

REVIEWS

The Classical Liberal Alternative to Progressive and Conservative Constitutionalism

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The Constitution in 2020,
Jack M. Balkin and Reva B. Siegel, Editors.
Oxford, 2009. Pp iv, 355.

I. A THIRD SEAT AT THE TABLE

In 2005, a group of liberal scholars gathered at Yale Law School to enter in upon what editors Jack Balkin and Reva Siegel call, in typical Yale style, a “conversation” about the future of American constitutional law (p 1). The results of their deliberations are published in a collection of twenty-seven essays in a volume entitled *The Constitution in 2020*. Much of course has happened between 2005 and 2009: we have had the surge in Iraq, the financial meltdown in the United States, the election of the progressive Democrat, Barack Obama, to replace the conservative, George W. Bush, and the appointment of Sonia Sotomayor and the nomination of Elena Kagan to the United States Supreme Court as replacements for Justices David Souter and John Paul Stevens respectively. We can doubtless expect lots of other profound changes in the next decade before we reach the target period of 2020.

In a sense, however, you would not be able to glean a hint about the ongoing turmoil both at home and abroad from reading essays gathered in *2020*. All of the authors, in their own different ways, are addressing a set of perennial constitutional problems that seem to resist the tumults and surprises that routinely upset the confident predictions of journalists and pundits. Twenty-twenty foresight of the future is, as it were, not a precondition for having an essay included in

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My thanks to Sharon Yecies, The University of Chicago Law School, Class of 2011, for her excellent research assistance on an earlier version of this Review.

2020, the volume. In these essays, the high level of abstraction works both as a blessing and as a curse. On the positive side, the high level of generality means that the essays here will not fail because of social obsolescence. But on the negative side, it also means that the rhetorical trope of thinking ahead a (half) generation falls flat on its face. The arguments here are as strong, or as weak, today as they will be a decade or a century from now. The key questions that the participants address are those for the ages. The only inquiry here is how well they do collectively and individually.

The answer to this question is, to this Reviewer, decidedly mixed. All of the essays without exception are short and well crafted. They are easily accessible to a popular audience and of varying interest to a professional one. My sources of concern are two. The first is the extent to which these essays present a suitable base for conversation and dialogue on the perennial constitutional problems. The second deals with the soundness of the individual essays. On the first point, it takes little time to see that the “conversation” at Yale Law School was not meant to be inclusive of all points of view. The list of contributors reads like a who’s who of the Left, but it contains not a single author who deserves to be included in a who’s who of the Right. This ostensible effort to create a unified position has led Eric Posner and Adrian Vermeule, in their review in *The New Republic*, to call these essays a “manifesto.”¹ But if we use that potent word in the sense that Karl Marx and Friedrich Engels attached to it in *The Communist Manifesto*, that description is surely incorrect. There are in fact deep intellectual divisions among these essays, so much so that they often read as though their authors are at war with each other on key issues.

The source of that division within the progressive ranks comes on two dimensions, which are curiously linked: interpretive theory and substantive constitutional vision, or “nomos” (pp 27–28). The first deals with the familiar issue of fidelity to text in connection with the potent movement that seeks to interpret the Constitution in accordance with its “original meaning”—a phrase used to avoid the difficulty of aggregating the intentions of the many different persons who wrote or ratified the Constitution.² The second deals with the political split that emerges, in line with much of modern constitutional law, be-

¹ Eric A. Posner and Adrian Vermeule, *Outcomes*, *Outcomes*, *New Republic* 43, 43 (Aug 12, 2009).

² See Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U Cin L Rev* 849, 862–64 (1989) (arguing that using the notion of original meaning negates the risk of seeking to interpret the original intentions of multiple sources).

tween the constitutional interests in economic liberty and private property that have received short shrift since the great New Deal revolution, and the concern with those preferred freedoms including speech, religion, and racial equality, which receive greater solicitude under contemporary constitutional interpretation.³

In principle, there is no necessary linkage between these two issues. But there is a practical explanation as to why progressives turn hostile to originalism when they deal with the economic issues, and sympathetic to it when they deal with the personal and social issues. Quite simply, ours is a classical liberal Constitution that meshes more closely with (some) progressive attitudes on personal and social issues. It also explains why, on balance, those essays that deal with social issues are in general more cogent than those that address economic issues from a strongly egalitarian perspective.

