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## Progressive and Conservative Constitutionalism

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# PROGRESSIVE AND CONSERVATIVE CONSTITUTIONALISM†

*Robin West\**

American constitutional law in general, and fourteenth amendment jurisprudence in particular, is in a state of profound transformation. The “liberal-legalist” and purportedly politically neutral understanding of constitutional guarantees that dominated constitutional law and theory during the fifties, sixties, and seventies, is waning, both in the courts and in the academy.<sup>1</sup> What is beginning to replace liberal legalism in the academy, and what has clearly replaced it on the Supreme Court, is a very different conception — a new paradigm — of the role of constitutionalism, constitutional adjudication, and constitutional guarantees in a democratic state. Unlike the liberal-legal paradigm it is replacing, the new paradigm is overtly political — and overtly conservative — in its orientation and aspiration.

Over the last few years, a substantial and growing number of Supreme Court Justices, federal judges, and some theorists, including Raoul Berger, Robert Bork, Frank Easterbrook, Michael McConnell, Sandra Day O’Connor, Richard Posner, and Antonin Scalia, have begun to articulate a profoundly conservative interpretation of the constitutional tradition.<sup>2</sup> There are obviously many differences between

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\* Professor, University of Maryland School of Law; Visiting Research Fellow, Institute for Philosophy and Public Policy, College Park, Maryland. B.A. 1976, J.D. 1979, University of Maryland; J.S.M. 1982, Stanford University. — Ed. I would like to thank the participants in the Cleveland-Marshall Legal Series Seminar, the Chicago Law School Legal Theory Seminiar, the University of Maryland Legal Theory Workshop, the Institute for Philosophy and Public Policy Political Theory Workshop, and the New York University Law School Jurisprudence Seminar for helpful comments on early drafts of this essay. Cass Sunstein, David Luban, Michael Kelly, Jana Singer, Robert Green, Richard Posner, and Lynne Henderson gave help, criticisms, and encouragement at various stages along the way.

1. Among the classic articulations of the “liberal-legalist” regime, see, for example, Wechsler, *Toward Neutral Principles of Constitutional Law*, in *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* (1961); J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

2. See, e.g., R. BORK, *THE TEMPTING OF AMERICA* (1989); R. POSNER, *THE ECONOMICS OF JUSTICE* (1981); Berger, *Federalism: The Founders’ Design — A Response to Michael McConnell*, 57 *GEO. WASH. L. REV.* 51 (1988); Berger, *Originalist Theories of Constitutional Interpretation*, 73 *CORNELL L. REV.* 350 (1988); Berger, *New Theories of “Interpretation”: The Activist Flight from the Constitution*, 47 *OHIO ST. L.J.* 1 (1986); Berger, “Original Intention” in *Historical Perspective*, 54 *GEO. WASH. L. REV.* 296 (1986); Berger, *Some Reflections on Interpretivism*, 55 *GEO. WASH. L. REV.* 1 (1986); Berger, *The Activist Legacy of the New Deal Court*, 59 *WASH. L. REV.* 751 (1984); Berger, *G. Edward White’s Apology for Judicial Activism*, 63 *TEXAS L. REV.* 367 (1984); Berger, *Against an Activist Court*, 31 *CATH. U. L. REV.* 173 (1982); Bork, *Neutral*

the conservative views of each of these theorists. But there is also significant commonality: the conservatives share enough ground and sufficient themes that we can discern, without too much difficulty, an emerging conservative paradigm of constitutional interpretation — what this article calls “conservative constitutionalism.” Conservative constitutionalism now dominates the Supreme Court, may soon dominate the federal judiciary, and has already profoundly shaped the constitutional law of the foreseeable future.

The modern transformation of constitutional law and theory, however, goes even deeper than the influence of conservative constitutionalism. For at the same time that conservative constitutionalism has replaced liberal legalism on the Court, a new progressive conception of constitutional interpretation has begun to replace the critical and deconstructive scholarship that dominated the dissenting discourse of the last two decades.<sup>3</sup> Over the last decade or so, a number of progressive legal academicians, including Cass Sunstein, David Strauss, Suzanna Sherry, Catharine MacKinnon, and Frank Michelman, among others — and joined by some critical and liberal scholars, such as Roberto Unger and Laurence Tribe — have begun to articulate yet another alternative not only to the mid-century liberal legal understanding of constitutional interpretation, but also to the view of constitutionalism that emerged from the Critical Legal Studies movement’s powerful critique of liberal-legalism during those same years.<sup>4</sup> This

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*Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971) [hereinafter Bork, *Neutral Principles*]; Easterbrook, *Method, Result, and Authority: A Reply*, 98 HARV. L. REV. 622 (1985) [hereinafter Easterbrook, *A Reply*]; Easterbrook, *The Supreme Court, 1983 Term — Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4 (1984); Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J. L. & PUB. POLY. 87 (1984); Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85; Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533 (1983); McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law* (Book Review), 98 YALE L. J. 1501 (1989); see also R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); Wilson, *Justice Diffused: A Comparison of Edmund Burke’s Conservatism With the Views of Five Conservative Academic Judges*, 40 U. MIAMI L. REV. 913 (1986).

3. Mark Tushnet has produced the most consistent and incisive critical constitutional scholarship. See M. TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988). For a general introduction to the thinking of the Critical Legal Studies movement, see M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987).

4. See, e.g., C. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); C. MACKINNON, FEMINISM UNMODIFIED (1987); L. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988); L. TRIBE, CONSTITUTIONAL CHOICES (1985); Michelman, *Law’s Republic*, 97 YALE L.J. 1493 (1988); Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986) [hereinafter Michelman, *Traces of Self-Government*]; Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L. Q. 659, 677 [hereinafter Michelman, *Welfare Rights*]; Sherry, *Outlaw Blues* (Book Review), 87 MICH. L. REV. 1418 (1989); Sherry, *Republican Citizenship in a Democratic Society* (Book Review), 66 TEXAS L. REV. 1229 (1988); Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHI.-KENT L. REV. 1001 (1988) [hereinafter Sherry, *The Ninth Amendment*]; Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989) [hereinafter

alternative constitutional paradigm, developed not in the courts, but in the academy, is also overtly political: all of these theorists are progressive, explicitly liberatory or even liberationist in their political tilt. These theorists as well are divided by significant internal differences, but, as with the leaders of conservative constitutionalism, there is enough shared ground that we can meaningfully speak of a second new jurisprudential understanding of constitutional interpretation coming on the heels of the demise of the liberal legal paradigm. We might call this second post-liberal alternative "progressive constitutionalism."

The paradigm shift, then, in its totality, is this: the liberal and critical legal discourses that dominated constitutional law in the sixties and seventies have been replaced by conservative and progressive discourses, respectively. Not only the answers, but more importantly, the questions posed by our leading constitutional jurists and theorists have been radically transformed.

The first and major purpose of this article is to describe these two new constitutional paradigms. The article's central thesis is that the understandings of the constitutional tradition most central to both paradigms are determined by sometimes implicit, but more often explicit, political dispositions toward various forms of social and private power, and the normative authority to which social and private power gives rise. Very broadly, conservative constitutionalists view private or social normative authority as the legitimate and best source of guidance for state action; accordingly, they view both the Constitution and constitutional adjudication as means of preserving and protecting that authority and the power that undergirds it against either legislative or judicial encroachment. Progressive constitutionalists, in sharp contrast, view the power and normative authority of some social groups over others as the fruits of illegitimate private hierarchy, and regard the Constitution as one important mechanism for challenging those entrenched private orders. Where the conservative is likely to see in a particular social or private institution a source of communitarian wisdom and legitimate normative authority, the progressive is likely to see the product of social or private hierarchy, and the patterns of domination, subordination, and oppression that inevitably attend such inequalities of power. The profound substantive differences between the conservative and progressive understandings of what the fourteenth

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Strauss, *The Taming of Brown*]; Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99; Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987); Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983).

amendment requires, and of the meaning of constitutionalism more generally, are rooted in these contrasting political attitudes toward social power. Correlatively, the debate presently ongoing between progressives and conservatives is only superficially over interpretive issues; on a more substantive level it is over the value of the visions of the good defined by the various hierarchies that make up our private and social life.

Thus, while the constitutional debate of the last two decades or so focused on the purported neutrality and the permissible scope of judicial decisionmaking in democratic society, constitutional debate of the next decade, and into the next century, will focus instead on the merits and vices of various forms of social and private power and authority, and hence the wisdom of using state power — through either the legislative, executive, or judicial branch — to upset them. This is the sense in which the *questions* — and not just the answers — of constitutional discourse have been altered. Neither the modern conservatives nor the modern progressives seem overly concerned with the issues that consumed constitutionalists of the last twenty or thirty years: the antimajoritarian difficulty posed by judicial review and even constitutionalism itself; the propriety of and justifications for judicial review; the liberal requirement of judicial neutrality; the derivation of particular outcomes from neutral principles; or, on the other side, critical demonstrations that the antimajoritarian difficulty is both insoluble and necessary within the contradictory assumptions of liberal theory; that judicial review can be neither justified nor abandoned; that derivations of favored outcomes from neutral principles are not possible.<sup>5</sup> These are simply not the issues that stir our most contemporary progressive and conservative constitutional scholars. Rather, both the progressives and conservatives seem increasingly willing to grant to the critics of liberal theory their main point — that liberal neutrality in judging is illusory, and that constitutional adjudication is consequently necessarily political. Modern constitutional scholarship is generally characterized by a desire to take up the question that such a premise quite clearly implies: If the decisions of judges, no less than of legislators, are necessarily political — and hence necessarily grounded in some normative conception of the good — what politics should judges pursue, and on the basis of what conception of the good should they act?

Conservative and progressive answers to that question are grounded in contrasting attitudes toward majoritarianism, which in

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5. See generally M. TUSHNET, *supra* note 3.

turn directly stem from the contrasting attitudes toward social power that divide progressive and conservative political thought. Significantly, conservatives and progressives *agree* that untrammelled majoritarianism poses dangers, and that there is, consequently, a justification for constitutional restraints and an independent judiciary to enforce them. However, conservatives and progressives have sharply conflicting assessments of the *type* of danger posed by majoritarianism, and hence of the content and meaning of our constitutional guarantees. To the conservative, a governing popular "majority" carries the danger of being or becoming an irresponsible and excessively egalitarian, or "leveling," mechanism bent on the redistribution of social wealth, power, and prestige.<sup>6</sup> Against such democratic excess, the Constitution offers the conservative some hope of protecting, and conserving, the existing social order. To the progressive, a governing popular "majority" is dangerous for a different reason: it is always in danger of becoming excessively beholden to a staid, tradition-laden, backward, regressive political vision.<sup>7</sup> "Majorities" tend to guard their majority status with almost paranoid fervor, and hence over-identify with existing social orders. Against this regressive tendency the Constitution offers some disruptive inspiration.

These differing attitudes toward the danger posed by majoritarianism are, in turn, grounded in fundamentally contrasting attitudes toward the social order that the "majority" is perceived as either threatening or unduly conserving. For the conservative, social institutions depend on distributions of wealth, power, and normative authority that are worthy of respect and preservation, while for the progressive those institutions are as often as not the illegitimate fruit of damaging and hurtful patterns of oppression, domination, and subordination.

In brief, then, modern constitutional law and theory can be understood as focused on this question: Should the Constitution be read, and the courts used, as a vehicle to preserve existing social and private orderings against majoritarian political change — making it an essentially conservative document, protecting the status quo against democratic excess — or should it be read and implemented in such a way as to facilitate continuous, inventive challenges to the dominant private and social order, making it a guarantor of at least progressive inspiration, if not progressive change? This is not, in a sense, a novel claim;

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6. See R. EPSTEIN, *supra* note 2.

7. See, e.g., Michelman, *Law's Republic*, *supra* note 4. This basis for distrust of majority power is a central theme in liberal as well as progressive thought. See J. MILL, *ON LIBERTY* (1859).

in fact, it is a frequently heard complaint that what constitutional theory is really — and covertly — about is the merits and demerits of private and social hierarchy. What I want to do is give content to this description of constitutional commitments and debates, enrich it, and thereby, perhaps, legitimate it.

A complete restatement, analysis, and point-by-point contrast of the conservative and progressive constitutional paradigms is obviously beyond the scope of this article. The article focuses instead on three particular and topical issues of constitutional law on which conservatives and progressives have sharply divergent views, and attempts to show that at least those differences can best be understood as stemming from the divergent attitudes toward social power described above. Two of these issues are substantive and one is theoretical. First, most conservative constitutional theorists and judges vehemently reject the “privacy jurisprudence” developed by the Warren and Burger Courts during the sixties and early seventies, and particularly disagree with both the conclusion and reasoning of the Burger Court’s most controversial decision, *Roe v. Wade*.<sup>8</sup> Correlatively, conservatives tend to support both the outcome reached by the Rehnquist Court in *Bowers v. Hardwick*,<sup>9</sup> in which the Court signaled a clear retreat from both the reasoning and outcome of the privacy cases, and the more recent *Webster v. Reproductive Health Services*,<sup>10</sup> in which the Court severely restricted the scope of reproductive rights by expanding the range of permissible state regulations over abortions. Progressives, in contrast both to most conservatives and to some liberal legalists<sup>11</sup> as well, tend to support the outcome in *Roe* and dissent from the result reached in *Bowers*.<sup>12</sup> In theoretical or jurisprudential terms, the difference might be cast this way: progressives tend to support an “affirmative” understanding of the liberty protected by the due process clause of the fourteenth amendment — in which case, reproductive and sexual freedom is at least arguably included within the sphere of due process protection — while conservatives read the clause as protecting “negative liberty” only, *i.e.*, the right to be free from

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8. 410 U.S. 113 (1973).

9. 478 U.S. 186 (1986).

10. 109 S. Ct. 3040 (1989).

11. For liberal arguments against *Roe*, see J. ELY, *supra* note 1, at 11-41, and M. PERRY, *MORALITY, POLITICS AND LAW* 572-78 (1988).

12. For progressive arguments in support of *Roe*, see *Webster*, 109 S. Ct. at 3067 (Blackmun, J., dissenting); Brief for the National Coalition Against Domestic Violence as Amicus Curiae Supporting Appellees, *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989); Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105 (1989); Sherry, *Women’s Virtue*, 63 TUL. L. REV. 1591 (1989).

certain defined interferences. This article ultimately argues that the difference is best explained by reference to the theorists' and Justices' sharply conflicting assessments of the legitimacy and value of one important source of social authority and power: the normative authority of a community's positive morality, and the social power on which that authority is based.

Second, progressive and conservative constitutional theorists sharply divide over the constitutionality and social value of voluntarily adopted affirmative action plans which are meant to remedy the effects of past, unconscious, or institutional racism on the performance of minorities in various economic, professional, and cultural markets. Conservatives generally dispute the constitutionality of such plans, and accordingly support the Rehnquist Court's decision in *City of Richmond v. J.A. Croson Co.*,<sup>13</sup> which held that, except for in very narrowly drawn circumstances, affirmative action plans voluntarily adopted by state or local governmental entities for the purpose of rectifying the effects of past societal discrimination in economic markets are unconstitutional under the equal protection clause of the fourteenth amendment. Progressives, by contrast, generally support the constitutionality as well as the wisdom of affirmative action plans and tend to read the equal protection clause either as neutral toward such plans or as in fact requiring them; they are accordingly critical of the present Court's hostility toward such plans and disagree particularly with the result in *Croson*.<sup>14</sup>

This disagreement quite obviously rests on drastically divergent understandings of the meaning, requirements, and perhaps the history of the equal protection clause. It also rests, however, on different philosophical understandings of the meaning of the "equality" that the clause is designed to promote, encourage, or ensure. Very roughly, progressives tend to support a "substantive" understanding of the equality guaranteed by the equal protection clause — which has the effect of requiring or at least permitting affirmative action to rectify the effects of past discrimination in the private sector — while conservatives support a "formal" or "legal" interpretation, which arguably has the effect of invalidating such plans.<sup>15</sup> This article argues that the difference can best be understood as resting on contrasting assessments of the value of a second source of private authority and power: the normative authority of private markets, and the social and economic power on which that authority rests.

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13. 109 S. Ct. 706 (1989).

14. See, e.g., Strauss, *The Myth of Colorblindness*, *supra* note 4.

15. See *infra* notes 55-60 & 106-108 and accompanying text.



Finally, conservative and progressive constitutionalists differ over the nature of constitutional interpretation itself. Conservative constitutionalists tend to support two basic principles of constitutional interpretation: first, that interpreters should defer whenever possible to the originally intended meaning of the Constitution's drafters, and second, that judges should defer, whenever possible, to the will of legislators. Conservatives tend to advocate originalism, judicial restraint, or both, as guiding principles of constitutional adjudication.<sup>16</sup> Progressives, by contrast, argue that constitutional interpretation should be in some sense "open," or what I call "possibilistic": that the Constitution is always open to multiple interpretations, which *at least* include interpretations capable of facilitating progressive causes and policies.<sup>17</sup> This difference, I argue, is grounded in the contrasting attitudes toward yet a third type of social authority and power: the legitimacy, wisdom, and morality of legal authority and power.

Political attitudes toward private and social power do not, however, in any simple way, *directly* imply either these or any other set of particular constitutional commitments. The implication of a constitutional commitment arising from a political vision is complicated — and often masked — by two factors. First, "constitutional law" is undeniably a field of law as well as politics, and constitutional theorists and jurists are therefore legal theorists and legal actors, as well as adherents to political points of view. Constitutional theorists accordingly combine their political outlook toward social power with some allegiance to a jurisprudential view of the nature of law, and particularly of the relation of law to social policy, to morality, and to politics itself. As a result, differences in constitutional interpretation are often believed to be and often appear to be rooted in *jurisprudential* differences and debates that divide conservatives and progressives along apparently apolitical lines: progressive natural lawyers debate conservative instrumentalists as though the jurisprudential difference between natural law and instrumentalism accounts for their disagreements in constitutional outlook; progressive positivists debate conservative natural lawyers on the same assumption, and so on. As I try to show, however, the deepest divisions in modern constitutional thought are a function not of jurisprudential differences, but of political orientation. Despite their casting, modern constitutional disagreements do not reflect or stem from the jurisprudential differences between natural law, legal positivism, and legal pragmatism (although

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16. See *infra* notes 64-69 and accompanying text.

17. See *infra* note 136 and accompanying text.

they are complicated by them), but rather from the vastly divergent political assessments of the value or danger of private and social power held by conservative and progressive constitutional scholars.

The second factor complicating and sometimes masking the dependence of the conservative and progressive constitutional paradigms on their political underpinnings is that the respective political underpinnings are themselves not uniform. While there are substantial commonalities, there are also significant differences within as well as between major conservative and progressive political theories. Briefly, conservatives differ among themselves over the *type* of private or social authority to which the state should turn when specifying a conception of the good.<sup>18</sup> Progressives differ fundamentally over what types of experiences of the disempowered should be at the heart of a socially sensitive vision of the good.<sup>19</sup> As a result of these internal political differences, conservative and progressive constitutional commitments often — perhaps typically — command less than universal support from conservative or progressive scholars: not all conservatives support every aspect of the conservative constitutional paradigm, nor do all progressives support every aspect of the progressive paradigm. What this article calls the “progressive constitutional paradigm” and the “conservative constitutional paradigm,” then, are simply those core constitutional interpretations or commitments that are supported by a critical mass of progressive or conservative constitutional scholars. It is worth stressing, however, that even the theorists who agree on a particular constitutional commitment often do so for widely divergent political reasons.

The first two Parts of this article describe in some detail these two constitutional paradigms, and their component parts: political theory, jurisprudence, and constitutional commitments. The first Part describes the conservative constitutional paradigm and its three constituent components. It begins with a discussion of conservative political thought; then turns to conservative jurisprudence; and finally, shows how the three major conservative constitutional commitments summarized above can be derived from conservative political and jurisprudential theory. The second Part describes in a parallel fashion the progressive constitutional paradigm.

The second purpose of this article is partisan rather than descriptive, and is addressed to progressives. It is not at all clear, from a progressive political point of view, that the development of a progres-

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18. See *infra* notes 23-32 and accompanying text.

19. See *infra* notes 75-83 and accompanying text.

sive constitutional paradigm — to which a conservative Court will be openly hostile — is a worthwhile project. What would be gained? It is at least arguable that progressives over the next few years should devote themselves to the development of strategies that will minimize the impact of constitutional adjudication on progressive politics, rather than to the perfection of an alternative progressive model of what the Constitution and the fourteenth amendment require, for adoption by a counterfactual, nonexistent, and unforeseeable progressive Court.

The concluding Part of this article argues that even in the short term, and certainly in the long term, there are good reasons for developing an alternative, non- or post-liberal, and explicitly progressive paradigm of constitutional interpretation, even if it is clear, as it seems to be, that the present conservative Supreme Court will not embrace it. It also argues, however, that for both strategic and theoretical reasons, the proper *audience* for the development of a progressive interpretation of the Constitution is Congress rather than the courts. The progressive Constitution should be meant for, and therefore must be aimed toward, legislative rather than adjudicative change.

The strategic reasons for this proposed reorientation of progressive constitutional discourse should be self-evident. Although the progressive Constitution is arguably consistent with some aspects of the liberal-legalist paradigm of the middle of this century, it is utterly incompatible with the conservative paradigm now dominating constitutional adjudication. It does not follow, however, that the progressive Constitution is incompatible with *all* constitutional decisionmaking: both legislatures and citizens have constitutional obligations, engage in constitutional discourse, and can be moved, presumably, to bring electoral politics in line with the progressive mandates of the Constitution, as those mandates have been understood and interpreted by progressive constitutional lawyers and theorists.

