negative appellation” that has harmed non-originalists (for want of a better word). The “non-originalist” label inflicts harm similar to “non-interpretivist”: “not only are we thought not to care much what the Constitution *originally* meant, but now it appears we are not concerned with interpreting the document at all!”<sup>71</sup> Progressives should avoid providing the Right with easy targets for manipulation and misrepresentation as they work to convey more effectively the interpretive principles to which they adhere.

#### LESSON FIVE: CONSTITUTIONAL CHANGE TAKES TIME, SO TAKE A LONG VIEW

The move toward originalism is a marathon, not a sprint . . . .  
This is a debate that will go on, probably for decades.<sup>72</sup>

Many observers trace the current Right’s intellectual and political beginnings to Barry Goldwater’s failed 1964 presidential bid. Four decades of hard work later, conservatism has moved from a “fringe idea” in American life to “a veritable encyclopedia of ideas about everything from judicial activism to rogue states.”<sup>73</sup> With regard to the legal agenda, the Reagan/Meese reports detailed hundreds of pages of desired changes on

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(2002).

<sup>69</sup> POWELL, *supra* note 68, at 209.

<sup>70</sup> See, e.g., Jack M. Balkin, *Abortion and Original Meaning*, CONST. COMMENT. (forthcoming 2007) (arguing “for the right to abortion based on the *original meaning* of the constitutional text as opposed to its *original expected application*”).

<sup>71</sup> Rebecca Brown, *History for the Non-Originalist*, 26 HARV. J.L. & PUB. POL’Y. 69, 69 (2003) (discussing the need to address how best to use history in constitutional interpretation); see also ORIGINAL MEANING SOURCEBOOK, *supra* note 21, at 1–5, 58–72 (denigrating “non-interpretivism”).

<sup>72</sup> Meese, *supra* note 66.

<sup>73</sup> ADRIAN WOOLDRIDGE & JOHN MICKELTHWAIT, *THE RIGHT NATION: CONSERVATIVE POWER IN AMERICA* 41 (2004).

virtually every significant issue, from substantive individual rights to government power, and from access to courts to judicial remedies. Conservatives understand well the scale of their agenda for transformation, as revealed by Meese's 2005 statement that their effort to make originalism the prevailing interpretive methodology is a "marathon" that "will go on, probably for decades" more.<sup>74</sup>

An interim analysis reveals a mixed record: the Right has suffered some losses and setbacks, but it has achieved partial success and continues to make progress, especially when measured by the proportion of federal judges appointed by Republican presidents—judges who will continue to move constitutional law incrementally to the right. The changed composition of the Supreme Court vividly illustrates this shift. In contemplating the ideological composition of the Court and calling for the appointment of Justices with careful regard to their legal views, the Reagan administration set for itself the year 2000 as a marker. When Reagan took office, Justices Brennan and Marshall occupied a strong left on a Court that covered a broad ideological spectrum, with Justice Rehnquist on the far right and no Justice who could be described as an originalist. By 2000 many described the Court as having only a center, a right of center, and a far right, with Justices Scalia and Thomas falling to the right of Rehnquist and often following an originalist approach (at least when it served their desired ends). President George W. Bush, who had cited Scalia and Thomas as his models for future appointments, has moved the Court even farther to the right.<sup>75</sup> As of 2006, Bush has appointed a new Chief Justice, John Roberts, and has replaced Justice Sandra Day O'Connor—the critical Justice in the middle—with the more ideologically conservative Samuel Alito. Looking beyond the Court and legal communities, conservative constitutional ideas and ideals have greatly influenced politics and public discourse. Progressives cannot quickly counter the Right's gains achieved over decades. They must instead work diligently over time to make their vision a reality.

#### CONCLUSION

The five lessons outlined above suggest directions for future efforts to advance a twenty-first-century vision for our great country. All call for greater coordination among the various components of the progressive community behind a more unified agenda and message. With this inaugural issue of the *Harvard Law & Policy Review*, progressives eager to take part in this much-needed work have the benefit of two exciting new institutions within which to work: the *Harvard Law & Policy Review* and its sponsor, the American Constitution Society for Law and Policy.

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<sup>74</sup> Meese, *supra* note 66.

<sup>75</sup> Lewis & Johnston, *supra* note 23, at A1.