The depth of these authorial differences is concealed in the only part of this book that can be called a manifesto—its tendentious introduction by Jack Balkin and Reva Siegel. In their view, there are only two sides to the constitutional debate. Theirs is the progressive side that tries to make sure that the Constitution is updated through dialogue in which, apparently, only the anointed are allowed to participate. The dragons that must be slain are the conservatives whose devotion to an “imagined past” (p 2) conceals the imperative need of enlightened citizens to engage in the near-religious experience of “redemptive constitutionalism” (pp 2, 6–7) for their own time.

In contrast, the conservatives are guilty of “blind deference” to the past, unlike the progressives who are doing the hard intellectual and political work of updating the Constitution which only they understand to be “a work in progress,” to which each generation makes its own contribution (p 2). Their lofty rhetoric conceals the unstated assumption that all right-thinking people will embrace the progressive solution that reflects their preferred two-tier system of rights. Suitably informed, the public will rejoice as one in the protection of freedom of speech and religion, but will at the same time celebrate the “federal power to regulate the economy and provide basic social services like Social Security and Medicare; and guarantees of equality for all Americans” (p 3). These same people will deplore “Jim Crow [and] sex discrimination,” perhaps equally (p 3). Yet Balkin and Siegel offer

³ See *United States v Carolene Products Co*, 304 US 144, 152 n 4 (1938) (imposing a higher level of scrutiny to protect discrete and insular minorities than is used to protect economic liberties). It is a sign of the passage of time that no author in the book cites to this case, even though much of the architecture of modern constitutional law derives from this text.

no argument for this discordant synthesis, which they treat as a self-evident truth. The small government tilt to free speech is never juxtaposed against the out-of-control expansion of Medicare. And the careless bracketing of Jim Crow oppression with the multiple forms of private discrimination (including, of course, preferential treatment for women) shows an utter disregard for the critical difference between state domination on the one hand and the multiplicity of private choices in a competitive market that prevent any form of employer domination on the other.⁴

Balkin and Siegel's generalizations fail because they treat the debate over constitutional law as being a two-sided struggle in which the enlightened progressive slays the hidebound conservative. But there are not two sides to this debate; there are at least three. The unacknowledged player in the debate is the classical liberal defender of small government and strong property rights. For many years now, I have argued that, on matters of both interpretation and substance, the most accurate reading of those provisions of the Constitution that have survived—the three-fifths rule⁵ and Fugitive Slave Clause⁶ not included—is consistent with the classical liberal tradition that counts as its intellectual heroes the likes of John Locke, Baron Montesquieu, David Hume, and James Madison.⁷ Each of these great thinkers in his own way contributed to the formulation of a document that featured the introduction of complex structural features whose ultimate ends were to preserve all, not just some, of the liberty and property of the citizens within the political community. The theory here is neither novel nor deep. Thomas Paine captured the basic position well in two sentences of his famous pamphlet *Common Sense*:

For were the impulses of conscience clear, uniform, and irresistably obeyed, man would need no other lawgiver; but that not being the case, he finds it necessary to surrender up a part of his property to furnish means for the protection of the rest; and this he is induced to do by the same prudence which in every other

⁴ See Richard A. Epstein, *Forbidden Grounds: The Case against Employment Discrimination Laws* 24–27 (Harvard 1992) (attacking the use of antidiscrimination law in private competitive employment markets).

⁵ US Const Art I, § 2, cl 3 (stating the apportionment of representatives and taxes and counting those “bound to Service for a Term of Years” as three-fifths of a person).

⁶ US Const Art IV, § 2, cl 2 (mandating that those who have committed a crime and fled to another state must be delivered back to the state with jurisdiction over the crime).

⁷ See, for example, Richard A. Epstein, *How Progressives Rewrote the Constitution* xiii, 16, 19–22, 135–36 (Cato 2006) (attacking the New Deal revision of the classical liberal Constitution on matters of federalism and economic liberties).

case advises him out of two evils to choose the least. *Wherefore*, security being the true design and end of government, it unanswerably follows that whatever *form* thereof appears most likely to ensure it to us, with the least expence and greatest benefit, is preferable to all others.⁸