I also argue, however, that for theoretical as well as strategic reasons, the long-range success, the sense, and even more modestly the *relevance* of the progressive interpretation of the Constitution, depend not only on the merits of its interpretive claims, but also, and perhaps more fundamentally, on a federal Congress re-enlivened to its constitutional obligations. First, of course, it is Congress, not the Court, that is specifically mandated under the fourteenth amendment to take positive action to ensure equal protection and due process rights — the core constitutional tools for attacking illegitimate social and private power. If Congress is ever to fulfill this obligation, it will need the

guidance of interpretive theories of the meaning of equal protection, due process, equality, and liberty that are aimed explicitly toward the context of legislative action and are not constrained by the possibilities and limits of adjudicative law. But more fundamentally, the progressive Constitution, I argue, will never achieve its full meaning — and worse, will remain riddled with paradox and contradiction — so long as it remains in an adjudicative forum. This is not only because of the probable political composition of the Court over the next few decades, but also because of the philosophical and political meanings of adjudicative law itself: the possibilities of adjudicative law are constrained by precisely the same profoundly conservative attitudes toward social power that underlie conservative constitutionalism. By acquiescing in a definition of the Constitution as a source of adjudicative law, progressives seriously undermine its progressive potential. Only by reconceptualizing the Constitution as a source of inspiration and guidance for legislation, rather than a superstructural constraint on adjudication, can we make good on its richly progressive promise.

Therefore, the concluding Part of this article argues that, for structural long-term as well as strategic short-term reasons, the progressive Constitution — the cluster of meanings found or implanted in constitutional guarantees by modern progressive scholars — should be addressed to the Congress and to the citizenry, rather than to the courts. The goal of progressive constitutionalists, both in the academy and at the bar, over the coming decades should be to create what Bruce Ackerman has called in other contexts a “constitutional moment”<sup>20</sup> and what Owen Fiss might call more dramatically an “interpretive crisis.”<sup>21</sup> Progressives need to create a world in which it is clear that a progressive Congress has embraced one set of constitutional meanings, and the conservative Court a contrasting and incompatible set. The Supreme Court does, and always has, as Fiss reminds us, read the Constitution so as to avoid crisis.<sup>22</sup> The lesson to draw is surely that only when faced with such a constitutional moment will this conservative Court change paths.

## I. THE CONSERVATIVE CONSTITUTIONAL PARADIGM

### A. *Conservative Politics*

Modern political conservatism is grounded in and united by an

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20. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022 (1984).

21. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 753-54 (1983).

22. *Id.* at 754.

aversion to the redistributive normative authority of the political state and a commitment to the preservation, or conservation, of existing social, economic, and legal entitlements and structures. Whatever else they may hold or believe, conservatives distrust both the capacity of state actors — whether judges or legislators — to generate, through dialogue or any other means, desirable novel conceptions of social life that would upset or redistribute extant entitlements; they also distrust the willingness of state actors to legislate or adjudicate in a disinterested fashion in accordance with those conceptions. Accordingly, conservatives advocate minimizing the role of the normative authority (although not the power) of the state: what the state should do is act in such a way as to preserve, not question or alter, the constituent structures of our social life. As this Part attempts to show, however, even this minimal commitment is not as straightforward as it seems — conservatives differ among themselves over the *contours* of “the state,” over what forms of normative authority do or do not come within its gambit, and over what sorts of preexisting social structures are most worthy of protection. But conservatives are more or less united in their antipathy for the specious forms of redistributive normative authority to which state power gives rise, and their commitment to the preservation of extant social structures and entitlements.

In its distrust of the redistributive normative authority of the political state, modern conservatism can claim a share in the mantle of classical liberalism. Conservatives and classical liberals arrive at their common distrust, however, by way of different routes. Classical liberals, far more than modern conservatives, constitutively distrust centralized power of *any* sort — and hence centralized state power as well. Classical liberal distrust of a state’s normative authority is derivative of this more fundamental distrust of power. Classical liberals accordingly require the state, wherever possible, to defer to the normative authority of the smallest unit of power — *individuals* — and then to promote that normative authority through noninterference. For modern conservatives, by contrast, it is the distrust of the state’s redistributive normative authority, rather than distrust of either state power or power per se that is fundamental. What the state is peculiarly ill-suited to do, according to modern conservatives, is to formulate a respectable, defensible, or “legitimate” conception of the good or of the good life that departs in any significant way from the conception of the good reflected in and bolstered by extant social structures. Accordingly, what modern conservatives characteristically require of the state is not inaction, passivity, or noninterference — modern conservatives often demand quite a bit of state action and quite a bit of state

interference in private lives, and from all three branches. Rather, what conservatives constitutively require of state actors is that they refrain from imposing *their own* conception of the good on the community, and that they instead respect, preserve, conserve, and protect the conception of the good promoted by preexisting social structures and entitlements — what I will sometimes call the community's dominant normative authority. For the conservative, the political state then has a duty to promote, protect, and encourage that form of life reflected in the community's social structures and preexisting entitlements — a duty that can often be fulfilled simply through noninterference with private lives, but that at least as often requires affirmative, even aggressive, legislative, judicial, or executive intervention.

In its distrust of the redistributive normative authority of the political state, modern conservatism also claims a share in the mantle of *modern* liberalism, particularly modern legalistic liberalism. Many (although not all) modern legal liberals also distrust the normative authority of the state, but their distrust again rests on a very different basis from either the modern conservative's or the classical liberal's. Modern liberal legal distrust of the state's normative authority is rooted not in a particular distrust of the normative authority of the "state," but rather, in a generally skeptical stance toward normative authority of *any* sort. There is no way a state actor can specify the content of the good or the good life — beyond simply recording his or her own preferences — because there is no way that anyone can do so. There is, consequently, no principled way for a legislature to second-guess the value judgments of an individual, or for a court to second-guess the value judgments of a legislature. Conservative distrust of a state's normative authority, by contrast, is rooted not in a general or philosophical value-skepticism, but in a decidedly nonskeptical preference for the value judgments enshrined in those institutions that embody social power, and in an antipathy toward the value judgments embodied in state authority that seeks to challenge that power. While the liberal legalist and conservative share an overriding distrust of state normativity, that distrust derives from profoundly divergent political and social visions.

The difference, then, between modern conservatism and both classical and modern legal liberalism is fairly stark: while classical liberals typically urge the state simply to refrain from interfering in the private lives of individuals, and modern legal liberals urge the state to refrain from all normative judgments, conservatives, although sharing the liberal distrust of state authority, are not so tied to either the value-skepticism insisted upon by modern legal liberalism or the indi-

vidualistic premises of the classical liberal. For the conservative, the state will often have a duty to exercise its power to promote, through legislation, the good life on behalf of its citizens. The conception of the good life the state is empowered to promote, however, must be derived from the normative teachings of some dominant communitarian authority, and *not* from the will, beliefs, preferences, or desires of state actors.

Modern conservatives differ among themselves on the *type* of social structures or communal authority to which the political state must defer, and those differences in turn define the major lines of distinction between popular forms of modern conservative political thought. Although the lines are fuzzy, and exceptions abound, we can nevertheless distinguish three strands of modern conservative politics, each of which has had a discernible — and distinctive — impact on the conservative constitutional paradigm.

First, some conservatives — who might be called “moralistic conservatives” or “social conservatives” — argue that the state should defer to the accumulated wisdom of a community’s positive conventional morality when formulating a vision of the good as a basis for state action.<sup>23</sup> For these conservatives, the political state should legislate on the basis of the vision of the good promulgated by the dominant moral voices in a community’s shared life, whether those voices emanate from religious or secular moral traditions.

The social conservative’s deference to the vision of the good propounded by the community’s conventional morality is typically motivated by an attitude of respect — sometimes justified, sometimes not — for the presumed wisdom of the dominant normative moral traditions, customs, beliefs, and values of the past. The ethical idea here is simple enough: we should decide how to live by relying heavily on the rules that have emerged from the experiences of others who have wrestled with comparable dilemmas. There is no reason, they argue, to reinvent the moral wheel. History has its lessons, normative as well as otherwise, and the moralistic conservative’s embrace of traditional wisdom is simply a recognition of the proper role that humility should play toward the wisdom of the past in our attempt to make collective sense out of our lives. Michael McConnell defends the moralistic conservative’s respect for communal authority in this way:

[W]hy [do] thoughtful individuals often defer to tradition and historical experience when making moral judgments, rather than attempt[ing] a

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23. See, e.g., P. DEVLIN, *THE ENFORCEMENT OF MORALS* (1965); Dworkin, “*Natural*” Law Revisited, 34 U. FLA. L. REV. 165 (1982); cf. H.L.A. HART, *LAW, LIBERTY AND MORALITY* (1963).

more individualistic or utopian analysis[?] Such deference is natural and inevitable, . . . but it is also *sensible*. An individual has only his own, necessarily limited, intelligence and experience (personal and vicarious) to draw upon. Tradition, by contrast, is composed of the cumulative thoughts and experiences of thousands of individuals over an expanse of time, each of them making incremental and experimental alterations (often unconsciously), which are then adopted or rejected (again, often unconsciously) on the basis of experience — the experience, that is, of whether they advance the good life. Much as a market is superior to central planning for efficient operation of an economy, a tradition is superior to seemingly more “rational” modes of decisionmaking for attainment of moral knowledge.<sup>24</sup>

It is this sense of deference to collective wisdom that drives moralistic conservatives’ allegiance to communal morals.

A second group of conservatives — who might be called “legal conservatives” — argue that “the state,” in the form of both legislators and adjudicators, should defer to the mandates of the community’s established legal system, and its entrenched body of law, when deciding how to act. For legal conservatives, the modern political state, including the judicial as well as the legislative branch, should defer to the vision of the good articulated in established, historically enshrined legal traditions, including, most significantly, constitutional history and common law precedents. For these conservatives, the political “state,” and its entirely specious claims to normative competence, is importantly different from the “law” and its quite legitimate claims: indeed, that there is a difference between the law and the state, such that the “law,” and the rational, reasoned, normative authority it embodies and extols, operates as a welcome check on the illegitimate excesses and the irrationality and whimsy of the political “state,” is becoming a central tenet of modern conservative thought.<sup>25</sup>

The legal conservative’s deference to the authority of law on normative questions regarding the nature of the good typically rests on an attitude not of *respect* toward the presumed wisdom behind dominant legal normative authority, but rather of *obedience* toward the power

24. McConnell, *supra* note 2, at 1504 (citation omitted).

25. The most striking example in the legal literature is Epstein’s demonstration in *Takings* of the unconstitutionality, as well as irrationality, of the “New Deal” legislative reforms of the first half of the century. R. EPSTEIN, *supra* note 2. Bork criticizes Epstein on precisely this ground in *The Tempting of America*. R. BORK, *supra* note 2, at 229-230. Bork’s adamant originalism, however, is more similar than dissimilar to Epstein’s constitutional critique of redistributive politics. For Bork, as for Epstein, it is *law*, the original Constitution, and the reasoned, judicious mindset its interpretation requires, that must take precedence over the political desires of presently constituted majorities. Only where the Constitution dictates majoritarian rule does Bork allow the majority unfettered say.

For a general critique of the modern conservative’s hostility toward politics, see Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and “Empirical” Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988).



that, whether visible or not, inevitably underlies it. The motivational difference, then, between moral conservatives and legal conservatives is that whereas moral conservatives take a “respectful” deferential stance toward a community’s positive morality, legal conservatives take an obedient or submissive stance toward the “legitimated” powerful voices of legal history — so long as those voices are in the sufficiently distant past to be distinguishable from the powerful voices of the contemporary political state. Legitimate legal authority, for the legal conservative, is not so much there to be respected for its wisdom as it is to be obeyed. What the modern state actor (as well as citizen) “ought” to do with his or her power, then, for the legal conservative, is to relinquish it; what the state actor ought to do with freedom is not simply to respect, but positively to obey, the dictates of lawful authority. Put differently, the way to make one’s political will conform to the requirements of political morality is to constrain political willfulness, and the way to constrain willfulness is to obey the dictates of legal authority.<sup>26</sup>

This second strand of conservative thought, and particularly the attitudinal and ethical stance toward legal authority that undergirds it — which I have discussed at length elsewhere<sup>27</sup> — rests on an entirely different ethical account of the relation between the individual and communal authority than the first strand (with which it is often confused). Unlike respectful deference to the normative authority of moral tradition, the justification for an obedient attitude to legal authority does not rest on the quasi-empirical McConnellian claim that the moral actor, without relinquishing autonomy in any meaningful sense, might nevertheless sensibly defer to lessons of the past. Rather, the morality of submissive, obedient deference to legal authority is typically defended instead on the ground that the authority of the legal other is “legitimate” (rather than wise). For the legal conservative, legal authority generates a near-absolute ethical duty of obedience *so long as* that authority is “legitimate.”<sup>28</sup>

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26. For critiques of this strand of conservative thought, see Henderson, *Authoritarianism and the Rule of Law* (unpublished manuscript, on file with author); Sherry, *The Ninth Amendment*, *supra* note 4, at 1010-11; Wilson, *supra* note 2, at 913; Wilson, *Constraints of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, Easterbrook and Winter*, 40 U. MIAMI L. REV. 1171 (1986). See also West, *The Authoritarian Impulse in Constitutional Law*, 42 U. MIAMI L. REV. 531 (1988).

27. See West, *The Celebration of Authority* (Book Review), 83 NW. U. L. REV. 977 (1989); West, *supra* note 26.

28. Richard Posner calls this moral outlook a “morality of obedience” and identifies it with “mature values.” See R. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* (1988). For a critical account of the morality of obedience as defended in Posner’s work, see West, *The Celebration of Authority*, *supra* note 27.

For the legal conservative, legal authority can be “legitimated” — and hence give rise to a duty of obedience — in one of two ways: either by the apparent or actual “consent of the governed”<sup>29</sup> or by the distance of time.<sup>30</sup> If the imperative command behind the legal norm has sufficiently receded in history, or is perceived as sufficiently “consensual” — even if the consent is the consent of the vanquished on a distant battlefield — then the law becomes “legitimate”: it is law, rather than mere politics, and thus authoritative.<sup>31</sup> It is that which actors have a moral duty to obey. The “legitimacy” of the power of this distant military-victor-turned-legal-authority is then coupled with the claim that a state actor’s *own* power, or autonomy, is not to be trusted; that the felt moral autonomy of individual state agents is, indeed, the core evil from which most political turmoil springs. Where distant or past legal authority is legitimate, and the state actor’s own power is untrustworthy, then the moral thing for the state actor to do with freedom is to relinquish it. The central ethical claim of the legal conservative is that the moral state act is the obedient act, so long as the legal authority being obeyed is legitimate. The central psychic disposition of the legal conservative is a felt imperative to relinquish power and responsibility, and acquiesce instead in the power and authority of a totemized, triumphant, legalized Other.

Finally, for a third group — “libertarian conservatives” or “free-market conservatives” — the source of social authority to which the state should defer is the authority of actors and forces operating in private economic markets.<sup>32</sup> For free-market conservatives, it is the market, and the economic power to which it gives voice, that is the sole legitimate source of normative authority. The political state should accordingly defer to the normative authority of successful market processes and the economic power that underlies them. Motivationally, the free-market conservative’s constitutive deferential stance toward the authority of dominant market actors rests neither on respect nor obedience, but instead on a *celebratory* attitude toward economic authority, and toward the success, the triumph, the power, and the strength evidenced by its ascendance. To the free-market conservative the will of the economic actor does not simply reflect value, but rather *constitutes* value, and hence constitutes the “good” that the

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29. See, e.g., McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI-KENT L. REV. 89 (1988); Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987).

30. The longevity of the Constitution, for example, plays a major role in justifying the various forms of conservative legalism endorsed by Richard Posner. See, e.g., R. POSNER, *supra* note 28; see also McConnell, *supra* note 29; Meese, *supra* note 29.

31. For a critical account, see Sherry, *The Ninth Amendment*, *supra* note 4.

32. See, e.g., R. EPSTEIN, *supra* note 2.

state, basically through noninterference, has a duty to promote. Morally justifiable legislation should, then, reflect, mimic, or promote the bargained-for outcomes of economic actors, rather than the political or ethical visions of legislators, and morally justifiable adjudication should uphold those legislatively encoded private and public bargains.

The ethical argument for this celebratory stance toward the will of the economically powerful is some version of "moral Darwinism." Moral Darwinism unabashedly asserts and celebrates the normative rightness of economic power: for the moral Darwinist, at least in the economic sphere, that which is, ought to be; that which endures, ought to endure; that which lasts, ought to last; and that which triumphs, rightly triumphs. Thus, celebratory, Darwinian, free-market conservatism rests explicitly on an awestruck and admiring stance toward the power that underlies economic authority: we should defer to the authority of the market, according to the moral Darwinian, because market authority necessarily reflects a triumphant conquest of strength over weakness, of power over impotence, and of that which is over that which could have been — of existence over possibility.<sup>33</sup>

Conservative political theory, then, is united by its antipathy to state normative authority and preference for social authority, but conservative theorists differ over the particular social authority to which the state should defer. Moralistic or social conservatives urge the state to defer to the visions of the good embedded in a community's moral institutions; legal conservatives view the legal system as the appropriate authority to which the state should turn; and free-market conservatives locate normativity in the outcomes generated by and the preferences reflected in economic markets. All, however, view these forms of authority as importantly higher or better than the normative authority of "the state." All view the visions of the good and the good life that they generate as superior to those reflected in the "mere preferences," desires, or will of state actors.

### B. *Conservative Jurisprudence*

Conservative political thought grounds, but does not directly compel, the core tenets of the conservative constitutional paradigm. Conservative constitutionalists, as noted above, are lawyers as well as political theorists, and as such, they adhere to some sort of jurisprudential position regarding the nature of law, as well as some sort of conservative political theory regarding the legitimacy of social and

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33. Some version of moral Darwinism pervades the writings of the normative wing of the law and economics school, as well as modern public choice writings. *See, e.g.*, R. EPSTEIN, *supra* note 2; R. POSNER, *supra* note 2.

state power. Constitutional theory is surely as indebted to jurisprudence as it is to politics. However, it would be a mistake to think that those jurisprudential commitments that undoubtedly influence the conservative constitutional paradigm have in any way “de-politicized” the constitutional paradigm itself. Rather, the jurisprudence embraced by conservative constitutional thinkers, and which in turn helps ground the conservative constitutional paradigm, is *itself* profoundly political. As this section attempts to show, the three conservative understandings, canvassed above, of the proper source of communal normative authority for state action imply, in turn, distinctively conservative interpretations of our three major jurisprudential traditions: natural law, positivism, and legal instrumentalism.

First, moral conservatism, and the respect for the community’s conventional morality on which it rests, implies a distinctively conservative interpretation of the natural law jurisprudential tradition. For all natural lawyers, conservative and otherwise, those political edicts that deserve to be called “law” must meet at least minimal moral criteria.<sup>34</sup> Now this basic jurisprudential definition of the nature of law *need not* be conservative. The political consequences of the natural lawyer’s definitional claim depend entirely upon the content and source of the “morality” the law must incorporate. Obviously, if the moral criteria the law must definitionally meet (in order to be true “law”) is informed by the unrealized morality or ideals of the disenfranchised, natural law can be (and has been) profoundly revolutionary in its implication: the natural lawyer’s claim then implies that extant positive law that fails to meet the moral criteria, in some higher sense, is not true “law” at all, and hence carries with it no claim to the people’s allegiance.

For the moral conservative, however, the natural lawyer’s identification of law with morality turns out to have profoundly conservative consequences. For the moral conservative, the content of the “morality” that the law incorporates consists not of the unrealized aspirations of the disempowered, but rather of the community’s authoritative moral commitments and traditions. Therefore, for the moral conservative drawn to the natural law tradition, a society’s law is properly and explicitly — even necessarily — informed by the community’s traditional, conventional beliefs. Thus, for the conservative natural lawyer — such as, for example, England’s Lord Devlin, or Justice Sandra Day O’Connor, or Professor Michael McConnell — a community’s historical and “moral” revulsion to homosexuality, its

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34. See L. FULLER, THE MORALITY OF LAW 33-91 (1964).

abhorrence of abortion or interracial marriage, its endorsement of traditional gendered roles, or its resistance to the commodification of babies, sexuality, or reproductive services, might all properly inform legislative governance.<sup>35</sup> Traditional morality — a community's dominant understandings of the content of the good life — is the form of normative authority that properly informs and guides legislation.

Just as deference to the conventional morality of a community implies a conservative version of the natural law tradition, so the deference toward legal power which characterizes legal conservatism implies an archly conservative version of legal positivism. For legal positivists generally, unlike natural lawyers, the "law" is, definitionally, that which is spelled out in historically authoritative legal sources. For the positivist, then, there is no definitional link between a society's law and either its conventional or its aspirational morality. Again, as with natural law, there is nothing necessarily conservative about this positivistic understanding of law. The positivistic separation of law and morality is at least analytically helpful and arguably necessary to establish the immorality of a particular law or legal regime, and hence the moral case for change.<sup>36</sup> When legal positivism is combined with the obedient stance toward legal authority characteristic of legal conservatism, however, it becomes conservative and profoundly so. For all positivists, "law" is the product of historical, political, and military victories — it is the will of the strong channeled through processes themselves determined by the will of the strong, and thereafter legitimated by tradition. But distinctively for legal conservatives, a duty to obey the "law" thus defined immediately follows: the political and military victor whose will is expressed in law becomes the legitimate and hence "legal" authority. The moral actor, whether judge or citizen, when faced with a legal mandate, behaves morally by disempowering himself through unstinting obedience.