That theory summarizes much of what the United States Constitution is about. The basic logic is pure John Locke. Property exists prior to the creation of the state. It is not created in a top-down fashion by the government, which only gets its powers from the individuals it governs. Occupation of unowned land, not government grant, is the source of individual ownership in a state of nature.⁹ High transaction costs—a modern refinement, which explains why voluntary agreement transmutes itself into a social contract—block consensual cooperation by all individuals. Some central authority is needed to make sure that the bad apples in the barrel do not ruin the lives of typical mortals who do listen to the “impulses of conscience.”¹⁰ Stopping the aggression by the few gives the many a chance to sort out their own lives. Finding the right terms for the posited surrender of property for security (here against the aggression and misconduct of others, only) is a chancy business. The art of practical judgment is needed to pick out which system is “most likely” to achieve that end.¹¹ Paine does not deal with these structural questions, except to denounce on theoretical grounds the ability of the king to negative—that is, veto—legislation.¹² It is therefore a quiet irony that the Founders included the presidential veto and the legislative override in their structural Constitution.¹³ In fact, much of federalism worked because the Constitution just substituted the federal government for the English Crown.

The Constitution in 2020 does not spend much time on the structural questions as such. It does, however, devote a lot of ink to matters of individual rights, except of course those that relate to private property. And on these select issues of individual rights, it is not just a matter of coincidence that originalism appeals much more to the defenders of personal liberties than the defenders of massive government

⁸ Thomas Paine, *Common Sense*, in Eric Foner, ed, *Thomas Paine: Collected Writings* 5, 7 (Library of America 1995) (adopting Lockean theory in the American context).

⁹ See, for example, John Locke, *Second Treatise of Government* §§ 25–35 at 18–22 (Hackett 1980) (C.B. Macpherson, ed).

¹⁰ Paine, *Common Sense* at 7 (cited in note 8).

¹¹ *Id.*

¹² *Id.* at 29–31 (attacking the king for abusing “a negative over the whole legislation of this continent”).

¹³ See US Const Art I, § 7, cl 2.

regulation of economic matters. In her thoughtful essay on voting, Pamela Karlan makes the simple point that seems to elude many of her more sophisticated coauthors. “The entire Constitution is characterized by negative rights” (p 161), including of course the Due Process and Equal Protection Clauses, which start with the words “nor shall any State.”¹⁴ It therefore takes far fewer interpretive gymnastics to find constitutional support for the small-government solutions that progressives sometimes prefer on matters of speech and religion than it does to squeeze out constitutional authorization for positive rights to education and health care from the negative phrasing of the Equal Protection Clause.

In order to explore how these interpretive and substantive issues fit together, I first examine the interpretive theories that are advanced in *2020* and then turn to a discussion of the substantive issues. In each case, I not only make a comparison of the progressive theory with its conservative counterpart, but also explain the extent to which the classical liberal approach to the twin questions of interpretation and constitutional substance does a better job with this Constitution than either of its rivals.

II. THE INTERPRETIVE QUEST

The need to twist and turn on these issues puts stress on any effort to mount a uniform system of interpretation that can do all things at all times. As evidence, in *2020*, there are at least three different strands of interpretive theory that require some comment. Two of these purport to be distinctive contributions of progressive theory: the devotion to the living Constitution (pp 4, 25) and the reliance on constitutional minimalism (p 37). The third is in fact a variation of the originalist position which resorts to what Balkin calls the method of “*text and principle*” (p 11), which in a far more thoughtful, but still flawed, way seeks to reconcile a sophisticated version of textual originalism with the inescapable truth that many of the most distinctive features of constitutional doctrine evolve from judicial decisions and general state practices that took hold long after the Constitution’s initial adoption (pp 13, 20–23).

¹⁴ US Const Amend XIV, § 1.

A. The Living Constitution

One common strand of progressivism is that of the living Constitution, which has long raised conservative hackles on the ground that it is a simple pretext for allowing unelected judges to impose their preferences on ordinary citizens and their elected representatives.¹⁵ To stem this threat to the position of judges, conservative theorists have long held that some objective meaning to terms is necessary to ensure that judges do not abuse their precarious position in a system of judicial review, which, of course, gives judges the power to knock down the laws that have been duly enacted through standard processes.¹⁶ On this interpretive point, the classical liberal is of two minds. First, he tends to align himself with the conservative because of their shared belief that only clear and conscientious adherence to text offers protection against the abuse of judicial power. But he tends to part company with the conservatives to the extent that they find in the Constitution an overpowering preference for democratic solutions over the protection of individual rights. Rather, in the tradition of Thomas Paine, he sees a key role for judges to protect individual rights from legislative encroachment. Put in its simplest terms, many major constitutional guarantees are stated in broad and comprehensive terms. No implicit premise in favor of judicial restraint should result in denaturing these guarantees in ways that are inconsistent with the structure and text of the Constitution.

These various observations cannot, of course, conceal the real difficulties in executing any scheme of text-bound interpretation. Those difficulties are unavoidable given the incompleteness and brevity of constitutional text. But the correct classical liberal response, which resonates with conservatives, is that it hardly makes things better when judges just announce that they are prepared to respond to overall changes in social mores as part of some stilted and partial “conversation” about the meaning of constitutions.

Some real sense of the difficulty with the progressive position is highlighted in Balkin’s Exhibit A of the advantages of a living Constitution. He writes that “the Eighth Amendment’s prohibitions on ‘cruel and unusual punishments’ bans punishments that are cruel and unusual as judged by contemporary application of these concepts (and

¹⁵ See, for example, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in Amy Gutmann, ed., *A Matter of Interpretation: Federal Courts and the Law* 3, 38 (Princeton 1997) (arguing that “The Living Constitution” allows judges to “find” law, thus upstaging statutes developed by democratic legislatures).

¹⁶ *Id.* at 20–21.

underlying principles), not by how people living in 1791 would have applied those concepts and principles” (p 12). The same view is taken by Harold Hongju Koh, who insists American courts should be informed by the best practices of other courts from overseas in evaluating what counts as “unusual” punishment (pp 319–30).¹⁷ Both of these positions have caveats. Balkin’s last clause is a sensible concession to the originalists, for none of them (or, in this instance, us) thinks that this general prohibition would not apply to such novel punishments as electrical prods that were not invented in 1791. So he recognizes that the sensible inquiry is whether the challenged practice has the requisite degree of sadism or barbarity that matches that of torture on the rack, for which the appropriate answer is probably yes. Koh too does not insist that any and all overseas practices count (pp 319–20). Zimbabwe is out. Only respectable nations are in. Which ones qualify is a project to be determined, case by case.

These modest concessions do not conceal the major difficulties with this approach.¹⁸ In particular, they do not cover the ground in two cases where the originalist and the progressive part company. Unfortunately, neither Balkin nor Koh discusses the particularity of his chosen issue with the textual specificity that the underlying interpretive issues require. First, does the Eighth Amendment prohibit the death penalty in any or all cases? On this issue, no technological update intrudes for those methods—for example, hanging—which were commonly used in 1791. They should be permissible today. It is not just common practice; it is also the textual context of the Eighth Amendment.¹⁹ In particular, the Fifth Amendment contains three distinct references to the death penalty: punishment for a “capital” crime, double jeopardy for life or limb, and protection against loss of life, liberty, or property without due process of law.²⁰ It strains credibility to think

¹⁷ I have more sympathy for the more modulated account of the use of foreign law in Vicki Jackson’s *Progressive Constitutionalism and Transnational Legal Discourse* (p 286) (describing historical uses of foreign law by United States courts).

¹⁸ For a powerful critique of the “modernist” approach to cruel and unusual punishments, see Jonathan F. Mitchell, *Modernization, Moderation, and Political Minorities*, U Chi L Rev Legal Workshop (May 3, 2009), online at <http://legalworkshop.org/2009/05/03/modernization-moderation-and-political-minorities-a-response-to-david-a-strauss> (visited Nov 3, 2009) (arguing that modernization is not the central theme in the Supreme Court’s recent capital punishment and substantive due process cases), critiquing David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U Chi L Rev 859 (2009) (defending the Supreme Court’s modernizing approach while noting the need to address issues of institutional competence, distortion of the political process, and judicial susceptibility to public opinion).

¹⁹ US Const Amend VIII.

²⁰ US Const Amend V.

that any evolving set of social expectations of what counts as either cruel or unusual could undermine via the Eighth Amendment a practice that is explicitly authorized in the Fifth.