Hence, the combination of legal conservatism and legal positivism yields a strand of positivism that might best be called "conservative positivism": For the conservative positivist, it is law itself (rather than, as for the conservative natural lawyer, a community's conventional morality) that is and ought be the source of authority on questions regarding the nature of the good to which state actors ought defer and which the state then has a duty to promote. When an agent of the state, then, such as a court, seeks to inform legal interpretation

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35. See, e.g., P. DEVLIN, *supra* note 23; McConnell, *supra* note 2. I do not mean to imply that any of these individual theorists support these outcomes in particular.

36. H.L.A. HART, *THE CONCEPT OF LAW* (1961); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 620-21 (1958).

by some conception of the good, it should do so by re-articulating a conception of the good held by some higher or earlier "legitimate" legal authority — such as a "founding father" — and then obeying that mandate.<sup>37</sup> Again, the argument is not that such a conception should be respected because its holder was wise. Rather, the conservative positivist's position, more simply, is that such a conception should be obeyed because its holder was "legitimate."

Finally, the adoration, celebration, or, more simply, love of economic power characteristic of modern free-market conservatives implies an archly conservative version of legal pragmatism or instrumentalism. Obviously, as the legal-realist experiments with instrumentalism and pragmatism established, legal instrumentalism, no less than natural law or legal positivism, can be put to either radical, liberal, or conservative political ends. For all instrumentalists, law is a tool with which to achieve other independently defined purposes. When legal pragmatism is combined with the politics of free-market conservatism, however, the result is again a profoundly conservative jurisprudential doctrine: what might be called "conservative instrumentalism." For the conservative instrumentalist, law should be organized in such a way as to promote free economic competition. Economic competition — the process by which the wishes, instincts, and desires of the strongest appropriately become the will of the community, and by which their perceptions of the world become the truth about reality — is not just a fact or practice, but a normative principle of modern life. Law, then, both adjudicative and otherwise, should be used and interpreted in such a way as to promote best the substantive values and norms of competitive life.<sup>38</sup> The consequence for decision-making is that when law must be informed or guided by a conception of the good, it should embrace whatever decision will liberate competition.

The relationship between conservative politics and conservative jurisprudence might be schematized in this way:

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37. See Bork, *Neutral Principles*, *supra* note 2; Easterbrook, *A Reply*, *supra* note 2, at 627-29. Lon Fuller seemed to assume, in his debates with Hart, that a duty to obey the law followed naturally from positivist premises. See L. FULLER, *supra* note 34, at 106-18. Some forms of legal positivism lend themselves to this interpretation, legitimating the natural lawyer's complaint that legal positivism carries with it conservative and even authoritarian implications. See Henderson, *supra* note 26.

38. See R. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (forthcoming); R. POSNER, *supra* note 2.

Source of Authority	Conservative Political Theory	Conservative Jurisprudence
Positive Morality	Moral Conservatism	Conservative Natural Law
Legal System	Legal Conservatism	Conservative Legal Positivism
Market Economy	Free-Market Conservatism	Conservative Instrumentalism

### C. *Conservative Constitutionalism*

The conservative interpretations of the Constitution now dominating Supreme Court adjudication and conservative academic commentary may or may not be mandated by the constitutional text itself or by our constitutional history. If the last thirty years of substantive debate over the meaning of constitutional clauses, the nature of the document itself, and the possibilities the process of interpretation opens or forecloses has taught us anything at all, it should have taught us to be skeptical of any such claim. What this Part shows, however, is simply that *whatever* may be the interpretive status of the conservative paradigm, at least three of its core tenets — (1) the characteristically conservative denial that a “right to privacy” can be found in the Constitution, and particularly in the liberty prong of the due process clause; (2) the conservative insistence on a “color-blind” interpretation of the equal protection clause and on a “formal” understanding of the equality that clause protects, such that state or city-initiated affirmative action plans meant to eradicate the effects of societal discrimination are unconstitutional; and (3) an intentionalist view of constitutional interpretation, such that the Court is not free to “discover” fundamental rights not clearly implied by the document’s text or history — follow immediately from the various conservative jurisprudential and political commitments outlined above. Whether or not the text or history of constitutional law mandates these interpretations, in other words, conservative politics and conservative jurisprudence clearly do.

#### 1. *Privacy Jurisprudence*

Let me start with the present Supreme Court’s privacy jurisprudence. Although the abortion debacle triggered by *Webster v. Reproductive Health Services*<sup>39</sup> presently dominates public consciousness of

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39. 109 S. Ct. 3040 (1989).

the Court's privacy jurisprudence, *Bowers v. Hardwick*<sup>40</sup> is nevertheless more representative of the conservatives' distinctive understanding of the right to privacy and the liberty it is designed to protect. *Bowers*, which predates *Webster* by three years, gives a far clearer articulation of the conservative jurisprudential premises that underlie both decisions. In upholding the anti-sodomy statute at issue in *Bowers*, a majority of the Supreme Court, arguably for the first time in modern constitutional history, embraced an explicitly conservative political account of the meaning of the good, an explicitly conservative jurisprudential account of the "natural" right of the community to define and enforce the good in law, an explicitly conservative political account of the normative weight of positive law, and an explicitly conservative jurisprudential account of the duty of courts and citizens faithfully to obey the law. From a jurisprudential understanding of law as definitionally incorporating morality and of the courts' and citizen's duty to obey it, and a political understanding of both the conventional nature of morality and the moral content of positive law, the Court drew its profoundly conservative constitutional inference: legislation that reflects conventional morality is entirely proper and thus must be fully constitutional, unless it conflicts with an explicit constitutional provision to the contrary.

To put the same point negatively, and more familiarly, the Court in *Bowers* emphatically rejected the classically liberal account of the relation of law to morality, the classically liberal trust of the individual and correlative suspicion of "community," and hence the paradigmatically liberal inference that any legislation incorporating the community's conventional moral belief and thereby constraining individual freedom is suspect. For classical liberals, it is the individual, not the community, who is the authority on the nature of the good, not only with respect to religious beliefs and political ideas (separately insulated from community control by the first amendment), but also with respect to ways of life. Consequently, legislation that interferes with such individual authority is strongly disfavored, and properly subject to constitutional check. The obvious importance of *Bowers* is that it was the first "privacy" case to reject definitively this classically liberal and individualist account of the good, of law, and hence of the constitutional right to privacy, and adopt in its stead a conservative communitarian conception. In his concurrence, Chief Justice Burger rejected liberal individualism unequivocally:

[T]he proscriptions against sodomy have very "ancient roots." Deci-

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40. 478 U.S. 186 (1986).



sions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian [sic] moral and ethical standards. Homosexual sodomy was a capital crime under Roman law. . . . Blackstone described “the infamous *crime against nature*” as an offense of “deeper malignity” than rape, an heinous act “the very mention of which is a disgrace to human nature,” and “a crime not fit to be named . . . .” The common law of England, including its prohibition of sodomy, became the received law of Georgia and the other Colonies. In 1816 the Georgia Legislature passed the statute at issue here, and that statute has been continuously in force in one form or another since that time. To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.

This is essentially not a question of personal “preferences” but rather of the legislative authority of the State. I find nothing in the Constitution depriving a State of the power to enact the statute challenged here.<sup>41</sup>

In addition to the Court’s rejection of liberal individualism, there is another reason that *Bowers* is a central part of the emerging conservative paradigm of fourteenth amendment and due process law. The opinion is central to modern conservatism not only because it tumbled what was on the verge of becoming a hegemonic liberal interpretation of the requirements of privacy, due process, and liberty — an interpretation that had dominated Supreme Court privacy jurisprudence for almost two decades. The significance of *Bowers* is that it was not only revolutionary, but it was also “integrative”: it uniquely and cleanly integrated two of the three competing — and potentially contradictory — strands of modern conservative political and jurisprudential theory.

First, the result in *Bowers*, and Chief Justice Burger’s concurrence most dramatically, rests on an understanding of “liberty” and the due process clause that gives constitutional backing both to the moral conservative’s respect for a community’s authoritative accounts of the good, and to the conservative natural lawyer’s belief that law should embrace that positive morality. The “liberty” to which individuals are legally entitled, to the conservative natural lawyer, is the liberty to live the good life as determined by the traditional moral customs and norms of the community itself and as reflected in its legislation, and not, as for the classical liberal, the liberty to live the good life as determined by the individual’s own lights. The individual does not have the “liberty” to determine for herself the content of the good life and then pursue it, for the simple reason that the “good life” according to the conservative natural lawyer, *is* what the community’s normative traditions have established it to be — and law properly and constitution-

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41. 478 U.S. at 196-97 (Burger, C.J., concurring).

ally reflects that conception.<sup>42</sup> “Liberty” therefore not only does not include “privacy,” it is antithetical to it: the liberty we enjoy is the liberty to live a moral life *as defined by* the community’s moral convictions. The Court in *Bowers* decisively endorsed this conservative understanding. The Court respectfully deferred to the normative authority of the Georgia legislature, which had in turn deferred to the conventional morality of the Georgian citizenry — to say nothing of the normative authority of Roman Law, the classics, Blackstone, the common law, and the Christian religion. From a conservative natural lawyer’s perspective, the “political state” of Georgia had acted entirely properly in a moral sense as well as in a constitutional one: it enacted legislation that articulated and deferred to the wisdom of the community’s normative authority.

Second, the Court’s *reasoning* in *Bowers* is at least as rigorously positivistic as its result is moralistic, and the case is for that reason alone likely to be as appealing to conservative legalists and positivists as its result is to conservative natural lawyers. Justice White’s opinion in particular makes clear that not only should conventional morality be respected by legislators, but that furthermore, the Constitution is a law to be obeyed by Courts. Only the judgments contained in the Constitution itself have “authority.” All else is nothing but the Justices’ own value judgments and hence lacks legitimacy. White explained:

This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state court decisions invalidating those laws on state constitutional grounds. The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time. The case also calls for some judgment about the limits of the Court’s role in carrying out its constitutional mandate.

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... [R]espondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do.

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... The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and

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42. P. DEVLIN, *supra* note 23, Chapter I.

the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.<sup>43</sup>

Both the Georgia legislature's and the Constitution's sovereign authority are to be obeyed, then, no less than should the wisdom they incorporate be respected. *Bowers* thus satisfies not only the need to respect tradition central to conservative natural law, but the equally central search for legitimate authority critical to conservative positivism. It affirms both the centrality of communal tradition to the development of morality, and also the centrality of law to legitimate political authority.

Of the major strands of conservative political and jurisprudential thought, only conservative instrumentalists will dispute the *Bowers* result. Conservative instrumentalists cannot unequivocally support the Georgia legislature's attempt to cut off experimental social competition between competing lifestyles and sexual orientations. *Bowers* dampens competition between lifestyles, no less than the legislation at issue in *Lochner*<sup>44</sup> dampened competition in economic markets. It is worth noting, though, that on another level — perhaps a deeper level — the opinion is profoundly pro-competitive, even though, so far as I know, no conservative instrumentalist has explicitly supported the outcome on this rationale. By upholding the Georgia legislature, the Court in effect embraced a competitive, and rejected a hedonistic, understanding of the nature of human sexuality. Nonreproductive, pleasure-seeking, hedonistic sexuality only impedes reproductive competition. The outcome in *Bowers*, like the legislation it sustains, can surely be read as an endorsement of the pro-competitive, “biological market”-based understanding of reproduction propounded by conservative sociobiologists, and a simultaneous rejection of a hedonistic, pleasure-based understanding of our sexual practices.

If all of this is right, then *Bowers* is destined to become as central to conservative dominance over the next few decades as *Brown v. Board of Education*<sup>45</sup> was to liberalism during the last few. In *Bowers*, the Court managed in just a few pages to incorporate at least two and

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43. 478 U.S. at 190-91, 194-95.

44. *Lochner v. New York*, 198 U.S. 45 (1905).

45. 347 U.S. 483 (1954).

perhaps three of the competing strands of conservative constitutionalism into a coherent whole: it respected the normative authority of the community to propound on matters of conventional private morality, obeyed the positive law of both the Georgia legislature and the overarching will of the constitutional founders, and at the same time, at least arguably celebrated the biological competition between members of the species to which reproductive heterosexuality, in contrast to hedonistic homosexuality, is conducive. *Bowers* achieved what *Lochner* could not: a positivistic, obedient Court upheld a statute backed by what the Court perceived to be the dominant moral sense of the community. *Bowers*, then, unlike either the majority or the dissenting opinion in *Lochner*, is paradigmatically conservative. It was not only the vehicle for the triumph of conservative over liberal values on the Supreme Court; *Bowers* did something more deeply ideological than that — it synthesized and accommodated multiple strands of modern conservative constitutionalism.

A sizeable number of recent Supreme Court cases — including *Webster v. Reproductive Health Services*,<sup>46</sup> *Deshaney v. Winnebago County Department of Social Services*,<sup>47</sup> *Penry v. Lynaugh*,<sup>48</sup> *Stanford v. Kentucky*,<sup>49</sup> and *Michael H. v. Gerald D.*<sup>50</sup> — cleanly fit the *Bowers* “model”: in each of these cases, regardless of the doctrinal right at issue, the Court interpreted the constitutional language in such a way as to underscore both the Court’s positivist obligation to obey the constitutional mandate, and the state’s right and obligation to enact legislation embracing the normative authority of the community’s conventional morality. Thus, in *Webster*, the Court held that the Constitution’s protection of individual privacy and reproductive freedom does not restrict the state’s power to define the “beginning of life” by reference to (its view of) the community’s conventional morality.<sup>51</sup> In *DeShaney*, the Court further limited the scope of the liberty protected by due process, and in so doing, extended deferential respect to the normative authority of the family.<sup>52</sup> The Court in effect held that the due process clause does not require the state to invade the family’s “separate sphere” of political authority on behalf of an individual’s safety. In *Stanford* and *Penry*, the Court held that the eighth amend-

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46. 109 S. Ct. 3040 (1989).

47. 109 S. Ct. 998 (1989).

48. 109 S. Ct. 2934 (1989).

49. 109 S. Ct. 2969 (1989).

50. 109 S. Ct. 2333 (1989).

51. *Webster*, 109 S. Ct. 3040.

52. *Deshaney*, 109 S. Ct. 998.

ment does not restrict the right of the state to decide whether and when to execute juveniles and the mentally retarded (respectively) by reference to community standards,<sup>53</sup> and in *Michael H.* that a biological but nonlegal father has no constitutional right against the power of the community to decide the contours of the "nuclear family."<sup>54</sup> In each of these cases, the Court combined conservative-positivist *methodology* with conservative natural law *results* to reach paradigmatically conservative readings of individual rights embodied in the fourteenth and eighth amendments: what the liberty-due process clause of the fourteenth amendment guarantees, according to these cases, is only that the state may not (without providing due process) deprive the individual of the liberty to live the good life *as defined by the community's moral traditions*, and what the cruel and unusual punishment clause ensures is that individuals will not be subjected to cruel punishments, where cruelty is defined, roughly, as out of line with the community's "moral sense."

The Court's conservative due process jurisprudence, then, might be summarized in this way. The due process clause, according to the conservative jurists, cannot and does not, in any way, restrict, constrain, define, or guide the community's authority to dictate, by reference to whatever traditions have become dominant, the content of the life that individuals must be free to enjoy, unimpeded by illegal process. By this view, to identify and define "the good life" is definitionally the community's natural right and moral responsibility, and it is consequently the Court's positive legal and political duty to defer to that communal authority (limited by other constitutional provisions, notably the first amendment). The due process clause grants rights to individuals and accordingly restrains communitarian will, but the right granted is only the right to pursue the community-defined good unimpeded by illegal state action, and the power restrained is only the power of the state to deprive the individual illegally of the liberty that the state, by reference to the community's authoritative conventional traditions, has deemed compatible or necessary to pursuit of the good life and the good society. The legislature, and through it the community, and through the community authoritative traditions, remain empowered to define the content of the good life (and hence the content of evil) and legislate accordingly. Constitutional restraints leave the authority of tradition and its authoritative power over our lives intact.

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53. *Stanford*, 109 S. Ct. at 2969; *Penry*, 109 S. Ct. at 2934.

54. *Michael H.*, 109 S. Ct. at 2342-47.

## 2. Equality Jurisprudence

*City of Richmond v. J.A. Croson Co.*,<sup>55</sup> decided last Term, may well be the conservative Court's paradigm equal protection clause case, destined to become as central to the conservatives' developing understanding of equality doctrine as is *Bowers* to due process. As others have argued, and as countless others no doubt will argue in the near future, the minimalist understanding of equal protection rendered by the Court in *Croson* cannot be traced to any neutral reading of either political history or constitutional law.<sup>56</sup> What I want to argue here is the somewhat different point that *Croson* can readily and easily be traced to conservatism's political and jurisprudential premises.

First, and most obviously, the *result* in *Croson* (rather than the reasoning) is a conservative instrumentalist's triumph, no less than the result in *Bowers* was a conservative natural lawyer's victory. For the free-market conservative, race ought not to be a determinant of legislative decisionmaking that affects the success of individuals in competitive economic markets — *regardless of whether the motive for such legislation is benign or malignant* — because and to the degree that race is not a rational proxy for any characteristic that could conceivably be of relevance to the competitive process. For the conservative instrumentalist, the purpose of law should be to free economic competition, so that economic power can prevail unimpeded by extrinsic considerations. The equal protection clause should therefore be read in such a way as to further this purposive mandate. Discriminatory, race-conscious legislation generally inhibits rather than furthers competition, and hence trenches on competitive values. If competitive rationality is the purpose — and therefore the meaning — of equality and of equal protection, it obviously makes no difference whether the discriminatory legislation is malignant or benign — either way it inhibits competition. The result in *Croson* is substantially in accord. Thus, Justice O'Connor's summary of the Court's holding emphasizes both the value of competition and conservative instrumental themes:

The Equal Protection Clause of the Fourteenth Amendment provides that "[N]o State shall . . . deny to *any person* within its jurisdiction the equal protection of the laws". . . . As this Court has noted in the past, the "rights created by the first section of the Fourteenth Amendment

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55. 109 S. Ct. 706 (1989).

56. Casebeer, *Running on Empty: Justice Brennan's Plea, The Empty State, the City of Richmond, and the Profession*, 43 U. MIAMI L. REV. 989, 1007 (1989); Delgado, *On Taking Back Our Civil Rights Promises: When Equality Doesn't Compute*, 1989 WIS. L. REV. 579; Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729 (1989); Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989).

are, by its terms, guaranteed to the individual. The rights established are personal rights." *The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race.* To whatever racial group these citizens belong, their "personal rights" to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.

Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. . . . We thus reaffirm the view expressed by the plurality in *Wygant* that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.<sup>57</sup>

For the conservative positivist as well, the decision is a victory. As the concurring opinions of Justices Scalia and Kennedy were at pains to establish, no distanced, historical "other" has ever "legitimated," through military, political, or judicial victory, the quest for substantive racial equality in this country's history.<sup>58</sup> Substantive racial equality — the clear goal of affirmative action — is simply not a part of the normative authority of our positive constitutional law. Formal racial equality — the neutrality standard under which affirmative action laws are struck down — by contrast, *is*. Thus, the conservative positivist, like the conservative instrumentalist, will endorse a reading of equal protection that precludes benign as well as malicious uses of race in legislative decisionmaking, but the reason will be different: for the conservative instrumentalist, such a reading furthers competition; for the conservative positivist, such a reading is commanded by the Constitution. As Justice Scalia explained:

The benign purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can no more be pursued by the illegitimate means of racial discrimination than can other assertedly benign purposes we have repeatedly rejected. . . . The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency — fatal to a nation such as ours — to classify and judge men and women on the basis of their country of origin or the color of their skin. A solution to the first problem that aggravates the second is no solution at all. I share the view expressed by Alexander Bickel that "[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of

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57. 109 S. Ct. at 720-21 (emphasis added; citation omitted).

58. 109 S. Ct. at 734-39 (Scalia, J., and Kennedy, J., concurring).

democratic society.”<sup>59</sup>

The conservative natural lawyers’ support of *Croson* is considerably more tentative, as is reflected in both the tone and content of Justice O’Connor’s opinion. For O’Connor as well as for other conservative natural lawyers, the moral sense of the community, as expressed through its legislature, is the proper source of authority on issues concerning the good. It would seem to follow that if the community has embraced substantive race equality as a desirable legislative goal, that commitment should be respected. The only *limit* to this principle (and the equal protection clause is surely a limit) for the conservative natural lawyer must come not from an abstract commitment to a particular understanding of “equality” as constitutive of the good that conflicts with communitarian conceptions, but rather, from limits on the community’s normative authority: if history has proven the community untrustworthy with respect to some aspect of its authority to define the good, then to that degree, the community has lost its claim to authority. The meaning of “equal protection” should, then, be derived from a moralistic understanding of the limits on the community’s normative authority, not from any understanding of equality itself.