Worse perhaps is that the notion of contemporary standards presupposes a false level of progressive unity that is nowhere found today, either domestically or overseas. Thus, Justice Anthony Kennedy's ill-conceived Supreme Court decision in *Kennedy v Louisiana*²¹ invoked his strained conception of modern evolving standards of decency to disallow the death penalty in cases of child rape.²² But why, when many Americans think that it is not only appropriate but also desirable?²³ His appeal to evolving standards was a fig leaf for the imperial ukase that originalists fear. The arbitrary nature of the decision became clearer when the Court did nothing even after it was pointed out that Congress in 2006 had enacted the death penalty for child rape in the Uniform Code of Military Justice.²⁴

Nor should it matter in these cases that every other nation and state had banned the death penalty for child rape, or any other class of offenses. The entire text says, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."²⁵ The clear reference here is to the types of punishment that are eliminated, not to some unspecified proportionate relationship between the punishment and the underlying crime. As far as the Constitution is concerned, the death penalty could be inflicted for a parking violation. Textually, the effort to press the clause into service for excessive punishment (as opposed to excessive bail or fines) could not be limited to death cases but could put the entire criminal law under review for all types of offenses. Indeed the Supreme Court took just that step in *Graham v Florida*,²⁶ when it held that the Cruel and Unusual Punishment

²¹ 128 S Ct 2641 (2008).

²² See *id* at 2665 (striking down the death penalty in child rape cases as cruel and unusual punishment under an "evolving standard[] of decency"), distinguishing *Coker v Georgia*, 433 US 584, 592 (1977) (holding that the death penalty was cruel and unusual punishment for the rape of an adult woman).

²³ See *Kennedy*, 128 S Ct at 2669 (Alito dissenting) (noting five states that have implemented death penalty for child rape—Georgia, Montana, Oklahoma, South Carolina, and Texas).

²⁴ National Defense Authorization Act for Fiscal Year 2006 § 552(b), Pub L No 109-163, 119 Stat 3136, 3263 (amending Uniform Code of Military Justice Article 56 to authorize capital punishment for the rape of a child). For discussion, see Linda Greenhouse, *In Court Ruling on Executions, a Factual Flaw*, NY Times A1 (July 2, 2008) (recounting how a military law blog had uncovered an overlooked federal statute authorizing the death penalty for military personnel in child rape cases).

²⁵ US Const Amend VIII.

²⁶ 2010 WL 1946731.

Clause precluded sentencing a juvenile offender to life in prison without parole when convicted of a nonhomicide crime.²⁷

An amendment that presents enough challenges for sorting out the impermissible types of punishment does not offer tools to make these judgments. The basic use of social information on textual matters is a dead end that works nowhere under the Constitution.

B. Minimalism

There is, then, good reason to steer clear of living constitutional arguments, regardless of one's view of the underlying merits of the practice. The same can be said of a second technique of constitutional interpretation, minimalism, which has been brought into prominence by Cass Sunstein.²⁸ The basic idea behind this principle is that today the Supreme Court should not be the driving force behind social change, which is a task far better left to the legislature (p 37). Instead the Court should seek to make narrow decisions on limited grounds, and to rely where necessary on what Sunstein likes to call "incompletely theorized agreements" (p 41), which is his way of saying that the justices should look to the narrowest permissible grounds for reaching a decision, without plumbing the depths of any particular issue. The arguments in favor of minimalism are purely institutional. Sunstein makes no attempt to indicate how the language of particular clauses requires this approach to interpretation.

It should not be supposed, however, that the use of this approach does not have its own political agenda. Sunstein makes it clear that he thinks that conservative activist justices have gone seriously astray insofar as they have thrown cold water on affirmative action programs, or limited campaign finance legislation, or imposed limits on the federal power under the Commerce Clause, or allowed Congress to expand the meaning of the Equal Protection Clause, or revived the doctrine of state sovereign immunity, or restricted the ability of individuals to have standing to bring certain environmental causes of action (pp 43–44). But at no point does he give anything that looks like a traditional legal argument based on text, structure, or purpose, to defend the particular results that he supports.

There is, moreover, a clear political agenda that lies behind this embrace of minimalism, which is to keep the path clear for the legisla-

²⁷ Id at *23.