Because history has proven the local community’s authority on the nature of the good untrustworthy in matters regarding race, O’Connor reasoned, benign as well as malicious racial categorizations *made by local and state governments* are clearly unconstitutional. The state and municipal community — otherwise authoritative — cannot be trusted with racially explicit classifications, whether they be in the service of apartheid or in the service of affirmative action:

That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori* the States and their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit *constraint* on state power, and the States must undertake any remedial efforts in accordance with that provision. To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions. The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the States to exercise the full power of Congress under § 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under § 1. We believe that such a result would be contrary to the intentions of the Framers of the Fourteenth Amendment, who desired to place clear limits on the States’ use of race as a criterion for legislative action, and to have the federal courts enforce those

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59. 109 S. Ct. at 735 (Scalia, J., concurring) (emphasis added) (quoting A. BICKEL, *THE MORALITY OF CONSENT* 133 (1975)).



limitations.<sup>60</sup>

Thus, to summarize, equality means “formal equality” and no more in the conservative paradigm, just as “due process” means protection against procedural illegality and procedural illegality only. For conservative theorists and jurists, the equal protection clause protects the individual’s right not to be irrationally discriminated against by state officials: like individuals must be treated alike by the legislature as well as in the market, no less than like cases must be treated alike by judges. Racial classifications are irrational classifications, or should be presumed to be such, because they breach this formal justice mandate — similar individuals are treated differently — and are accordingly unconstitutional. The clause does no more than this. It does not guarantee, in any way, a right to substantive social or economic equality. It does not guarantee or even suggest that states should take action to ameliorate the substantive inequality suffered by particular historical groups during the country’s history. The right granted is an individual right to be free of the effects of legislation that categorizes on the basis of irrational factors, such as race or, in some circumstances, gender. It neither recognizes nor protects group grievances, group histories, or group entitlements.

In this decade, what this conservative interpretation of equality means, most importantly, is that other than in truly extraordinary circumstances, no individual’s or corporation’s competitive chances in the marketplace will be compromised by societal efforts to put an end to the substantive, subordinating effects of private, social, or institutional racism through anticompetitive affirmative action programs. The clause thus construed protects not equality so much as the integrity of the competitive process, and targets not *racism* (to say nothing of classism, misogyny, or heterosexism), but race-conscious governmental decisionmaking. The conservative’s conception of the guarantee of equality thus has nothing to do with putting an end to racism if “racism” is understood as the white majority’s hatred, contempt, and subordination of nonwhites, and little if anything to do with achieving equality. Rather, it has everything to do with protecting competitive values against progressive political attempts by the state to do so.

### 3. *Constitutional Interpretation*

Finally, two central and arguably inconsistent propositions about the nature and scope of constitutional interpretation are paradigmatically conservative: first, that the Constitution should be interpreted in

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60. 109 S. Ct. at 719.

such a way as to give effect to the meaning most likely intended by its authors (“intentionalism” or “originalism”),<sup>61</sup> and second, that in the absence of clear constitutional authority to the contrary, the Court should defer whenever possible to legislative will.<sup>62</sup> Most conservatives subscribe to one or the other of these two claims, and many, if not most, subscribe to both. Interpretation, for the conservative constitutionalist, is a matter of ascertaining the original meaning of the Constitution, and in cases of doubt, deferring to legislative judgment. Judicial restraint and originalism constitute the core of a conservative theory of constitutional interpretation.

At first glance, this dual endorsement of judicial restraint and originalism is hard to rationalize: it is not clear why a strict originalist would advocate judicial restraint over judicial activism — either, from time to time, might be necessary to achieve the original intent of the Framers. Nor is it at all clear why an advocate of judicial restraint would insist upon obedience to original intent. The conservative approach to interpretation, in other words, seems to flow from *neither* a commitment to majoritarian democracy nor an adherence to strict constitutionalism. When viewed as an outgrowth of the politics and jurisprudence of conservatism, however, it is less mysterious why so many conservatives try to hold both commitments.

First, the two imperatives within the conservative view of constitutional interpretation — that courts should interpret the Constitution narrowly so as to effectuate the will of its authors, and that the courts should whenever possible defer to legislative will — are each directly responsive to the need for obedience to legitimated authority that drives conservative positivism. First, originalism compellingly satisfies the conservative positivist’s quest for legitimated authority. The original Constitution, to the conservative positivist, is a legal document laid down by earlier embodied political sovereigns in positions to command, is therefore “legitimate,” and should be construed accordingly.<sup>63</sup> Consequently, the conservative positivist will read the Constitution wherever possible as a command that does and should trigger an attitude of obedience. The Constitution is not, for the conservative positivist, a “text” requiring active, creative, and hence morally responsible interpretation by particular judges within the context of particular historical circumstances. Rather, the text is a command within a hierarchy of commands, to which the judge’s only distinc-

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61. See, for example, the work of Raoul Berger, cited *supra* note 2, and Robert Bork, cited *supra* note 2.

62. See R. BORK, *supra* note 2; Bork, *Neutral Principles*, *supra* note 2.

63. See R. BORK, *supra* note 2; Bork, *Neutral Principles*, *supra* note 2.

tively *moral* duty is one of unflinching obedience. The judge's moral duty, then, is exhausted by his duty to obey; judicial morality is a "morality of obedience." The judge behaves morally by obeying authority, rather than capriciously acting on his or her "own" values.

Judicial restraint similarly satisfies the psychic and ethical mandate of obedience that drives conservative positivism. Judicial restraint continues to be a central commitment of conservative positivism, not for the narrowly political reason that the judiciary's politics are substantively at odds with conservatism — for this is clearly no longer the case — but rather for the deeply political reason that it is the lawmaking, imperativist activity of legislation, rather than the deliberative work of adjudication, that gives rise to imperatives that invite obedience. The conservative positivist judge will tend to construe the more general and less imperative provisions of the Constitution narrowly, so as to maximize deference to — and hence obedience to — the legislative will. The legislator is an embodied authority speaking in unambiguously imperative language. Where the constitutional command can be traced to equally clear and clearly imperative authority it will surely trump; but where the constitutional text does not do so — where it neither appears nor operates as an imperative command, and where the "embodiment" of its authority is unclear — the conservative judge will read it narrowly, so as to retain the form and substance of a hierarchic, legalistic structure of command.

The Court, then, as a state actor, should obey rather than act; should defer rather than interpret; should acquiesce in authority rather than question it. The Court (like all moral agents) should defer to, or submit to, the *law*, as established by the legislature or the constitutional founders — not because the legislature or the founders were necessarily wise, but rather because the power on which their authority rests is legitimate. Judge Easterbrook defends both conservative legal positivism and the legal conservative's constitutive stance of obedience in the judicial realm in this representative passage:

[T]he proper judicial role combines honest interpretation of decisions made elsewhere with careful discharge of powers expressly granted. . . . Judges have no authority to reconstitute the values of the people or to exalt redistribution at the expense of competing objectives selected by the political branches. . . . The Constitution demands that all power be authorized. . . . Judges applying the Constitution we have, rather than the one Professor Tribe wishes we had, must take their guidance and authority from decisions made elsewhere. Otherwise they speak with the same authority they and Professor Tribe and I possess when we fill the law reviews with our speculations and desires: none. And the other branches owe no obedience to those who speak without authority.

This is not to say that the judicial process is mechanical. Far from it. . . . Knowledge is ephemeral, and doubts about both the meaning of words and the effects of rules tax the greatest interpreters. But none of this changes the source of the power to decide. Judges can legitimately demand to be obeyed only when their decisions stem from fair interpretations of commands laid down in the texts.<sup>64</sup>

It is not surprising, then, that conservative positivists are drawn to principles of interpretation mandating both originalism and judicial restraint. The reason this is so, however, is not narrowly political in the sense often meant by critics of intentionalism. It *is*, however, political in a deeper sense: for positivist conservatives, a Constitution, like a statute, is there to be obeyed. The Constitution *binds* just as the law *commands*; they are both *authoritative*; they constitute our capacity for *self-rule*. That a rigid intentionalism and originalism dominates conservative constitutionalism thus has everything to do with the conservative need and desire to constrain one's freedom and hence moral responsibility by submitting to and obeying legitimated authority. The conservative positivist's insistence that the Constitution must be construed and obeyed in accordance with the intent of its Framers — that the Constitution must be “obeyed,” not freely interpreted — follows inexorably from the psychic need to constrain choice, freedom, fluidity, motion, and the will to power, with prior, objective, and controlling authority.

A strand of moral conservatism as well supports the centrality of both judicial restraint and strict originalism to the interpretive model at the core of the conservative paradigm. The evident wisdom, intelligence, and vast practical and historical knowledge of the “Founding Fathers” ought surely to be respected. Somewhat less obviously, however, the legislature also constitutes, at least in its ideal form, a group whose substantive judgments command respect. Moralistic conservatives and conservative natural lawyers thus have independent reasons to endorse both originalism and judicial restraint, although their support for these interpretive commitments is more likely to be ambivalent than that of conservative positivists — precedent, or the common law tradition, constitutes, for the moralistic conservative, an important competing body of accumulated wisdom, and the wisdom of precedent may of course diverge from the wisdom of original intent, and may counsel considerable judicial activism. This may not, however, be as great a conflict as first appears. As moral conservatives correctly note, constitutional decisions, with only rare exceptions, are in fact far less likely to deal meaningfully with underlying moral issues than is

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64. Easterbrook, *A Reply*, *supra* note 2, at 627-29.

commonly supposed. Thoughtful moral conservatives are accordingly skeptical of the “precedential wisdom” of judicial decisions, and are more inclined to value the culmination of wisdom expressed in moments of legislative and constitutional enactment. As Professor McConnell explained:

[J]udicial decisionmaking contains very little serious deliberation on moral issues. In the abortion decision, for example, the Court majority thought it “need not resolve” the moral-legal status of the unborn child . . . while the dissenters devoted their entire opinion to issues of standing to sue and the power of the states. . . . *Bowers v. Hardwick*, which dealt with state power to regulate private consensual sexual conduct, presented an unedifying face-off between a majority that believed the claims of homosexuals to sexual autonomy were “at best, facetious,” and dissenters who reflexively equated longstanding religious moral teaching with “religious intolerance,” without pausing to reflect on its possible moral underpinnings. . . . [T]he discussion of gay rights in and around the Chicago City Council had more substance than the opinions in *Bowers v. Hardwick*. The Court’s treatment of other prominent moral-constitutional questions. . . has not been much better. . . .

Nor . . . has there been much more moral deliberation behind the curtains. The Justices are far too busy to spend much time thinking about the cases. . . . In contrast to the months, even years, that are devoted to major legislative deliberation, the Justices devote one hour to oral argument and somewhat less than that to discussion at conference.<sup>65</sup>

For obvious reasons, the dual principles of originalism and judicial restraint do not resonate nearly as strongly with conservative instrumentalism. For the conservative instrumentalist, the Constitution, like all law, should be interpreted so as to free economic competition, not so as to effectuate the will of either founders or legislators, and this will often require considerable judicial activism in the face of legislation inhibiting economic competition. Free-market libertarianism, as is increasingly well understood, requires considerable judicial activism and seems to mandate legislative rather than judicial restraint.

Nevertheless, even conservative instrumentalists can find some reason to support the principles of judicial restraint and original intent. As Holmes’ famous dissent in *Lochner*<sup>66</sup> makes clear, judicial restraint in the face of legislative will facilitates not only judicial submission to the imperatives of legislation, but also frees competitive victories — albeit of a political, rather than economic, stripe. For Holmes, as for some of his present-day moral-Darwinian followers, the legislature, no less than the market, constitutes a sphere of competitive normativity. Post-Holmesian moral-Darwinian conservatives are therefore under-

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65. McConnell, *supra* note 2, at 1536-37.

66. *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

standably split not only over the value of judicial restraint, but also over the value of Holmes' famous *Lochner* dissent: on the one hand, an activist judiciary could overturn anticompetitive legislation, thus freeing competition and competitive market outcomes, but on the other hand (as Holmes' dissent argued), legislation is itself (at least at times) the outcome of competitive processes, and when it is, an activist court that upsets those outcomes is undermining, rather than furthering, competitive values and competitive victories.<sup>67</sup> For the instrumental moral-Darwinian conservative — who views the public competition of interests and ideologies regarding the nature of the good that is characteristic of legislation as of greater consequence to the struggle for survival than the competition of wealth, skills, and talents in private markets — judicial restraint will be a constitutional imperative, even in the face of anticompetitive legislation. Particularly where legislation is the product of economic-styled bargaining, the legislature's will ought to remain untrammelled: legislative will ought to trump not only the conflicting outcomes that competitive markets would dictate, but also the conflicting principles that moralistic courts might wronghandedly seek to enforce. At least a strand, then, of moral-Darwinian conservatism supports rather than contests the primacy of judicial restraint to the conservative paradigm.

Thus, conservatives converge on an originalist-judicial restraint understanding of constitutional interpretation and support the outcomes in *Bowers*<sup>68</sup> and *Croson*,<sup>69</sup> although for different reasons. The developing conservative constitutional paradigm, and the divergent reasons for its conservative support, might be schematized in this way:

	Interpretation (Originalist/restraint)	Liberty ( <i>Bowers</i> )	Equality ( <i>Croson</i> )
Moralistic, Natural Law	<i>Respect</i> for wisdom of founders/ legislators	<i>Respect</i> for religious teachings; community's traditions	<i>Respect</i> for the <i>limits</i> of community's wisdom
Imperativist Positivism	<i>Obedience</i> to legitimate legislative & constitutional commands	<i>Obedience</i> to Georgia legislative & constitutional mandate	<i>Obedience</i> to constitutional imperative
Competitive Instrumentalism	<i>Celebration</i> of legis. & constitutional outcomes as products of normative competition	<i>Celebration</i> of pro-reproductive, competitive sexuality	<i>Celebration</i> of competitive processes over substantive equality

67. In this regard, see Posner's discussion of *Lochner* in R. POSNER, *supra* note 28, at 281-88, and R. POSNER, *supra* note 2, at 383-86.

68. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

69. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989).

## II. THE PROGRESSIVE CONSTITUTIONAL PARADIGM

### A. *Progressive Political Theory*

Modern progressive political theory begins with a central, even definitive, insight: conservative deference to communal authority — whatever form it takes — directly implies a parallel deference to the clusters of social power that invariably underlie it.<sup>70</sup> Communal “authorities” on how we ought to live — whether they be moral, legal, or economic — no less than the state authorities so distrusted by conservative theorists, are “authoritative” not because they are necessarily right (although they may be) but because they have, use, reflect, and wield social power. They may have power, in turn, because they are right (and thus have survived centuries of critical inquiry) or, as Foucault’s social “archeologies” have aimed to reveal, they may have power for some other reason, such as that they serve the interests of dominant social groups.<sup>71</sup> In any case, normative authority rests on some form of social power. The authority of the market to dictate what is and is not of value is directly dependent upon the power of particular market actors to shape the preferences of others.<sup>72</sup> Similarly, the normative authority of the rule of law to demand obedience to lawful authority is dependent upon the power of the legal system to coerce, where need be, its mandates.<sup>73</sup> Lastly, the authority of the community to dictate particular moral values is dependent upon some part of the community achieving sufficient power so as to transform its “will” into received “wisdom.”<sup>74</sup> In all three cases, when the conservative embraces, preserves, respects, and defers to the teachings of communal authority, he or she necessarily, whether or not intentionally, embraces the social power that underlies it. Thus, progressives conclude, political and jurisprudential conservative thought rests not only on attitudes of deference to a community’s normative authority,

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70. That communal authority is premised on social power is an organizing tenet of critical theory. See, e.g., M. FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1977) [hereinafter M. FOUCAULT, *DISCIPLINE*]; M. FOUCAULT, *THE HISTORY OF SEXUALITY* (1978) [hereinafter M. FOUCAULT, *SEXUALITY*]. For parallel arguments in the legal literature, see M. KELMAN, *supra* note 3, at 213-33, and Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57, 71-116 (1984).

71. See, e.g., M. FOUCAULT, *DISCIPLINE*, *supra* note 70; M. FOUCAULT, *SEXUALITY*, *supra* note 70.

72. See M. KELMAN, *supra* note 3, at 151-85.

73. This is, of course, the central insight of the Critical Legal Studies movement. See, e.g., *ESSAYS ON CRITICAL LEGAL STUDIES* (Harvard Law Review Association ed. 1986); Kairys, *Introduction, THE POLITICS OF LAW 5* (D. Kairys ed. 1982); *Critical Legal Studies Symposium*, 36 *STAN. L. REV.* 1 (1984).

74. See generally B. SMITH, *CONTINGENCIES OF VALUE: ALTERNATIVE PERSPECTIVES FOR CRITICAL THEORY* (1988).

but also on attitudes of deference toward the social power that underlies it.

Progressivism, in part, defines itself in opposition to this conservative deference toward social power. Progressive political theory is grounded in feelings of *antipathy* and *resistance*, rather than attraction, to both social authority and social power. Progressives reject both the wisdom and often the legitimacy of the normative authority that emanates from social institutions, including the three particular institutions that presently dominate conservative political and legal thought: the community's conventional morality, its positive law, and its economic markets. According to progressives, state actors, whether legislators or adjudicators, should not defer to the normative authority that rests on those sources when deciding how to act. Instead, progressives argue, state actors should rely upon the experiences, ideals, and aspirations of the relatively *disempowered*, rather than the established traditions or customs of the socially empowered. The progressive is thus willing to countenance state action designed to disrupt patterns of social hierarchy, just as the conservative is typically quite willing to countenance state action designed to reinforce those patterns.

The particular experiences of the disempowered to which the progressive turns, however, and their reasons for doing so, diverge, just as conservatives split on the type of community authority to which, in their view, state actors ought to defer. Again, it is useful to distinguish at least three major strands of progressive political thought — and three correlative jurisprudential movements — all of which have had an impact on progressive constitutional theorists.

First, for some progressives, the meaning of the good and hence the content of the “good life” that should be the goal of state action should be understood by reference to a set of ideals that derive from the experiences and aspirations of the relatively disempowered. These progressives, whom I call “idealistic progressives,” identify the content of their progressive politics — the meaning of the “good life” that citizens must have the right to pursue and that the state has an obligation to encourage — by reference to a particular utopian vision of social life which is in turn grounded in those experiences: a world in which each individual enjoys some degree of meaningful individual autonomy, some degree of life-fulfilling rather than life-threatening connection to others, and freedom from fear of oppression, want, violence, or subordination.<sup>75</sup> To make such a life possible for all citizens, ac-

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75. See generally J. MILL, *supra* note 7. For an argument that modern liberals fail to read Mill correctly, that his theory is progressive and requires the state to engage in discrimination



ording to idealistic progressives, is and should be the proper aim of state action.

The “experiences” that inform this utopian vision of the good, for the idealistic progressive, are not culled from the lessons of objective tradition, as for the moralistic conservative; rather, they are derived from the experiences — which may include memories, glimpses, or dreams — of true freedom or equality that occur “in the interstices” (as it were) of a daily life constructed for the most part within conditions of hierarchy, inequality, subordination, and bondage. Let me offer two examples of progressive thought explicitly defined and informed by such interstitial moments; one more familiar, one less so. In both cases, the moral reasoning contrasts sharply with the conservative “idealistic” method outlined for “thoughtful people” by Michael McConnell.<sup>76</sup>

First, along with a number of radical feminists, lesbian feminist Adrienne Rich has argued eloquently and persuasively that the widespread participation of women in practices of heterosexuality, family, and motherhood is best explained as a product not of nature or biology, nor of benign culture, and certainly not of individual choice, but rather as a product of patterns of coercion, gendered hierarchy, sexual violence, and male control of women’s sexual and reproductive labor — patterns that transcend culture, race, and era.<sup>77</sup> What is *distinctive* about Rich’s work — what distinguishes it from other radical feminist writings on the same topic — is her explicit reliance on women’s “aspirational experiences” — fleeting, occasional, generally unrecorded, and often distrusted, even by the woman herself — of a better, fuller, “woman-identified” and woman-bonded emotional, spiritual, and, at times, erotic life. It is this reliance on interstitial experiences of true liberty and equality that renders Rich’s work idealistic and gives her argument its moral core. It is *because* women experience these fleeting, interstitial moments of freedom from male coercion, Rich suggests, that we can be confident that patriarchy and its attendant sexual violence are indeed very real obstacles to the enjoyment of the good life. Rich calls these experiences, collectively, the “lesbian continuum” and argues that virtually all women, at some point in their lives,

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between conceptions of the good life, see West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673, 688-93 (1985).

76. See *supra* note 24 and accompanying text.

77. A. RICH, *ON LIES, SECRETS AND SILENCE: SELECTED PROSE, 1966-1978* (1979); see also A. DWORKIN, *INTERCOURSE* (1987); A. DWORKIN, *WOMAN-HATING* (1974); C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 4.

have an experience of nondominated life that at least tangentially touches that continuum:

I mean the term *lesbian continuum* to include a range — through each woman's life and throughout history — of woman identified experience, not simply the fact that a woman has had or consciously desired genital experience with another woman. If we expand it to embrace many more forms of primary intensity between and among women, including the sharing of a rich inner life, the bonding against male tyranny, the giving and receiving of practical and political support . . . we begin to grasp breadths of female history and psychology which have lain out of reach as a consequence of limited, mostly clinical, definitions of *lesbianism*.

Lesbian existence comprises both the breaking of a taboo and the rejection of a compulsory way of life. It is also a direct or indirect attack on male right of access to women. But it is more than these, although we may first begin to perceive it as a form of naysaying to patriarchy, an act of resistance. . . . The destruction of records and memorabilia and letters documenting the realities of lesbian existence must be taken very seriously as a means of keeping heterosexuality compulsory for women, since *what has been kept from our knowledge is joy, sensuality, courage, and community, as well as guilt, self-betrayal and pain.*<sup>78</sup>

The second, and more familiar, example comes from Martin Luther King's writing and oratory. King's thought was not just "progressive" in its opposition to racial hierarchy. It was also, like Rich's, idealistic in its method: King's conviction that a life lived in a world free of racial hierarchy would indeed be a better life was explicitly informed not only by traditions culled from religious history, but also by occasional experiences, religious visions, and "dreams" of a utopian future. It was these interstitial moments and dreams, for King, that gave him confidence that a life free of the damaging effects of racism would indeed be better, for both the individual and the community:

*I have a dream* that one day even the state of Mississippi, a desert state sweltering with the heat of injustice and oppression, will be transformed into an oasis of freedom and justice.

*I have a dream* that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.

*I have a dream* today.

*I have a dream* that one day the state of Alabama, whose governor's lips are presently dripping with the words of interposition and nullification, will be transformed into a situation where little black boys and black girls will be able to join hands with little white boys and white girls and walk together as sisters and brothers.

*I have a dream* today.

*I have a dream* that one day every valley shall be exalted, every hill

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78. Rich, *Compulsory Heterosexuality and the Lesbian Continuum*, in BLOOD, BREAD, AND POETRY 51-52 (1986) (emphasis added to last sentence).

and mountain shall be made low, the rough places will be made plains, and the crooked places will be made straight, and the glory of the Lord shall be revealed, and all flesh shall see it together.<sup>79</sup>

These experiences of the ideal “in the interstices” of everyday lives of subordination and domination, occasional and fleeting as they may be, are arguably essential to any progressive movement: they are the basis of the conviction that there is another possible life, and a life that is qualitatively better than the life defined and constrained by the social hierarchy of the present. Without such idealistic experiences, the progressive insight that a present social reality is riddled with hierarchy and power imbalances runs the risk of triviality — it is hard to imagine a social reality that is not. Idealism that relies directly on interstitial experiences of true liberty and equality is thus one way (which is not to deny that there are others) by which the progressive can assert the normative superiority of a more egalitarian and less hierarchical social life, and thus one way that progressivism becomes a normative and moral vision, rather than merely a political imperative fueled by the discontent of the disempowered. Idealistic progressives, distinctively of all progressives, focus on these experiences of ideal forms of life, not only as a minimal constituent of a moral vision, but as constituting the moral vision itself. For the idealistic progressive, the content of the good, and the good life, that the state ought to use its power to ensure and create, is quite self-consciously constructed from these intensely subjective, although by no means individualistic, direct, occasional, and for the most part “un-lived” experiences of the good life.

Second, for some progressives, the meaning of the good and the good life that the state ought to promote, should be understood by reference to the recurrent experience of *freedom*, and the understanding of its necessity, even within objective conditions of constraint, subordination, deprivation, and bondage. These progressives — whom I call “existential progressives” — identify the content of the good life with these concrete lived experiences of freedom. The good life, for the existential progressive, is the life that both understands and constructs itself as authentically constituted by its possibilities; appreciates the open and identified choice; and maintains a passion for free play, ambiguity, and change. For the existentialist, the “good life” is the life that is consciously lived in conditions of constant internal subjective growth and external flux. The core value, then, is authenticity, and the core political imperative is to maximize the social conditions

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79. King, *I Have a Dream*, in WORDS OF MARTIN LUTHER KING 95-97 (C.S. King ed. 1983).

that make possible an authentic life. Life is that which changes, and the good life is the self-conscious realization of that ideal. Political and social life should be organized in such a way as to make such a life realizable for all.

This existential understanding of freedom, choice, possibility, and openness has had tremendous influence on the Critical Legal Studies movement, and hence indirectly on progressive constitutionalism as well. To avoid confusion, we should identify two quite different lines of influence. First, existential progressives, like critical scholars and critical legal scholars, have generally embraced the *descriptive* critical claim that behind the facade of control, determinacy, or rigidity in any particular political choice — including, significantly, the judicial choice — lies an underlying reality of choice, possibility, indeterminacy, and freedom. This idea has played a tremendously important role in the development of the “indeterminacy critique” in the Critical Legal Studies movement. In an early and seminal piece, Duncan Kennedy described the existential and phenomenological experience of judicial choice in this way:

[T]he acknowledgement of contradiction makes it easier to understand judicial behavior that offends the ideal of the judge as a supremely rational being. The judge cannot, any more than the analyst, avoid the moment of truth in which one simply shifts modes. In place of the apparatus of rule making and rule application, with its attendant premises and attitudes, we come suddenly on a gap, a balancing test, a good faith standard, a fake or incoherent rule, or the enthusiastic adoption of a train of reasoning all know will be ignored in the next case. In terms of individualism, the judge has suddenly begun to act in bad faith. In terms of altruism, *she has found herself*. The only thing that counts is this change in attitude, but it is hard to imagine anything more elusive of analysis.<sup>80</sup>

Second, existential progressives, like critical scholars, have also generally embraced the related ethical claim that the destruction of socially constructed hierarchies and the limits on freedom they impose would be a gain in freedom and hence a gain in the good life for all affected individuals. In a series of books and articles, Roberto Unger, still the foremost spokesperson for normative critical thought, insists that the destruction of social hierarchy in all its forms is a sufficiently rich normative agenda for a progressive movement.<sup>81</sup> Any such “disentrenchment” constitutes a gain in both freedom and empowerment.

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80. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1776 (1976) (emphasis in original).

81. R. UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY* (1987); Unger, *supra* note 4.

In his most recent book, *False Necessity*, Unger puts the point in this way:

The guiding theme of the program of social reconstruction is the attempt to imagine institutional arrangements and social practices that can advance the radical project beyond the point to which contemporary forms of governmental and economic organization have carried it. By the . . . project of the modernist visionary I mean the attempt to realize the many forms of individual or collective empowerment that result from our relative success in disengaging our practical and passionate dealings from the restrictive influence of entrenched social roles and hierarchies. . . . The program suggests how our contemporary formative contexts might be disentrained, . . . how they might be more fully opened to challenge in the midst of our routine conflicts and therefore also how they might undermine or prevent rigid forms of social division and hierarchy. . . . The weakening of the influence of this prewritten social script is to be valued not only negatively, as an occasion for a broader range of choice, but affirmatively for the forms of empowerment it makes possible. . . .

. . . .  
 . . . [D]ifferent institutional arrangements reflect varying degrees of advance in the denaturalization of society. Society becomes denaturalized to the extent that its formative practices and preconceptions are open to effective challenge in the midst of ordinary social activity . . . . The concept of denaturalization or emancipation from false necessity includes the idea of a weakening of rigid roles and hierarchies. It therefore also refers to the development of forms of production, exchange, and passionate attachment that are less marked by such rankings and divisions. . . . I use the term negative capability to suggest the variety of forms of empowerment that denaturalization makes possible.<sup>82</sup>

For existential progressives, then, as for critical legal scholars, the state should act in a way that furthers a program of disentrainment and denaturalization. The goal is a social world in which each individual and group is as free as possible to “find herself” through discovering her multiple selves; to disentrench herself from rigid roles imposed from without; to “shift modes”; to denaturalize her roots; and to discover her essence not in her essentiality, but in her potentiality. The means by which this might happen is, in part, state action responsive to social rigidity: the state should properly be viewed as one mechanism, among others, for destabilizing social entrenchment. By so doing, and only by so doing, can it further rather than frustrate the “good life” of the citizens over whom it unquestionably holds dominion.

Lastly, for a third group of progressives — who can be called “anti-subordination progressives” — the meaning of the good and the

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82. R. UNGER, *supra* note 81, at 9, 164.

good life that the state ought to promote is understood by reference to the experiential understanding of the damage done by private and social hierarchies of authority and power. Anti-subordination progressives typically concern themselves not with the nature of the “good life” which the state has a duty to promote, but rather with the nature of its absence which the state has a duty to prevent. The meaning of the good, for anti-subordination progressives, is negatively inferred from varying experiences of subordination, bondage, and invasion. The sorts of experiences of inequality that inform anti-subordinationist politics and legal thought are vast. They include, for example, the daily, numbing joylessness of a materially impoverished existence; the self-contempt from being regarded as essentially less than human, less than whole, less than entitled, or less than respected; the pain of being a target of hatred and abuse; the dehumanization of being an object of property, of sexuality, or of another’s goals and ambitions; the general day-to-day horror of being systematically lessened or “handicapped” so that another can feel whole; of being systematically dirtied or polluted so that another can feel pure and clean; of being systematically rendered contingent, natural, bodily, of the dirt, or of the earth so that another can feel transcendental, free, spiritual, or rational; and of being systematically perverted, bent, and marginalized so that another can feel normal, straight, or central.

Subjective experiences of constraint, invasion, and bondage are also vast: they include the experience of the physical bondage of shackles, chains, whips, bits, and gags; the experience of the sexual bondage of an unwanted partner in a false intimacy; the constraints on life itself of the often unchosen and more often unwanted career of motherhood; the restrictions on livelihood, social contribution, career, and public work brought on even by wanted and celebrated mothering; and the invasiveness of mandated constructions of sexual intimacy and sexual choice. The meaning of bondage, invasion, constraint, and restriction, to the anti-subordination progressive, is in large part the content of these experiences. The meaning of the good or of the “good life,” to anti-subordination progressives, is informed by the content of those experiences, and the good life, very simply, would mean their absence.<sup>83</sup> The state, then, should aim to create a world free of these

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83. Storytelling, particularly the telling of stories relating experiences of subordination, plays a major role in anti-subordination progressive legal thought as well as in progressive political thought. See, e.g., Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320 (1989).

experiences. The good life that the state ought to promote is the life unconstrained by the foot on one's neck and the gag in one's throat.

### B. *Progressive Jurisprudence*

As is the case with conservative political theory, these three responses to social power inform three distinctive interpretations of our major jurisprudential traditions: natural law, legal positivism, and legal instrumentalism. First, like conservative moralists, progressive idealists tend to be "natural lawyers": progressive idealists, like conservative moralists, view law as definitionally aspiring toward a moral ideal. However, whereas the conservative natural lawyer gives content to the moral ideal toward which law aspires by reference to a community's conventional morality, the progressive natural lawyer gives content to the ideal by reference to the glimpses, memories, or dreams of a truly good life as experienced by the relatively disempowered: a life lived within actual conditions of liberty, equality, or freedom. Progressive idealism and the natural law tradition thus combine in a distinctively progressive version of natural law: the "legalism" of "natural law" gives foundation, permanence, and a link to the past to an otherwise unfettered idealism, while the progressive's unique blend of idealism and experientialism frees the natural law tradition from the shackles of social conventionality and tradition.

Thus, for the progressive natural lawyer, the ideal toward which government should aim is informed not by history but by possibility, not by authority but by vision, and not by the traditions that have triumphed over un-lived dreams but by the dreams that have survived in the interstices of the triumphant traditions. Law should and does aspire toward un-lived ideals, not toward a perfect congruence with the wisdom of historically established tradition. Martin Luther King's *Letter from the Birmingham Jail* contains what is undoubtedly this tradition's most eloquent restatement:

There are two types of law: just and unjust. . . . One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that "an unjust law is no law at all."

A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law. *Any law that uplifts human personality is just. Any law that degrades human personality is unjust.* All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority and the segregated a false sense of inferiority. Segregation, to use the terminology of the Jewish philoso-

pher Martin Buber, substitutes an "I-it" relationship for an "I-thou" relationship and ends up relegating persons to the status of things. Hence segregation is not only politically, economically and sociologically unsound, it is morally wrong and sinful. . . . Is not segregation an existential expression of man's tragic separation, his awful estrangement, his terrible sinfulness? Thus it is that I can urge men to obey the 1954 decision of the Supreme Court, for it is morally right; and I can urge them to disobey segregation ordinances, for they are morally wrong.<sup>84</sup>

The difference, then, for the progressive natural lawyer, between the just and the unjust law, and the difference between the laws that do and do not command obedience, is that the just law "uplifts human personality" while the unjust law degrades it. The just law promotes and encourages the good life: the life lived in conditions of true equality, liberty, and community, as those ideals are understood in our visions, our aspirations, our dreams, and occasionally, our experiences. The unjust law, quite simply, is the law that denies or frustrates or denigrates that law. The former commands obedience — is *true* law — the latter does not.

As idealism implies a progressive version of natural law, existentialism lends itself to a progressive interpretation of legal positivism. Existential progressives, like legal conservatives, tend to be legal positivists: they share with legal conservatives an overriding skepticism toward the aspiration to moral knowledge inherent in both the traditionalist and idealist versions of the natural law tradition. For the existential progressive, as for the legal conservative, the "law" is *not* that which aspires toward a moral ideal (whether informed by the community's tradition or the disempowered's utopian vision). Rather, law (whatever it ought to be) is nothing more than a series of actual, concrete choices made by particular, identifiable powerful actors. Both progressive and conservative positivists view "law" as importantly identified not with a continuing effort to achieve congruence with a moral ideal, but as a set of contingent choices. Law is not a set of principles that "uplifts human personality." Law is a set of acts and choices taken by particular people at particular moments in history.

The pivotal psychic *difference* between conservative and progressive positivists is political, not jurisprudential: whereas the conservative positivist sees in the set of acts and choices that constitute the "law" opportunities for obedience to prior legal commands, the progressive positivist sees in the same set of acts and choices opportunities for authenticity, freedom, self-actualization, and judgment. The re-

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84. King, *Letter from Birmingham City Jail*, in *WHY WE CAN'T WAIT* 84-86 (1963). For a critical commentary, see Luban, *Difference Made Legal: The Court and Dr. King*, 87 *MICH. L. REV.* 2152 (1989).



sulting jurisprudential difference between conservative positivists and progressive positivists is that the conservative positivist identifies the relevant history — the set of choices — that defines the content of “law” with the past, whereas the progressive positivist identifies the “law” with the future possibilities and the choices necessitated by virtually any and all verbal legal formulations. The progressive positivist views law as an open set of possibilities, and thus a vehicle for change, growth, and authenticity, rather than the static product of an unambiguous past historical process, and thus a vehicle for obedience. Suzanna Sherry wrote:

Above all, judging is an act of controlled creativity. Like writing at its best, it both draws on and evokes memories of what has gone before, but by innovation rather than by mimicry. It simultaneously acknowledges our debt to the past and denies that the past should control the present. The task of the pragmatist decisionmaker is to reconcile a flawed tradition with an imperfect world so as to improve both and do damage to neither. We can argue about whether a particular judge does so well or badly, but we should recognize that neither her job nor ours can ever be mechanical.<sup>85</sup>

“Law,” then, for the conservative positivist, mandates *obedience*, while the same “law,” for the progressive positivist, mandates *choice*. Law creates, rather than closes, possibility and responsibility. For the progressive positivist, the judge, like the citizen, is never bound and can never be bound: the judge, like the citizen, actively chooses the law she obeys; she has no choice but freedom. Understanding one’s freedom — facing the necessity of choice — is the only moral imperative. It is the path and the only path toward authenticity. It is therefore recognition of freedom or authenticity — and not, as Judge Easterbrook insists, the acquiescence in a mandate of obedience<sup>86</sup> — that constitutes the standard by which the outsider or critic can judge the morality of the judge. Duncan Kennedy described the phenomenology of this necessity of choice:

If you tell me that there is always a right answer to a legal problem, I will answer with these cases in which my experience was that the law was indeterminate, or that I gave it its determinate shape as a matter of my free ethical or political choice. It is true that when we are unselfconsciously applying rules together, we have an unselfconscious experience of social objectivity. We know what is going to happen next by mentally applying the rule as others will, and then they apply the rule and it comes out the way we thought it would. But this is not in fact objectivity, and it is *always* vulnerable to different kinds of disruption — intentional and accidental — that suddenly disappoint our expectations of

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85. Sherry, *The Ninth Amendment*, *supra* note 4, at 1013.

86. Easterbrook, *A Reply*, *supra* note 2, at 627.

consensus and make people question their own sanity and that of others. Thus vulnerability of the field, its plasticity, its instability, are just as essential to it as we experience it as its sporadic quality of resistance.<sup>87</sup>

For the progressive positivist, then, both the reality of legal decision-making and the ideal toward which law ought to aspire is a recognition of one's authenticity through the conscious recognition of the necessity of freedom. The reality of the judge's decision is in a sense a microcosm of the ideal form of social life toward which law should aspire: it is a necessarily free choice, unconstrained by prior commands, that becomes a good choice if the judge is conscious of her freedom, and hence achieves some degree of self-realization, when making it.

Finally, egalitarian, anti-subordination progressives, like free-market conservatives, tend toward a pragmatic, incremental, and instrumental approach toward legal progress, and hence toward an instrumental understanding of the meaning of law as well. Both anti-subordination progressives and free-market conservatives tend to identify the content of law not with a moral ideal, nor with particular concrete actions, but rather with its overriding purpose. The pivotal differences between progressive and conservative instrumentalists, again, are attitudinal and ethical. Whereas the conservative instrumentalist's moral skepticism is grounded in a neo-Darwinian embrace of competitive outcomes, and hence competitive values, the progressive instrumentalist's moral skepticism is grounded in antipathy to the hierarchies on which "competitive" outcomes rest. The progressive instrumentalist consequently resists precisely the hierarchies — the inequalities — that produce the competitive outcomes which the conservative embraces. The progressive instrumentalist sees law not as purposively freeing or protecting "competitive" process or outcome, as the conservative instrumentalist envisions, but as ideally and purposively ameliorating, addressing, and in the long run abolishing the hierarchical systems of domination and subordination masked as competitive processes producing "competitive" outcomes. For the progressive instrumentalist, law, in its progressive essence, resists, tempers, reduces, ameliorates, and ultimately should abolish natural, pre- or nonlegal social hierarchy.

Progressive jurisprudence, then, is variously committed to an idealistic vision of natural law as the embodiment of a particular conception of the good, an anarchic and existential conception of positive law as inherently possibilistic and open-ended — as inviting choice, move-

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87. Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 562 (1986) (emphasis in original).

ment, and necessitating freedom — or an instrumental resistance to hierarchy and a willingness to use law as a tool to that end. The relation between the experiences of subordinated persons, progressive politics, and jurisprudence might be schematized in this way:

<u>Source of Authority</u>	<u>Progressive Politics</u>		<u>Jurisprudence</u>
Experience of Ideals	Idealistic Progressivism	→	Progressive Natural Law
Experience of Freedom	Existential Progressivism	→	Progressive Legal Positivism
Experience of Social Hierarchy	Anti-subordination Progressivism	→	Progressive Instrumentalism

Based on sharply contrasting politics, the jurisprudence of progressive and conservative constitutionalists thus sharply contrast as well:

	Natural Law	Legal Positivism	Instrumentalism
Conservative (Reliance on authority; attraction to social power)	Moralism/ Traditionalism	“Imperativist” Positivism	Pro-Competitive Instrumentalism
Progressive (Reliance on Experience; Antipathy to Social Power)	Idealism	“Possibilistic” Positivism	Anti-Subordinationist Instrumentalism

### C. *Progressive Constitutionalism*

Progressive constitutional theory begins with a critique of conservative constitutionalism, which parallels the critique of conservative political theory at the center of progressive politics. In every case in which the Court acts to restrain the normative power of “the state” and to entrench or encourage the community’s normative authority, it is *also*, of necessity, strengthening the social or private power of whatever social institution or private group undergirds that authority. Thus, in all of the due process cases discussed above, the Court did indeed restrain, in some way, the power of “the state” to act on “its own” normative vision: in *Bowers v. Hardwick*,<sup>88</sup> *Michael H. v. Gerald D.*,<sup>89</sup> and *Webster v. Reproductive Health Services*<sup>90</sup> it restrained the power of the judiciary to legislate on the basis of “its own” conception of the good; in *DeShaney v. Winnebago County Department of Social*

88. 478 U.S. 186 (1986); see also *supra* notes 40-45 and accompanying text.

89. 109 S. Ct. 2333 (1989); see also *supra* note 54 and accompanying text.

90. 109 S. Ct. 3040 (1989); see also *supra* note 51 and accompanying text.

*Services*,<sup>91</sup> the power of the executive policing branch to interfere with family life; and in *Penry v. Lynaugh*<sup>92</sup> and *Stanford v. Kentucky*,<sup>93</sup> the power of judges to dictate the terms of the community's conscience. It is also true, however, that in each of these cases, the Court expanded, legitimated, and further entrenched the clusters of social power that undergird the various sources of communal normative authority to which the Court insisted the political state must defer. Thus, *DeShaney* limited the power of policing agencies over families, but at the same time legitimated and further entrenched the familial power of parents, step-parents, and foster parents to abuse children physically<sup>94</sup> — a power that undoubtedly underscores both the father's normative authority within the family, and the family's normative authority in society. *Bowers* limited judicial power, but left intact the power of the heterosexual majority over the subordinated homosexual minority,<sup>95</sup> just as *Webster* left intact the power of some men over many women's reproductive and sexual lives.<sup>96</sup> In each case, the "passive" judicial response limited "state power," and hence "state hierarchy," but it exacerbated social hierarchy and the injustices to which those hierarchies give rise.