²⁸ See generally Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard 1999) (arguing that the Constitution promotes deliberative democracy).

tive adoption of various pieces of the Franklin Roosevelt's "Second Bill of Rights," which "included a right to a decent education; a right to adequate medical care; a right to earn enough to provide adequate food, clothing, and recreation—and more" (pp 43–44).²⁹ Sunstein understands that no judicial body could ever engage in the kinds of activities that are needed to achieve this result. Indeed, Frank Michelman in his careful essay on the subject notes that the South African experience shows the profound institutional limitations on any constitutional regime that purports to create positive rights (pp 52–53). The courts do not try to enforce them directly, but squarely place the burden on the legislature to take steps in that direction—a messy but not entirely unsuccessful process.³⁰ Sunstein's clear strategy is to make sure that any of the guarantees of individual rights under our "negative" Constitution do not set up roadblocks to stand in the path of these devices. In this regard, he is joined by William Forbath, whose contribution to this volume is a paean to the labor legislation of the 1930s and similar reforms—again without once addressing the arguments that could be raised against his view (pp 57–60).

Sunstein's minimalist approach is at loggerheads with the classical liberal approach to constitutional law, for it gives no weight whatsoever to the constitutional provisions that explicitly limit the scope of federal or state power. It simply allows its own view of the institutional role of courts to swamp anything that is found within the constitutional text or structure. For these purposes, it is also instructive to note that the minimalist position in particular does not have that much allure even within the progressive tradition. Robert Post and Reva Siegel offer a trenchant criticism when they note that minimalism could never have formed the platform on which the great progressive innovations of the twentieth century rest (pp 32–33). Start with *Brown v Board of Education*,³¹ and ask whether the minimalist of 1953 could overturn *Plessy v Ferguson*,³² which authorized the creation of segre-

²⁹ See Cass R. Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever* 13 (Basic Books 2004).

³⁰ For discussion of the judicial response, see Kim Lane Scheppele, *Social Rights in Constitutional Courts: Strategies of Articulation and Strategies of Enforcement* 19–21 (unpublished draft, 2008) (on file with author) (examining how the South African courts balance a constitutional mandate to enforce substantive social rights with limitations on state resources); Rosalind Dixon, *Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited*, 5 Intl J Const L 391, 393 (2007) (advancing a "dialogue theory" of judicial and legislative cooperation with the goal of protecting positive constitutional rights).

³¹ 347 US 483 (1954).

³² 163 US 537 (1896).

gated schools, segregated transportation, and antimiscegenation laws.³³ Indeed, the prized decisions that applied the Equal Protection Clause to distinctions based on sex a generation later would similarly die stillborn in the face of common social practices to the contrary.³⁴ Minimalism is a philosophy that allows those in power to preserve the legal status quo, but it is utterly incapable of explaining how courts reached that status quo in the first place. The pace of social change is always great, and it is hard to see how any progressive, who thinks that many of these changes are welcome, would consistently adhere to the doctrine—except perhaps when conservatives are in control of the judiciary.

The minimalist approach also underplays the profound differences in world view that cry out for reasoned arguments. To be sure, there are lots of cases where two groups of judges will come to the same result on different rationales. In those cases it may well be fine to leave the underlying tension over the scope and direction of the desired outcome for another day. But in some cases, the opposite is true. Uncertainty also imposes a high cost on future transactions. Sometimes it is better to give broad decisions rather than narrow ones, so that people can plan their business and personal lives with knowledge of what the law requires. In addition, there are many deep differences that cannot be papered over in this manner, for they involve parties that have, as it were, “completely theorized disagreements” that can only be resolved in ways that leave either, or perhaps both sides, unhappy with the results. At this point, the idea of a reasoned judgment does not sit well with a view that says, “Take the least intrusive view on the matter.” And that position is even more tenuous because many of the guarantees in question on matters of speech, religion, property, and contract are painted in broad strokes that seem to preclude, not invite, the minimalist approach.

So why do we avoid the traditional tools of constitutional interpretation when they matter? To keep the possibility of Roosevelt’s Second Bill of Rights alive? That works only if we think that the first Bill of Rights really does not matter anymore. Sunstein, like Roosevelt before him, found it easy to articulate the desired rights (pp 43–44). But neither offers a coherent account of the correlative duties needed to make them work. If I have a right to a decent wage, who has the duty to supply me with the job? Can we really impress our neighbors

³³ Id at 552.