Conservative understandings of equality and of the equal protection clause are subject to a similar criticism. The Court's opinion in *City of Richmond v. J.A. Croson Co.*<sup>97</sup> undoubtedly restricted "state power": the Court restricted the power of the Richmond City Council to interfere in the competitive process of the construction industry, and by so doing enhanced the individual's entitlement to compete in that market free of the influence of racial factors. What the opinion also does, however, is reinforce the social power of economically privileged whites to set the terms of inclusion for economically disenfranchised blacks, just as the Court's opinion in *Washington v. Davis*<sup>98</sup> helped to entrench the racial identity of the Washington, D.C., police force by affirming the testing standards employed by the white-dominated department. Both opinions thus read the equal protection clause in a way that simultaneously restricts the power of states and enhances the economic and social power of whites.

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91. 109 S. Ct. 998 (1989); see also *supra* note 52 and accompanying text.

92. 109 S. Ct. 2934 (1989); see also *supra* note 53 and accompanying text.

93. 109 S. Ct. 2969 (1989); see also *supra* note 53 and accompanying text.

94. *DeShaney*, 109 S. Ct. 998 (1989) (refusing to find liability for county's failure to intervene to protect child from abusive parent).

95. See 478 U.S. at 191-96.

96. 109 S. Ct. 3058 (1989).

97. 109 S. Ct. 706 (1989).

98. 426 U.S. 229 (1976).

Lastly, conservative understandings of the nature of constitutional interpretation, while concededly restrictive of the power of judicial state actors to impose their “own” values or conceptions of the good, expand considerably the power of the dominant forces and victors of this country’s militaristic and legalistic past. Progressive scholar Suzanna Sherry makes the point this way:

This search for interpretive devices that eliminate judicial discretion is, at bottom, profoundly positivist and profoundly relativist. It treats the written Constitution as an absolute sovereign by excluding any examination of the moral dimensions of its language. Such a view is positivist in the sense that “it makes no difference . . . if the sovereign command is nothing but arbitrary will: order still requires capitulating to it.” It is relativist in that it denies the availability of any higher truth than what a particular society has already chosen to embody in its written fundamental law.

. . . The desire to appeal to the absolute authority of the historical Constitution is also self-replicating. To the extent that we as a society relieve ourselves of the obligation to make difficult moral decisions, we further undermine our capacity to do so. Moral sensibilities, whether of an individual or of a community, are best developed by making moral choices.

. . . To tell judges that they must engage in “value-free” judging — to confine them to the unsupplemented text — diminishes the very definition of moral choice by curtailing the sources of moral authority. Moreover, once we recognize that the legislature should not always prevail, we must delegate final moral authority somewhere: should we entrust it to judges who can reason about both morality and consent, or to an ancient document simply because it reflects our erstwhile will? Federal judges, however unrepresentative, are a part of the community in a way in which dead founders and parchment under glass cannot be.<sup>99</sup>

Progressive constitutional theory, however, does not stop with critique. Like conservative constitutional commitments, the affirmative progressive constitutional commitments I examine here — notably a substantive understanding of the equality guaranteed by the fourteenth amendment, a positive account of the liberty protected by the due process clause, and what I call a possibilistic understanding of the nature of constitutional interpretation — are ultimately rooted in political and ethical attitudes toward power and authority. Each of these three commitments is supported by most of the major progressive constitutional theorists. As was also the case with the conservative paradigm, however, different progressives support each element of the progressive paradigm for often contrasting and conflicting reasons. Those internal conflicts in turn reveal the diversity and breadth of

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99. Sherry, *The Ninth Amendment*, *supra* note 4, at 1010-11 (citations omitted).

contemporary progressive constitutional thought, as well as its political and jurisprudential roots.

### 1. *Equal Protection Jurisprudence*

Let me begin with the progressive understanding of the meaning of equality, and hence of the import of the equal protection clause. Very generally, "equality," for the progressive constitutionalist, means substantive equality and the "equal protection clause" constitutes a commitment to rid the culture of the stultifying, oppressive, and damaging consequences of the hierarchic domination of some social groups by others. In their view, the clause is aimed not at protecting competitive rationality against the pernicious effects of race or sex-conscious irrational legislative categorization, but rather, at correcting maldistributions of social power, wealth, and prestige. The targeted evil is not irrational state action, but state action or inaction, rational or not, and intentional or not, that perpetuates the damaging social, economic, domestic, or private domination of some groups by others. So understood, the clause is a tool for dismantling society's racist, misogynist, homophobic, patriarchic, and economic hierarchies. The goal of the equal protection clause is not rational competition, but substantive social equality.

Thus, according to various progressive arguments, the equal protection clause not only *permits*, but positively *requires* that the community take affirmative steps to achieve substantive racial justice;<sup>100</sup> that a state or municipality enact ordinances to rid itself of a subordinating pornographic subculture;<sup>101</sup> that the state protect women's reproductive choices so as to rid itself of the patriarchal expropriation of women's reproductive labor;<sup>102</sup> that its law enforcement resources be committed to ridding women's lives of private violence, both sexual and otherwise;<sup>103</sup> that the state take positive steps to eliminate hetero-

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100. Strauss, *The Myth of Colorblindness*, *supra* note 4.

101. C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 4, ch. 13.

102. See Brief for the National Coalition Against Domestic Violence as Amicus Curiae Supporting Appellees, *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989); R. GOLDSTEIN, *MOTHER LOVE AND ABORTION* (1988); C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 4, at ch. 8; L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, *supra* note 4, at 1353-56; L. TRIBE, *CONSTITUTIONAL CHOICES*, *supra* note 4, at 243-45; Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985); Karst, *The Supreme Court, 1976 Term — Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 53-59 (1977); Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984).

103. West, *Marital Rape Exemptions and Equal Protection*, 42 U. FLA. L. REV. (forthcoming 1990); Note, *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255 (1986).

sexual privilege;<sup>104</sup> and that the community in some way commit its economic resources to eliminating the subordinating effects of severe material impoverishment.<sup>105</sup> "Equal protection," for the progressive, means the eradication of social, economic, and private, as well as legal, hierarchies that damage. The contrast with conservative understanding of that phrase is nothing less than stunning: for the conservative, the clause invalidates a wide range of state-sponsored "affirmative actions" on behalf of the disempowered; for the progressive, it not only permits such actions but may well require them.

This interpretation of the equal protection clause as requiring substantive rather than formal equality, and as targeting maldistributions of social power, rather than irrational legislative classifications, is supported by all three progressive political and jurisprudential movements, but it finds its clearest support from progressive instrumentalists. For progressive instrumentalists, as for all instrumentalists, the meaning of a law is its purpose, and for progressive instrumentalists distinctively, the purpose of the equal protection clause is anti-subordination: the eradication of hierarchies. Anti-subordination feminist Catharine MacKinnon expressed this point in the context of women's subordination, but her logic can readily be generalized to all subordinate groups:

There is an alternative approach, one that threads its way through existing law and expresses, I think, the reason equality law exists in the first place. . . . In this approach, an equality question is a question of the distribution of power. Gender is also a question of power, specifically of male supremacy and female subordination. The question of equality, from the standpoint of what it is going to take to get it, is at root a question of hierarchy, which — as power succeeds in constructing social perception and social reality — derivatively becomes a categorical distinction, a difference. Here, on the first day that matters, dominance was achieved, probably by force. By the second day, division along the same lines had to be relatively firmly in place. On the third day, if not sooner, differences were demarcated, together with social systems to exaggerate them in perception and in fact, *because* the systematically differential delivery of benefits and deprivations required making no mistake about who was who. . . .

I call this the dominance approach, and it is the ground I have been standing on in criticizing mainstream law. The goal of this dissident approach is not to make legal categories trace and trap the way things are. It is not to make rules that fit reality. It is critical of reality. Its task is not to formulate abstract standards that will produce determinate

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104. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187; Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988).

105. Michelman, *Welfare Rights*, *supra* note 4.

outcomes in particular cases. Its project is more substantive, more jurisprudential than formulaic, which is why it is difficult for the mainstream discourse to dignify it as an approach to doctrine or to imagine it as a rule of law at all.<sup>106</sup>

As mentioned above, an anti-subordinationist reading of the equal protection clause lends not only constitutional support, but a constitutional mandate, to state-sponsored affirmative action plans. If, as MacKinnon suggests, the *reason we have equality law in the first place* is to eradicate the subordination of some groups by others, then states are not only permitted, but *obligated* to take affirmative steps to achieve social equality. Thus, progressive constitutional theorist David Strauss reasons that the equal protection clause and that clause's most important interpretive gloss, *Brown v. Board of Education*,<sup>107</sup> are best read not to require color-blind legislation, as numerous conservative theorists and jurists now assume, but rather, to require legislation that will achieve a racially equal society:

The prohibition against discrimination established by *Brown* is not rooted in colorblindness at all. Instead, it is, like affirmative action, deeply race-conscious; like affirmative action, the prohibition against discrimination reflects a deliberate decision to treat blacks differently from other groups, even at the expense of innocent whites. It follows that affirmative action is not at odds with the principle of nondiscrimination established by *Brown* but is instead logically continuous with that principle. It also follows that the interesting question is not whether the Constitution permits affirmative action but why the Constitution does not require affirmative action.

. . . The prohibition against racial discrimination prohibits — and must necessarily prohibit — the use of accurate racial generalizations that disadvantage blacks. But to prohibit accurate racial generalizations is to engage in something very much like affirmative action. Specifically, a principle prohibiting accurate racial generalizations has many of the same characteristics as affirmative action; and the various possible explanations of why accurate racial generalizations are unconstitutional lead to the conclusion that failure to engage in affirmative action may also sometimes be unconstitutional.<sup>108</sup>

This substantive interpretation of equality as the true meaning of equal protection is also supported by progressivism's existential strand. For the progressive existentialist, the most significant barrier to enjoyment of a free, authentic, and hence good life is the existence of rigid social, private, and domestic hierarchies, and for the progressive positivist, law is both a sphere of free choice, and a means by which social life can be made more free. The equal protection clause,

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106. C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 4, at 40.

107. 347 U.S. 483 (1954).

108. Strauss, *The Myth of Colorblindness*, *supra* note 4, at 100.



then, properly read, should serve as a mechanism by which social hierarchies are constantly challenged and undermined, and the power they embody redistributed. Race-conscious affirmative action plans, then, become the *prototype* for legislation mandated or suggested by the equal protection clause: when undertaking affirmative action, a state uses its power under the guidance of the equal protection clause to challenge and undermine social and private racial hierarchy.

More generally, the ideal and true content of the equal protection clause, for the existential progressive, is simply its negative potential for upsetting the settled distributions of power and wealth that constrain as they define private life. Unger's reinterpretation of the equal protection clause as ideally encoding a set of "destabilization rights," set forth in his classic essay *The Critical Legal Studies Movement*,<sup>109</sup> contains the clearest restatement of this existential ideal:

The central ideal of the system of destabilization rights is to provide a claim upon governmental power obliging government to disrupt those forms of division and hierarchy that, contrary to the spirit of the constitution, manage to achieve stability only by distancing themselves from the transformative conflicts that might disturb them. . . . Rather than just correct specific collective disadvantages within the circumscribed area of state action, it would also seek to break up entire areas of institutional life and social practice that run contrary to the scheme of the new-modeled constitution. . . .

Sometimes a destabilization right might work through a direct invalidation of established law. . . . The destabilization right might also operate in another, far less extreme way. It would act not to invalidate laws directly but to disrupt power orders in particular institutions or localized areas of social practice. The power orders to be disrupted would be those that, in violation of the principles governing social and economic organization had become effectively insulated from the disturbances of democratic conflict. As a result, they would threaten to eviscerate the force of democratic processes in just the way that citadels of private power do in the existing democracies. . . . The guiding criteria for the development of this branch of the law would be found in the principles that inform social and economic organization in the empowered democracy.<sup>110</sup>

Finally, progressive idealists and natural lawyers also understand the equal protection clause substantively rather than formally. For the progressive idealist, it is some measure of substantive equality and some measure of freedom from the economic, material, social, and spiritual burdens of inequality, rather than freedom from state-sponsored "irrationality" that is the pre-condition of a good life. For the

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109. Unger, *supra* note 4.

110. *Id.* at 612-13.

progressive idealist, the law should embody these ideals, and therefore, for the progressive natural lawyer no less than the progressive positivist and instrumentalist, substantive equality — the eradication of damaging hierarchy — is that to which the fourteenth amendment directs the legislative energies of the state.

The *content* of that guarantee, however, is somewhat different for the progressive natural lawyer than for the progressive existentialist or anti-subordinationist. As noted above, the “ideal” for the progressive idealist is the good life — in King’s words the “uplifted personality” — rather than either pure freedom, as for the existentialist, or pure equality, as for the anti-subordinationist. Therefore, for the progressive natural lawyer, the equal protection clause ensures “substantive equality” because by doing so it insures those minimal conditions necessary for an ideally flourishing life; the clause is less concerned by this view, with establishing either the conditions for truly free choice or the conditions for absolute social as well as political equality. Abuses of social power and the racial, sexual, and class hierarchies that sustain those abuses, make the “ideal life” inaccessible to the socially subordinated. Racism occasions an invasion of body, mind, and soul that Patricia Williams has tellingly called “spirit murder”;<sup>111</sup> misogyny engenders a self-hatred and self-denial that precludes often life itself, and certainly the good life; and poverty leaves no time, much less energy, resources, or will, for activities that enrich the individual and integrate her in the community. Idealists and progressive natural lawyers are consequently more likely to target the eradication of poverty, racism, and misogyny, rather than more abstract notions of “equality” or “freedom,” as the true goal of the equal protection guarantee; it is the damage wrought by those substantive conditions, after all, that frustrates and precludes a flourishing life.

Unsurprisingly, it has been idealist progressive scholars grounded in a natural law tradition, rather than either existentialist scholars rooted in critical positivism or anti-subordinationists rooted in pragmatism, who have argued most strenuously that the fourteenth amendment requires that the state protect against the most egregious risks of massive economic inequality — or, stated affirmatively, that the state has a constitutional duty to guarantee welfare rights. Thus, it was the constitutional theorist Frank Michelman, in the sixties and seventies, who did more than any other to popularize the idealistic argument that “equal protection” requires the states to guarantee a

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111. Williams, *Spirit-Murdering the Messenger: The Discourse of Finger-Pointing as the Law's Response to Racism*, 42 *MIAMI L. REV.* 127 (1987).

minimal level of welfare.<sup>112</sup> Without food, shelter, and clothing, other constitutional entitlements are virtually meaningless; but more significantly, for the idealist, without food, shelter, and clothing, life itself is a burden and a misery. In keeping both with idealist progressive politics and with naturalist jurisprudence, Michelman argued that not only *should* the Constitution protect minimal welfare rights, but that properly read it in fact *already does*:

Without basic education — without the literacy, fluency and elementary understanding of politics and markets that are hard to obtain without it — what hope is there of effective participation in the last-resort political system? On just this basis, it seems, the Supreme Court itself has expressly allowed that “some identifiable quantum of education” may be a constitutional right. But if so, then, what about life itself, health and vigor, presentable attire, or shelter not only from the elements but from the physical and psychological onslaughts of social debilitation? Are not these interests the universal, rock-bottom prerequisites of effective participation in democratic representation . . . ? How can there be . . . sophisticated rights to a formally unbiased majoritarian system, but no rights to the indispensable means of effective participation in that system? How can the Supreme Court admit the possibility of a right to minimum education, but go out of its way to deny flatly any right to subsistence, shelter, or health care?<sup>113</sup>

In contrast to MacKinnon’s anti-subordinationist argument for substantive equality given above,<sup>114</sup> Michelman’s idealistic arguments for welfare rights are premised on the assumption that it is the *good* life, not the equal life, that is the “point” of equality law. Thus, Michelman tended to emphasize the difference, rather than commonality, between absolute egalitarian conceptions of equal protection, and idealist conceptions. In his seminal defense of welfare rights, he was clearly more concerned with distinguishing his idealistic argument for the protection of welfare rights through equality law from egalitarian and anti-subordinationist interpretations of equal protection, than with distinguishing his conception from formal anti-discrimination models of the clause:

[T]he judicial “equality” explosion of recent times has largely been ignited by reawakened sensitivity, not to equality, but to a quite different sort of value or claim which might better be called “minimum welfare.” In the recent judicial handiwork which has been hailed (and reviled) as an “egalitarian revolution,” a particularly striking and propitious note has been sounded through those acts whereby the Court has directly shielded poor persons from the most elemental consequence of poverty

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112. See, e.g., Michelman, *Welfare Rights*, *supra* note 4.

113. *Id.* at 677 (citations omitted).

114. See *supra* note 106 and accompanying text.

Of course, the Court's "egalitarian" interventions are often occasioned by problems which would not exist but for economic inequality. *Yet I hope to make clear that in many instances their purposes could be more soundly and satisfyingly understood as vindication of a state's duty to protect against certain hazards which are endemic in an unequal society, rather than vindication of a duty to avoid complicity in unequal treatment.*<sup>115</sup>

For all three branches of progressive thought, although for different reasons, the equal protection clause is concerned not with pernicious state action, or irrational classifications, or even badly motivated governance, but rather, with the profound damage brought about through gross disparities of social power. Although their reasons differ, and differ profoundly, progressives believe the state is affirmatively obligated under the Constitution to use its legal power to protect its citizens, and protect them equally, from the damage wrought by abusive social power and the damaging hierarchies of race, gender, and class to which that power gives rise. The goal of equal protection for the progressive quite clearly has nothing to do with color-blindness, sex-blindness, or class-blindness, unless those strategies are conducive to some other end. The goal, rather, is a social life freed of the crushing consequences of inequality; the goal is an equal society.

## 2. *Liberty and Due Process Jurisprudence*

For the progressive constitutionalist, the "liberty" to which we are entitled under the fourteenth amendment's due process clause is "affirmative" just as the "equality" to which we are entitled under equal protection is "substantive": "Liberty" means the affirmative liberty to live a meaningfully free and autonomous life, rather than, as for the conservative, the liberty to live the good life as defined by community standards and as restricted through processes defined by law. The due process clause, for progressives, guarantees the freedom to make choices that will truly enrich our lives, rather than the freedom to make those choices sanctioned by a community's authoritative traditions through processes established by its positive law. Thus, for some progressives, the clause minimally guarantees the freedom to choose when and with whom to have and raise children. For others, it guarantees the freedom to decide when, if, and with whom to be sexually intimate. For others, it guarantees the material support necessary to a productive and unalienated work life, to a healthy private home and community life, and to meaningful participation in the public sphere

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115. Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9 (1969) (emphasis added; citations omitted).

of democratic decisionmaking. The common thread in these progressive positions is clear: the due process clause, for progressives, commits the state to ensure the conditions necessary to the enjoyment of affirmative liberty.

The contrast with the conservative's understanding of the guarantee of liberty is again dramatic. For the progressive, the affirmative liberty the due process clause guarantees not only invalidates the anti-sodomy statute upheld in *Bowers v. Hardwick*,<sup>116</sup> but may well affirmatively require that the state take some action to eradicate the harmful effects of the homophobia to which not only state action, but religious dogma and communitarian "traditions," have given rise.

Similarly, for the progressive, the affirmative liberty the due process clause guarantees not only invalidates anti-abortion statutes of the sort upheld in *Webster v. Reproductive Health Services*,<sup>117</sup> but may require the state to take action to ensure the availability of the means of reproductive freedom to all women, regardless of their economic class. Put generally, for the progressive, the clause should be used to challenge the social power that gives rise to the very normative authority that the conservative argues constitutes the source of wisdom which law should incorporate and which the due process clause must accordingly protect.

*Roe v. Wade*<sup>118</sup> is as central to the progressive paradigm of privacy, liberty, and due process as *Bowers* is to the conservative.<sup>119</sup> In sharp contrast not only to conservative constitutionalists, but also to a number of liberal legalists, progressive constitutionalists tend to support *Roe* and the positive understanding of liberty on which it is based. Again, though, their reasons for doing so diverge.

First, the affirmation of the "positive liberty" to choose the meaning and content of one's reproductive life at the heart of *Roe*'s reasoning is at least exemplary, if not emblematic, of the meaning of "authenticity" that the existentialist equates with the good life. For the existentialist, the right to abortion "denaturalizes" (to use Unger's word) and consequently humanizes the pregnant woman, ensuring the choice essential for authentic selfhood and humanness, and facilitating enjoyment of a genuinely free life. The "pro-choice" label for reproductive rights activists thus resonates with existential progressive thought: for the existentialist, the choice itself is what is of value, the choice itself is what is advocated. The freedom to decide one's life's

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116. 478 U.S. 186 (1986).

117. 109 S. Ct. 3040 (1989).

118. 410 U.S. 113 (1973).

119. See *supra* notes 40-54 and accompanying text.

course, rather than to have it thrust upon her, is what gives a life moral meaning. This choice, then, for the existential progressive, as a constitutional matter, cannot be legally interfered with — *any* interference by the state constitutes a “due process” violation. The due process clause guarantees not just freedom from undue and illegal interference with one’s private life, but the affirmative liberty to pursue those choices most fundamental to the fruits of affirmative liberty. The decision to carry a pregnancy to term is clearly such a choice. Although most of Suzanna Sherry’s work is idealist rather than existentialist, her defense of reproductive freedom sounds these existential themes:

Anti-abortion laws deprive women of the opportunity to choose freely among these discretionary moral choices, and hence of the opportunity to exercise and improve their capacity for moral knowledge and moral choice. Such laws coerce women’s moral decisions, stifling their ability for growth through self-criticism. Anti-abortion laws thus interfere with . . . the basic aspects of human morality and human flourishing. Furthermore, to the extent that a moral choice is coerced, the actor is less likely to accept responsibility for that choice. The coercion of anti-abortion laws discourages women from developing the moral sensibilities that come from making moral choices and accepting responsibility for them. It keeps them, in short, from becoming virtuous.<sup>120</sup>

Progressive positivists support the outcome in *Roe* not only for moral reasons, but for a purely jurisprudential reason as well, a reason that is also rooted in existential premises. The existentially inspired progressive positivist, of all constitutional theorists, will be the least bothered by the apparent “activism” exhibited by the Court’s willingness to “discover” a fundamental right to reproductive freedom in the unwritten part of the Constitution. For the existential positivist this activism is a necessary, inevitable aspect of judicial decisionmaking, as it is of all decisionmaking; it is certainly not peculiar to *Roe*. What *is* peculiar to *Roe* is the Court’s willingness to acknowledge the necessity of choice with which it is inevitably faced when making constitutional decisions. Far from condemning the decision for that acknowledgement, however, the existential positivist is likely to commend it. The Court must inevitably “act” when making decisions, and what that inevitability entails is both choice and responsibility. The acknowledgement of that existential reality in *Roe*, then, is constitutional decisionmaking at its best.

The progressive idealist and the progressive natural lawyer will also support *Roe* and the affirmative conception of liberty on which it is based, although for a different reason. For the idealist, “affirmative

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120. Sherry, *supra* note 12, at 1597 (citation omitted).

liberty” — “freedom to” rather than “freedom from” — requires, above all else, self-possession, and self-possession in turn requires that the individual have the authority to make decisions regarding family, reproduction, and sexual intimacy free from interference from the community’s normative commitments. This degree of authority and control over family, reproduction, and intimacy is, for the idealist, essential to any meaningful ideal of self-possession, self-will, and positive liberty that the constitutional guarantee of due process could conceivably be meant to protect.

This idealistic reasoning — that the ideal life must contain the power to make these decisions independent of the community’s moral beliefs — is at least arguably the connecting strand of the pre-*Bowers* privacy cases. Although the Court undoubtedly depended upon traditionalist and conservative arguments as well, the unifying principle of pre-*Bowers* privacy law was drawn from the idealist premise that limits on the community’s normative authority should be drawn from idealistic conceptions of what a qualitatively good individual life requires, and from the progressive natural lawyer’s assumption that “the law” — in this case, constitutional law — ideally and correctly read, incorporates those ideals. Thus, in *Meyer v. Nebraska*,<sup>121</sup> one of the Court’s earliest privacy cases, the Court merged conservative-traditionalist with progressive-idealist arguments to strike down a state mandatory education law:

[T]he liberty . . . guaranteed . . . [by the due process clause of the fourteenth amendment] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.<sup>122</sup>

Justice Harlan in *Poe v. Ullman*<sup>123</sup> and later in *Griswold v. Connecticut*<sup>124</sup> similarly relied on both conservative and progressive arguments:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. . . . The balance [it strikes between individual liberty and the demands of organized society] . . . is the balance struck by this country, having regard to what history teaches are

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121. 262 U.S. 390 (1923).

122. 262 U.S. at 399.

123. 367 U.S. 497, 522-55 (1961) (Harlan, J., dissenting).

124. 381 U.S. 479, 499-502 (1965) (Harlan, J., concurring).

the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. . . .

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. . . The State . . . asserts that it is acting to protect the moral welfare of its citizenry . . . .

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. . . [Society] has traditionally concerned itself with the moral soundness of its people . . . .

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But, as might be expected, we are not presented simply with this moral judgment to be passed on as an abstract proposition. The secular state . . . must operate in the realm of behavior, . . . and where it does so operate, . . . the *choice of means* becomes relevant . . . .

Precisely what is involved here is this: the State is asserting the right to enforce its moral judgment by intruding upon the most intimate details of the marital relation with the full power of the criminal law. . . . [T]he Statute allows the State to enquire into, prove and punish married people for the private use of their marital intimacy.<sup>125</sup>

And finally, in *Roe v. Wade*,<sup>126</sup> the Court made explicit that the liberty being protected was the liberty to live a good life, as defined by ideals of autonomy and freedom from want and unreasonable restraint:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty . . . as we feel it is, or . . . in the Ninth Amendment[, . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, . . . the additional difficulties and continuing stigma of unwed motherhood may be involved.<sup>127</sup>

The anti-subordinationist's support for a positive understanding of the meaning of liberty is considerably more tentative than that displayed by the Justices of the Warren and Burger Courts. Indeed, of all progressives, only anti-subordinationists tend to be critical of both the idealism-based argument and the "authenticity" claims that resonate in the Court's reasoning. For the anti-subordinationist, and hence for

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125. 367 U.S. at 542-48 (1961) (Harlan, J., dissenting) (emphasis in original); see also *Griswold*, 381 U.S. at 499-502 (Harlan, J., concurring).

126. 410 U.S. 113 (1973).

127. 410 U.S. at 153.



the progressive instrumentalist, neither the authentic, self-conscious choice which concerns the existentialist, nor the privacy necessary to the ideal life for the idealist-progressive, are truly *possible* within conditions of societal subordination. Consequently, neither authenticity nor privacy justify an affirmative understanding of the liberty to which individuals are entitled. Providing individuals with the freedom to make personal or private decisions in the face of the influence of the community's normative authority, within general conditions of inequality, may do nothing to further the empowerment of the subordinate, and hence nothing to further their true well-being. Indeed, freeing the individual from the constraints of the community's normative authority may prove harmful: it may simply render her more vulnerable to the degrading and subordinating pressures of a now insulated private sphere of personal and familial political hierarchy. Thus, anti-subordination progressives have little to say about "positive liberty" in general, and generally do not support the outcome in *Roe* on that basis. Catharine MacKinnon's arguments against the reasoning in *Roe* (not the outcome) are representative:

Arguments for abortions under the rubric of feminism have rested upon the right to control one's own body — gender neutral. I think that argument has been appealing for the same reasons it is inadequate: socially, women's bodies have not been ours; we have not controlled their meanings and destinies. . . .

In private, consent tends to be presumed. It is true that a showing of coercion voids this presumption. But the problem is getting anything private to be perceived as coercive. Why one would allow force in private — the "why doesn't she leave" question asked of battered women — is a question given its urgency by the social meaning of the private as a sphere of choice. But for women the measure of the intimacy has been the measure of the oppression. This is why feminism has had to explode the private. This is why feminism has seen the personal as the political. The private is the public for those for whom the personal is the political. In this sense, there is no private, either normatively or empirically. Feminism confronts the fact that women have no privacy to lose or to guarantee. We are not inviolable. Our sexuality is not only violable, it is — hence, we are — seen *in* and *as* our violation. To confront the fact that we have no privacy is to confront the intimate degradation of women as the public order.<sup>128</sup>

The anti-subordinationist argument for the result in *Roe*, and for positive liberty in general, is very different from the idealistic reasoning that has tended to dominate the Court's privacy jurisprudence. Anti-subordination progressive constitutionalists generally urge that the result in *Roe* should be grounded in equality, rather than liberty,

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128. C. MACKINNON, FEMINISM UNMODIFIED, *supra* note 4, at 98.

and accordingly, that it should be doctrinally based on the equal protection clause, rather than the due process clause or any other penumbral constitutional right.<sup>129</sup> For the anti-subordinationist, the right to secure an abortion should be constitutionally protected, not because such a right is essential to an ideally conceived individual life, but because it is essential to the struggle of a subordinated group — women — against the disproportionate power of a dominant group — men. Whether accomplished through constitutional, adjudicative, or legislative means, securing for women control over the abortion decision is one instrumental means, among others, by which the political imbalance occasioned by male control over female sexuality and reproduction may be righted. Thus, anti-subordination constitutionalists tend to argue that the goal of equality and the constitutional right to equal protection — not liberty, privacy, or due process — should be the foundation of the Court's abortion jurisprudence.

It is worth noting that the liberal Justices who continue to support *Roe* are increasingly shifting their argument away from due process and privacy arguments, toward explicitly anti-subordinationist equality-based arguments. Thus, in his dissenting opinion in *Webster*, in which the Court upheld substantial regulatory restrictions on access to abortion facilities and services, Justice Blackmun opined: "I fear for the future. I fear for the liberty and equality of the millions of women who have lived and come of age in the 16 years since *Roe* was decided. I fear for the integrity of, and public esteem for, this Court."<sup>130</sup>

He later elaborated:

Thus, "not with a bang, but a whimper," the plurality discards a landmark case of the last generation, and casts into darkness the hopes and visions of every woman in this country who had come to believe that the Constitution guaranteed her the right to exercise some control over her unique ability to bear children. The plurality does so either oblivious or insensitive to the fact that millions of women, and their families, have ordered their lives around the right to reproductive choice, and that this right has become vital to the full participation of women in the economic and political walks of American life. The plurality would clear the way once again for government to force upon women the physical labor and specific and direct medical and psychological harms that may accompany carrying a fetus to term. The plurality would clear the way again for the State to conscript a woman's body and to force upon her a "distressful life and future."<sup>131</sup>

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129. See, e.g., Olsen, *supra* note 12; see also *supra* note 102.

130. *Webster v. Reproductive Health Servs.* 109 S. Ct. 3040, 3067 (1989) (Blackmun, J., dissenting).

131. 109 S. Ct. at 3077 (Blackmun, J., dissenting) (citation omitted).

Progressive dissent from the *Bowers*<sup>132</sup> decision reflects the same set of concerns. For existentialist and progressive positivists, the community's authoritative control over the morality and legality of sexuality that the opinion legitimates cuts off one avenue by which the individual actualizes his or her potential for self-realization, and hence authenticity, just as does the community's authoritative control over the morality of reproduction, legitimated by the anti-*Roe* regression. Sexual activity is one sphere within which the individual creates himself or herself through making choices, living with decisions, and taking responsibility for the consequences. The normative authority of the community is nothing but an obstacle to that freedom. The "liberty" prong of the due process clause minimally protects those areas of decisionmaking most vital to the formation of selfhood, and sexuality is one such sphere.<sup>133</sup>

Idealist objection to *Bowers* rests on slightly different arguments. For the idealist, individual freedom with respect to sexual choice is necessary not so much because of the centrality of choice to selfhood, as because of the nature of sexuality. An ideally lived life, if it includes sexuality (which it need not), must embrace a sexuality grounded in the individual's desire for intimacy, sharing, and openness, not in training instilled by the community's normative authority, the force of its positive law, or the violence of its informal mechanisms of sexual regulation. It is for this reason that the affirmative liberty protected by the liberty clause of the fourteenth amendment must include the liberty to decide and act upon one's sexual orientation.

The conclusion that sexuality is "private," and therefore outside the reach of state or community control, rests, for the idealist, on a conception of the good life and a view of the nature of sexuality: for sexuality to be a part of a good life it must be chosen for reasons other than community coercion. Intimacy and sharing may be part of an ideally constructed life, but self-alienation and lack of self-possession clearly are not. Whether participation in sexuality is the former or the latter depends largely upon whether or not the form of sexuality in which participation is sought is prescribed or chosen. The due process clause, by this view, protects against intrusion by the community's dominant moral or social authority, manifested in the state's criminal law, into the individual's choice of sexual orientation, for the immidentally contingent reason that such intrusion renders impossible the

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132. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

133. *Law*, *supra* note 104, at 222-28.

form of life the due process clause is aimed to protect or foster.<sup>134</sup>

The anti-subordinationist's dissatisfaction with the outcome in *Bowers* is different still. For the anti-subordinationist, the Court had an opportunity and an obligation in *Bowers* to attack an illegitimate social hierarchy — the domination of the homosexual minority community by the heterosexual majority — and refused to act on it. The evil of state intrusion into sexual decisions is not so much that such intrusion interferes with decisions essential to the living of the good life, as that such state action underscores and encourages the suppression of an already subordinate group. As in the reproductive context, then, the anti-subordinationists' argument against the outcome in *Bowers* rests more on equality principles than on liberty principles, and doctrinally more on the equal protection clause than on the due process clause. The target of constitutional intervention in the context of sexual orientation, according to the anti-subordination constitutionalist, should not be sexual privacy and liberty, but sexual hierarchy and heterosexual privilege. Where state law furthers, underscores, or encourages that illegitimate hierarchical ordering, the Court is constitutionally obligated to strike it down.<sup>135</sup>

Again, then, although their reasons differ, the due process clause, for progressives, is targeted at constraints on individual liberty imposed by illegitimate *social* power and ordering, rather than, as for conservatives, at constraints imposed by illegal state power on individual liberty as defined and legitimated by social authority. Correlatively, the goal of the clause for progressives is a positively free life — one in which choice is genuine and conducive to growth — rather than a legitimating mark of underlying coercion. The state, through the due process clause, is required to take action to facilitate, protect, and ensure those choices most essential to that freedom. The ideal of due process, then, is an individual life free of illegitimate social coercion facilitated by hierarchies of class, gender, or race. The goal is an affirmatively autonomous existence: a meaningfully flourishing, independent, enriched individual life.

### 3. *Constitutional Interpretation*

Finally, for most progressives, the Constitution is an essentially open text inviting interpretation, rather than mandating obedience to original intent or legislative will. All three strands of progressive

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134. See Brief for Respondent, *Bowers v. Hardwick*, 478 U.S. 186 (1986); Henderson, *supra* note 83, at 1638-49; Law, *supra* note 104, at 224, 234-35; Law, *supra* note 102, at 955.

135. See Sunstein, *supra* note 104, at 1163-64, 1170-78; Henderson, *supra* note 83, at 1645-49; see also *Bowers*, 478 U.S. at 216, 218-20 (Stevens, J., dissenting).

thought support this interpretive claim. The reasons are familiar and can be summarized quickly.

First, for progressive positivists, the Constitution is possibilistic rather than closed for the straightforward reason that the “law” to which the courts pledge allegiance when deciding cases is definitionally open-ended. Courts can, and therefore should, use their adjudicative power whenever possible to further progressive ends (and it is almost always possible to do so). Law is a set of possibilities, some of which are progressive. Law, including constitutional law, and emphatically including fourteenth amendment guarantees, is and should be a vehicle for progressive social change.

Possibilistic constitutional interpretation — built on the belief that the Constitution is always open to a range of interpretive meanings, some of which are progressive — is also supported by progressive natural lawyers. For progressive natural lawyers, the Constitution is open and possibilistic because it is the embodiment of an un-lived, cultural ideal: the Constitution is *itself* the repository of the “glimpses,” “memories,” and “dreams” of the culture’s moral ambitions. For the progressive natural lawyer, the Constitution is indeed “possibilistic,” but not for the anarchic (or existential) reason that language inevitably invites and demands choice, but rather, for the moral reason that the Constitution on its own terms *permits* choice. The Constitution by its nature opens the door for morally demanding adjudication: it pushes society toward an as yet un-lived ideal. The Constitution is itself The Dream. The Constitution is “possibilistic” for the idealist, rather than rigidly historic, simply because we have the good fortune to live in a culture that takes its idealism seriously.

In a passage that well expresses the view of constitutional interpretation shared by scores of progressive natural lawyers, Laurence Tribe describes the idealist Constitution and its relation to fallible adjudicative institutions:

I do not regard the rulings of the Supreme Court as synonymous with constitutional truth. . . . [T]he Courts that held slaves to be non-persons, separate to be equal, and pregnancy to be non sex-related can hardly be deemed either final *or* infallible. Such passing finality as judicial pronouncements possess is an essential compromise between constitutional order and chaos: the Constitution is an intentionally incomplete, often deliberately indeterminate structure for the participatory evolution of political ideals and governmental practices. This process cannot be the special province of any single entity. . . .

While conceding the courts a less exclusive role as constitutional oracles, this book cedes them a greater authority — and duty — to advance that justice overtly. Judicial neutrality inescapably involves taking sides. The judgment of the Court, though it may be to elude an issue, in effect

settles the substance of the case. Judicial authority to determine when to defer to others in constitutional matters is a procedural form of substantive power; judicial restraint is but another form of judicial activism. . . . The inescapable boundaries of societal context and consciousness argue not that judges should restrain themselves still further, but that they must raise distinctive voices of principle. . . . [T]he highest mission of the Supreme Court, in my view, is not to conserve judicial credibility, but in the Constitution's own phrase, "to form a more perfect Union" between right and rights within that charter's necessarily evolutionary design.<sup>136</sup>

Finally, for the progressive instrumentalist, constitutional interpretation is open, rather than closed, because at least parts of the Constitution contain an anti-subordination subtext that at any point can be legitimately realized. As for the idealist, the indeterminacy of the Constitution for the anti-subordinationist is a contingent fact, not an existential necessity: the Constitution contains an anti-subordinationist subtext not because *all* texts contain such subtexts, but because this one, as a matter of historical fact, does. Parts of the Constitution, notably the fourteenth amendment and the precedential authority interpreting it, when properly read, explicitly target illegitimate social hierarchy. Patterns of domination that stem from the social subordination of one group by another, and that cripple, maim, impoverish, and stunt lives, are therefore not only moral abominations (and they are surely that) — they are also unconstitutional. The progressive instrumentalist supports the possibilistic paradigm of progressive interpretation through a rigorous and careful, rather than playful and anarchic, reading of the texts themselves.

To summarize, progressives converge on a possibilistic understanding of the nature of constitutional interpretation, a substantive account of the "equality" to which individuals are entitled under the equal protection clause, and an affirmative account of the "liberty" guaranteed under due process. The contrasting grounds for support might be characterized in this way:

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136. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, *supra* note 4, at vii-viii.

	Interpretation (Open)	Equality (Substantive)	Liberty (Positive)
Idealist Progressives	Constitution as a cultural <i>ideal</i>	Substantive equality necessary for the good life	Positive liberty necessary for the good life
Existential Progressives	Necessity of interpretative <i>choice</i>	Equality the pre-condition of authenticity	Liberty defined as authenticity
Anti-Subordination Progressives	Constitution as imperfect embodiment of <i>anti-subordination</i> ideal	Eradication of hierarchy the purpose of equal protection	Ambivalence in tension with anti-subordination goals

Finally, the contrast between the progressive and conservative paradigms can be schematized in this way:

	Interpretation	Equality (Equal Protection)	Liberty (Substantive Due Process)
Conservative	Imperativist; Originalist; judicial restraint	Precludes benign as well as malicious race-conscious decisionmaking	Defined by community traditions
Progressive	Possibilistic; Open; Necessity of choice	Requires affirmative eradication of hierarchy	Defined by ideals

Virtually all of the significant differences between conservative and progressive understandings of constitutional meanings are squarely rooted in divergent political attitudes toward social power. What the conservative sees as the institutional form or wellspring of communitarian wisdom, legal legitimacy, or market competition, the progressive sees as an oppressive domestic, social, legal, or economic hierarchy. What the conservative sees as the wisdom of the family, the progressive sees as an institution that perpetuates sexual and heterosexual hierarchy. What the conservative sees as respect for the "ties that bind" in subcommunities, the progressive is likely to see as xenophobia toward outsiders and oppressive conformism toward members. What the conservative sees as the market institutions that facilitate free individual choice, the progressive sees as the mechanism of wide-scale economic oppression. What the conservative sees as legitimate legal institutions that maintain order and reduce conflict, the progressive sees as instruments of ideological oppression that induce a mind-numbing homogeneity and hegemonic conformity.

Similarly, progressive and conservative constitutional meanings stem from these divergent perceptions of the value of social hierarchy.

Let me begin with the Court's due process and privacy jurisprudence. The divergent understandings of due process, and the conflicting assessments of cases such as *Griswold*, *Roe*, *Webster*, and *Bowers* central to the two constitutional paradigms, are grounded in conflicting attitudes toward social power — *not* in divergent understandings of the precedential authority and *not* in contrasting jurisprudential understandings of the nature of law. Thus, the moral conservative sees the wisdom of the ages in precisely the communitarian traditions in which the anti-subordination progressive sees the oppression of ancient hierarchies. The conservative natural lawyer thus sees the proper role of law as guarding and preserving communitarian wisdom, and the proper role of constitutional law as preserving that wisdom against the erratic and whimsical dictates of popular opinion. The progressive instrumentalist, by contrast, sees the Constitution as one central tool by which social hierarchy, embedded and reflected in law, can be eradicated.

The difference between these views does not, however, lie in the difference between natural law and instrumentalism; natural law is not essentially conservative, nor is instrumentalism essentially progressive. The difference is rooted in conflicting conservative and progressive attitudes toward social power. Thus, a conservative natural lawyer morally committed to the view that communitarian moral traditions are the source of our knowledge regarding the "good" will not be able to view the various religious, secular, and familial institutional structures that generate those traditions as the source of illegitimate domination, damaging subordination, and stultifying oppression. Nor will he or she see the un-lived ideals or dreams of the subordinated, rather than those traditions, as the truer aspirational purpose — and hence meaning — of the liberty clause of the fourteenth amendment.

Similarly, the differences between conservative and progressive understandings of equal protection, and the conflicting assessments of affirmative action programs that arise from those understandings, are rooted not in divergent interpretations of the constitutional tradition, but more deeply in divergent experiences and assessments of the normative values generated by competitive economic hierarchy. The free-market conservative sees competition, and hence the creation of value, where the progressive sees illegitimate private hierarchies of class. In jurisprudential terms, the conservative instrumentalist sees law as instrumentally aimed at freeing competition, and reads the equal protection clause to facilitate that end, while the progressive instrumentalist sees law as instrumentally aimed at eradicating illegitimate private and social hierarchy, and reads the equal protection clause to facilitate that



diametrically opposed end. The difference between them lies in their divergent assessments of, and perhaps experiences with, the social arrangements that constitute both the substance and the framework of private competitive hierarchy. Free-market conservatives, who view competition as the organizing principle of authoritative normativity, will clearly not view the hierarchies that facilitate “competition” as experiences of subordination and domination against which the moral weight of the equal protection clause should be pitted.

[Lastly, the difference between the conservative insistence that interpretation requires obedience toward legitimated commands, and the progressive view that interpretation invites choice, stems not from divergent understandings of either the nature of interpretation or of constitutionalism, but rather from divergent responses to the imperative dimension of legal power. Because the literature is vast and familiar, I can afford to be blunt: as the grossly disproportionate conservative response to the “indeterminacy claim” of the Critical Legal Studies movement has made vividly clear, a positivistic conservative wedded to the virtue of obedience is likely to respond hysterically to a view that identifies law with the necessity of choice, the burden of freedom, and the openness of possibility. What the conservative positivist sees as a source of authority facilitating moral outcomes through obedience, the progressive positivist sees as texts facilitating authentic choice through interpretive freedom. The difference, then, stems from drastically divergent assessments of the morality of obedience and the morality of choice: for the conservative, obedience facilitates morality, for the progressive, choice does so.

If this is right, then our presently constituted post-liberal constitutional discourse is somewhat pathological. Rather than discuss our divergent attitudes toward social and private power, modern constitutionalists who have abandoned pretensions to constitutional neutrality avoid politics and ethics by discussing instead their manifestations in conflicting jurisprudential conceptions. These debates, unsurprisingly, resolve nothing. The differences between conservative and progressive constitutional commitments can no more be understood as rooted in jurisprudence than in contrasting understandings of constitutional authority.

Thus, to take a specific example, the contrast between progressive and conservative understandings of the privacy cases cannot be explained or resolved by prior case authority — as the progressives and conservatives themselves seem increasingly inclined to grant. But *nor* can they be explained by, and hence resolved by, differences between natural law on the one hand and either positivism or pragmatism on

the other; natural law, positivism, and instrumentalism are all open to both conservative and progressive political use. Rather, our different assessments of *Bowers*<sup>137</sup> (as well as of *Webster*<sup>138</sup>) rest not on contrasting jurisprudential understandings of the nature of law, but on contrasting attitudes toward various forms of social authority. First, they rest on contrasting assessments of the value of the traditional family: what the conservative natural lawyer sees as social morality and legitimate legal authority the progressive natural lawyer sees (and may well have experienced) as a political mechanism of exploitation and oppression. Second, they rest on contrasting attitudes toward sexuality: what the conservative instrumentalist sees as nonreproductive, immoral sexuality the progressive instrumentalist sees as a subordinated sexual orientation. And third, they rest on contrasting attitudes toward the import of constitutional authority: what the conservative positivist reads as mandating obedience the progressive positivist reads as mandating choice. Politics, ethics, and experience — not jurisprudence and not constitutional law — determine these differing commitments. We will not resolve those differences, or, more modestly, come any closer toward a mutual understanding of their roots, by pursuing jurisprudential battles, any more than by pursuing traditional constitutional arguments.

### III. CONCLUSION: CONSERVATIVE DOMINANCE OR CONSTITUTIONAL CRISIS

It seems safe to predict that the progressive understanding of the Constitution now being developed by progressive theorists will not achieve much success with the explicitly conservative Court over the next few decades. But, it is important to remember, the progressive interpretation of the Constitution did not do especially well in front of the liberal Court of the last thirty years either. During the fifties, sixties, and seventies, progressive gains were only occasional, and all of them, including both *Brown*<sup>139</sup> and later *Roe*,<sup>140</sup> were almost immediately compromised when accommodated into the dominant liberal vision.<sup>141</sup>

In this conclusion I want to suggest briefly that there may be rea-

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137. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

138. *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989).

139. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

140. *Roe v. Wade*, 410 U.S. 113 (1973).

141. See Strauss, *The Taming of Brown*, *supra* note 4; see also *Harris v. McRae*, 448 U.S. 297 (1980); *Beal v. Doe*, 432 U.S. 438 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977); *Maher v. Roe*, 432 U.S. 464 (1977).

sons to suspect that there are deeper tensions, not just between the progressive and conservative interpretations of the Constitution, but between the progressive paradigm and the idea of adjudicative law within which both liberal and conservative courts operate. To the degree that progressives acquiesce in an understanding of the Constitution and of constitutional guarantees as a body of adjudicative law — as something that courts enforce as law against unwilling parties — they may be committed to a definition of constitutionalism that is antithetical to the goals of progressive politics and the phrase “progressive constitutionalism” may remain an anomaly.

The idea of “adjudicative law” may be antithetical to the progressive understanding of the Constitution for at least four reasons. First, progressives understand constitutional law as possibilistic and open-ended, as change rather than regularity and as freedom rather than constraint. This understanding of *constitutionalism* may be right, and it may even be right as an account of law, but as an account of *adjudicative* law — of what courts in fact *do* — it is perverse. Adjudicative law is persistently authoritarian: demonstration of the “truth” of legal propositions (arguably unlike other truth statements) relentlessly requires shows of positive authority. Existentialism may not be an odd foundation for a theory of politics, legislation, or constitutionalism, but it is certainly an odd (to say the least) grounding for a theory of adjudication. The lesson from this tension between the possibilistic Constitution envisioned by progressives and the authoritarian structure of adjudicative law is not necessarily that the conventional account of adjudicative law as requiring demonstrations of binding authority is wrong; rather, the important point may be that the identification of constitutional process and choices with the sphere of adjudicative rather than legislative legality — with law rather than politics — is misguided.

Second, the instrumental goal toward which the progressive Constitution is aimed is the abolition of subordinating and damaging hierarchies. The justice to which it aspires is not corrective but distributive. Yet the ideal of justice to which adjudicative law aspires has historically been primarily corrective and compensatory, rather than redistributive.<sup>142</sup> Another way to put the point is that adjudicative law has for the most part been essentially conservative: it maintains, stabilizes, and reifies the status quo against change. It *exists* to protect against change. Anti-subordination is accordingly a peculiar goal to establish for adjudicative law. It is not, however, a peculiar

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142. For a full discussion of this point, see C. Sunstein, *The Limits of Compensatory Justice* (NOMOS, forthcoming 1991).

goal for legislation, nor is it an odd or outlandish understanding of the import of the fourteenth amendment. Perhaps, again, we should conclude from this not that it is misguided to understand adjudicative law as aimed at corrective rather than redistributive justice, but rather that it is misguided to conceive of a progressive and radically redistributive directive document such as the fourteenth amendment as a source of adjudicative law, rather than as a source of inspiration or guidance for legislative change.

Third, the “morality” that adjudicative law undoubtedly absorbs from time to time is almost invariably conventional and traditional, rather than aspirational or utopian. The Court may indeed read “the Law” through the lens of morality, but the morality that comprises the lens is the morality embraced by the dominant forces in the community,<sup>143</sup> not an aspirational morality of unlived ideals informed by experiences of oppression.<sup>144</sup> Adjudicative law typically reflects a community’s moral beliefs, and only rarely its aspirational ideals. Perhaps, then, we should conclude not that the conventional understanding of the relation between adjudicative law and conventional morality is wrong, but that the Constitution — because it is indeed open to an aspirational interpretation — is simply not exclusively a source of adjudicative law.

Fourth, the form and processes of “adjudication” create additional tensions for the progressive paradigm, quite apart from and no less serious than those created by the idea of adjudicative law. As anyone who has ever been unwillingly caught in the process knows, adjudication is profoundly elitist, hierarchic, and nonparticipatory. It is itself a form of domination that creates experiences of subordination. The protestations of modern civic republicans notwithstanding, it is the *antithesis* of participatory democratic politics. The obsessive attention given by civic republican and liberal constitutionalists alike to the “anti-majoritarian difficulty” posed by aggressive judicial review has not done anything actually to *solve* the difficulty. It has, rather, only served to highlight the utter incompatibility of both liberals’ and republican’s substantive commitment to equalitarian and participatory democracy with their simultaneous endorsement of nonparticipatory, anti-democratic, and intensely hierarchical adjudicative processes for achieving it.<sup>145</sup>

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143. See Fiss, *supra* note 21, at 753; compare West, *Adjudication Is Not Interpretation: Some Reservations About the Law-as-Literature Movement*, 54 TENN. L. REV. 203, 210-19 (1987).

144. The notable exception, of course, is *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

145. Perhaps the clearest example of this attempt to square a circle, and to accommodate antimajoritarian judicial review with participatory theories of republicanism and democracy, is

There are still other distorting constraints imposed by adjudication upon the progressive paradigm. To name just a few: Adjudication presupposes bipolar conflicts; progressivism does not. Adjudication requires at every turn in the road recitation of and support from “authority”; progressivism is constitutively distrustful of authority. Adjudication requires a recalcitrant, guilty, state defendant, one consequence of which is a judicially constructed “nightwatchman”-like Constitution that can act only against pernicious state action, while progressivism understands the problems of inequality, subordination, and bondage in our lives to stem not from state action, but from private and social action followed by state *inaction* — the failure of the state to act against private oppression. Adjudication is particularistic and individualistic; progressivism is anything but. And, finally, adjudication blames, condemns, and punishes; progressivism is fundamentally uninterested, on many levels and for complex reasons, with blame and innocence. These are surely good reasons to fear that a progressive Constitution is not going to fare well in any adjudicative body, not just in front of a conservative Supreme Court.

The consequence of the tension between adjudication and progressivism is that the legalization of constitutional discourse may have seriously impoverished the progressive tradition. When we read our progressive politics through the lens of the Constitution, and then read the Constitution through the lens of *law*, we burden progressivism with the constraints, limits, doctrines, and nature of law. Progressivism — its very *content* — becomes identified with that which courts might do, and that which lawyers can feasibly argue. In the process, progressivism in the courts becomes weak and diluted. The consequence of this tension is not only, however, that progressivism in the Supreme Court is impoverished, although clearly it is. The consequence is also that progressive politics *outside* the Court is robbed of whatever rhetorical and political support it might have received from a de-legalized conception of the progressive Constitution. In a culture that routinely identifies its political aspirations with constitutionalism, it becomes extremely difficult to demand progressive change of a nature that the adjudicated Constitution cannot support. Redistributive progressive politics, for example, may be burdened by the “shadow effect” of the refusal, both on the Court and outside it, to understand poverty as a suspect basis of classification, or minimal material well-being as a fundamental right. More generally, *any* anti-subordinationist progressive legislation is marginalized by the inability of the Court

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Michelman, *Traces of Self-Government*, *supra* note 4. For a full discussion of this point, see Brest, *Constitutional Citizenship*, 34 CLEV. ST. L. REV. 175 (1986).

to “find” an anti-subordination principle in the Constitution. Constitutionalism defines our public morality, to some extent, and the failure of the adjudicated Constitution to accommodate progressive ends accordingly impoverishes progressive morality.

Thus, progressive politics is impoverished by the adjudicated Constitution simply because it loses the force, and power, of constitutional thought. The legal profession pervasively, and the larger culture somewhat, has come to view the Constitution as the repository of public morality; as the source, genesis, and articulation of our political obligations. If our collective social morality and our moral aspirations are embedded in our Constitution, if the Constitution is a form of adjudicative “law,” and if adjudicative law exists in a state of profound and perpetual (and not particularly creative) tension with progressive morality and ideals, then this conclusion is inescapable: progressive morality will *never* become part of our public morality, regardless of the composition of the Supreme Court. Progressive constitutionalism may be part of the problem (as the saying goes), not part of the solution. If progressive constitutionalists care as much about progressive politics as they care about the Constitution (a big “*if*”), then the imperative is unavoidable: the circle must be broken.

By way of conclusion, let me briefly characterize some of the gains of reorienting progressive constitutional discourse toward legislative rather than adjudicative action, and toward a congressional rather than a judicial audience. First, and perhaps most important, if we were to recharacterize our progressive understanding of the constitutional guarantees of liberty and equality as political ideals to guide legislation, rather than as legal restraints on legislation, many of these tensions within the progressive understanding of the Constitution would disappear. If we imagine Congress, rather than the Court, as the implicit audience of constitutional argument, it becomes far easier to envision arguments to the effect that the fourteenth amendment *requires*, rather than permits (as within the liberal paradigm) or precludes (as in the conservative) progressive objectives such as affirmative action programs, child care and support programs, greater police responsiveness to private and domestic violence, reform of marital rape laws, and the criminalization of homophobic, racist, and sexist assaults. *Congress*, after all, has the textual obligation to do something about the states’ refusal to provide what the progressive means by “equal protection” — to protect the citizenry against the damaging effects of rampant social and private inequality.

It is easier to envision these arguments succeeding — it is easier, in fact, even to *state* them — not only because the fourteenth amendment

is explicitly directed toward Congress rather than the Court, and not only because of the present composition of the Court, but also because of the differences between constraint and aspiration, tradition and ideal, corrective and distributive justice, the history of our settled past and the politics of our future possibilities, participatory lawmaking and adjudicative law enforcement. It is easier, in short, to envision the actualization of the progressive Constitution through legislative action than through adjudicative law because of the difference between law and politics.

Second, if progressives were to reorient progressive constitutional debate toward legislative politics rather than adjudicative law, they would invigorate and enrich the terms and stakes of public debate. It is a truism that contemporary discourse in the public sphere has become nihilistic and devoid of a sense of moral purpose. A constitutionalized legislative process might reinject a sense of moral urgency, of moral purpose, and even of moral obligation into a morally bankrupt process. Again the reason for this should not be mysterious: we have become societally accustomed to understanding the Constitution as the repository of public and public-spirited morality. We have also, however, become accustomed to understanding the courts, rather than the Congress, as the forum for constitutional articulation and obligation. The Court, then, is understood as the locus of moral understanding and debate. It is hardly surprising that the consequence is a public perception, if not the reality, of a legislative branch mired in a thicket of narrow self-interest. We have, in effect, alienated the responsibility for public morality to the courts. One solution (and the solution for which I have argued elsewhere)<sup>146</sup> is to invigorate nonconstitutional moral public discourse. Given the pervasiveness of the perceived equation of public morality with constitutionalism, however, that may not be possible. The other solution is to expand the scope and audience of constitutional discourse.

Third, if we were to reorient progressive constitutionalism toward Congress, we would, perhaps paradoxically, strengthen the legal position of progressive legislation when it is invariably challenged in court as violative of conservatively understood constitutional guarantees. Most of the significant items on any progressive political agenda are seriously threatened by the possibility of invalidation by the present conservative Supreme Court. A conservative *Lochner*-like<sup>147</sup> understanding of the due process clause such as that embraced by the early

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146. West, *supra* note 26.

147. *Lochner v. New York*, 198 U.S. 45 (1905).

New Deal Court, like a conservative understanding of the takings clause such as that propounded by Richard Epstein,<sup>148</sup> obviously jeopardizes congressional action aimed at social hierarchies bolstered by gross maldistributions of wealth, including legislation ranging from the progressive tax system to comparable worth and child care proposals presently under congressional consideration. Similarly, a conservative understanding of equal protection as protecting the individual's right to participate in a color-blind market threatens, if it has not already eviscerated, affirmative action plans, as evidenced by the Court's recent decision in *Croson*.<sup>149</sup> And lastly, conservative understandings of the nature and limits of constitutional interpretation threaten the adjudicative gains made by progressives through imaginative use of a possibilistic and open-ended Constitution, as evidenced by the judicial retreat from active judicial protection of privacy in both *Bowers*<sup>150</sup> and *Webster*.<sup>151</sup> With conservative interpretation now dominating the Court, constitutional challenges to progressive legislation are virtually inevitable, and many will prove successful. We might be able to slow the tide of those attacks, if we strengthen the rhetorical and political base of our progressive legislative proposals, by grounding them not only in politics and policy but also in arguments drawn from constitutional mandate as well.

The gains for progressive politics would be no less tangible. A constitutionalized progressive agenda would centralize progressive concerns and lend them far greater legitimacy. Progressive politics, as discussed above, are crippled in this culture in part because of their lack of constitutional legitimacy — progressivism does not seem to be *mandated* by the Constitution and increasingly may come to seem precluded by it. Constitutionalism, in other words, if it remains the exclusive interpretive dominion of the Court, has the effect not only of marginalizing but even of delegitimizing progressive gains: everything on the modern progressive agenda — from mandatory child care, to zoning, to comparable worth, to reproductive freedom, to affirmative action — is now, given the dominance of the conservative paradigm, an arguably unconstitutional taking, an infringement of a constitutionally protected interest in property or contractual freedom, a denial of equal protection, or a denial of a fundamental right to life. This is, of course, in part a function of larger societal conservatism infecting constitutional language. All I want to suggest is that it is surely *also*, in

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148. R. EPSTEIN, *supra* note 2.

149. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989).

150. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

151. *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989).



part, a function of the truncation of progressive constitutional thought through the identification of the Constitution with adjudicative law.

Finally, a reorientation of progressive constitutionalism to the legislative arena would bring progressive constitutionalism into line, for the first time in this country, with progressive politics. Progressive constitutionalists constrain the progressive constitutional tradition so as to fit what is perceived to be possible in the adjudicative sphere. The result is a very weak vision of progressive politics. When our politics are constrained by what courts will or will not do, we lose much of what is central to the progressive cause, including, most significantly, a constitutional as well as legislative commitment to the eradication of what must surely be the most crushing and “subordinating” hierarchy of all: poverty. The reason why is clear enough: with the demands of adjudication governing the interpretation of the Constitution, and with constitutionalism in turn constraining progressivism, we have come to choose our progressive political commitments to fit our lawyerly sense of what the Court might buy, instead of our political and moral sense of what people are most in need of. During the liberal era, this may have looked like an acceptable trade-off. But it clearly is not in a period of conservative domination. The constitutional rights of the homeless, the poor, the victims of institutional and social racism, the large class of undervalued and underpaid female workers, to say nothing of the uncared for children, cannot be allowed to disappear or remain unarticulated simply because they will not be judicially heard. When we quit thinking of the Constitution and its promise within the confines of courts, plaintiffs, defendants, causes of action, actionable intent, state action, malice or the lack thereof, standing to sue, mootness, procedural safeguards, and the rest of the legal apparatus designed for the application and adjudication of law, we will see a Constitution that is at once more progressive, more political, more challenging, more just, and more aspirational than we have yet imagined.

Progressives have clearly lost the Court to conservative domination, and stand in danger of losing — or worse, conceding — the Constitution as well to conservative interpretation. We can easily imagine a world in which the Constitution has become thoroughly identified with conservative causes; perhaps we already live in one. In such a world, political progressives would, in effect, concede both the Court and the Constitution to conservatism, seek, instead, political victories in the interstices of Congress, dodge judicial intervention, and hope against hope for unexpected judicial victories. Progressivism would remain strictly political, and legislative; conservatism would become

thoroughly constitutionalized. The conservative Court then would act as a brake — but with the full force of constitutional authority and rhetoric behind it — on progressive legislative politics. This would obviously be a disaster for progressive politics in this country. It is, however, a disaster in which progressive constitutionalists seem perversely willing to acquiesce.

There is an obvious alternative to this scenario of conservative constitutional victory. Progressive constitutionalists, as well as progressive legislators, could try to create a viable progressive interpretation of the Constitution, congressionally and popularly supported, with the explicit aim of creating a modern “constitutional moment.” A conservative Court will never mandate or even seriously entertain a progressive interpretation of congressional meaning. But all courts, as Owen Fiss argues, “read [the Constitution] in a way to avoid crises.”<sup>152</sup> This will be even more true of a Court committed not only to the prevention of crisis, but to a positivistic account of law and legal legitimacy and a deferential attitude toward conventional morality. Such a Court, if faced with a legislative agenda firmly and explicitly grounded in a second (or third) Bill of Rights — welfare rights, anti-subordination rights, autonomy rights, rights of intimacy, reproductive rights, employment rights — all constitutionally mandated and all popularly supported — would learn, or re-learn, to read the Constitution so as to avoid a confrontation with an awakened populace. A responsible as well as conservative Court — and there is no reason to think this is not one — would not and could not long impede the work of a progressive Congress newly enlivened to its constitutional obligations.

The key, of course, is to create a progressive Congress, and behind it a progressive citizenry. We presently have neither, to put it lightly. But surely we could, and surely we should, and maybe the likelihood of having one would be enhanced by constitutionalizing progressive causes. The question is where to invest our energies, how to spend our lives. All I want to suggest is that a life spent reorienting progressive constitutionalism toward participatory and democratic forums and away from the insulated and elitist judiciary would be a life well spent. It would well serve progressive politics and causes by giving them constitutional status. It would well serve the democratic, participatory process by giving it a sense of both idealism and constitutional purpose. Finally, it would serve even the Constitution by actualizing its as yet untapped, unexplored, but rich progressive promise.

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152. Fiss, *supra* note 21, at 754.