³⁴ See, for example, *Reed v Reed*, 404 US 71, 77 (1971) (holding unconstitutional on equal protection grounds an Idaho state law preferring men over women of equal ability in estate administration).

into service for this and then demand of them a thousand other tasks? Is there any reason to believe that the complex network of cross-subsidies and monopoly protections is something that fits in with any portion of our constitutional convention? Even Frank Michelman, who is far more sympathetic to these goals than I, notes that progressives are not always “sensitive” to other constitutional values that are sacrificed by an oppressive rent control law on the one hand, or limitations on political speech on the other (p 51). And for those of us who started with the exchange of property for security that motivated Thomas Paine, erecting an entire system of new public entitlements amounts to little more than a play on words. The reason we quit the state of nature was because we needed public protection against aggression, not state protection against old age or poor health. Social Security and Health Security are programs whose imitative use of the term “security” plays off the key role for the state in protecting against aggression. But there is nothing in the open-ended call for “adequate” health care, education, or income that serves as a basis for a coherent political agenda, let alone a constitutional theory of adjudication. If the living Constitution has its vices, the minimalist Constitution has them as well.

C. Text and Principle

So we come at last to the third technique of text and principle, which has a lot more going for it. The key point here to note is that no originalist theory could ever discharge its obligation by a close, even exhaustive, explication of the various provisions of the Constitution. As anyone who comes out of the interpretive tradition of either the Roman or common law systems knows, all great guarantees are subject to a principled set of exceptions. The biblical injunction “Thou shalt not kill” must be adapted to take into account a variety of issues from self-defense, defense of property, provocation, insanity, and necessity. The problem is not disposed of by recasting the proposition as one which says “Thou shalt not murder,” for then we have to back out from murder all the killings that may be either justified or excused. I have for many years taught that the *Lex Aquilia*, circa 287 BC, and its explication of the phrase “unlawfully kill,” gave rise to all these problems long before the adoption of our Constitution.³⁵ And the constant

³⁵ See Theodor Mommsen, Paul Krueger, and Alan Watson, eds, 1 *The Digest of Justinian* 277 (Pennsylvania 1985) (translating *Digestum Justiniani* 9.2’s “qui . . . iniuria occiderit” as “[i]f

invocation of police power issues under virtually every substantive guarantee, as well as some federalism issues, cannot be derived just by staring at the words in the Constitution. They require a full substantive theory for explication. The question here is how.

On this score I think that Balkin goes wrong when he assumes that the task of modification primarily requires historical updating for modern circumstances (pp 11, 23). In most cases, the issues of completeness involve problems that are similar to those of Roman times, and which involve only that natural interplay between a *prima facie* case and the possible justifications that override it. So we can believe in the freedom of speech, and still believe that we can prevent the use of fraud and intimidation in a wide range of human contexts. The use of these two examples is not by accident, but because they track the classical liberal definitions of wrongful conduct—as does the similar proposition that the constitutional protection of freedom of speech does not insulate newspapers from the strictures of the antitrust law.³⁶ We need, in a word, to articulate systems that read the particular text against a general framework of entitlements with its long historical pedigree. But it is not just any old entitlements pulled out of thin air. For the system of freedom to have coherence, it has to be those, and only those, entitlements that stem from the classical liberal tradition. And from this soil, a coherent progressive account of freedom cannot grow.

Balkin also points to a second set of interpretive difficulties to which no theory of constitutional law can supply an easy answer. Thus, Balkin's most powerful critique of originalism is captured in his discussion of “[m]istakes and [a]chievements” in constitutional law (pp 13–17). The problem arises in a simple but unavoidable way. Constitutional interpretation can proceed in relatively straightforward fashion if each decision provides a solid platform on which further decisions rest. In this happy universe, each decision adds a new piece to a coherent whole so that the true implications of a sound constitutional provision are slowly fleshed out over time. Unfortunately, however, judges (like the umpires to whom they are often compared)³⁷ are fallible, which means that they make mistakes of major proportions.

anyone kills unlawfully”). For an explication of the text, see generally Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 *BU L Rev* 699 (1992).

³⁶ See *Citizen Publishing Co v United States*, 394 US 131, 139–40 (1969).

³⁷ See Confirmation Hearing on the Nomination of John G. Roberts, Jr to be Chief Justice of the United States, Hearing before the Committee on the Judiciary, United States Senate, 109th Cong, 1st Sess 55 (Sept 2005) (statement of John G. Roberts, Jr) (“Judges are like umpires. Umpires don’t make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.”).

The question then arises—what should the next judge do if he is convinced that some previous decision is in error? (Let's ignore the additional complication that the second judge could be wrong as well.) The choices here are not appetizing for a conscientious originalist. One possibility is to treat the last decision as paramount and to allow it to set the course of future decisions. A second is to treat the last decision as erroneous and work to slowly limit its effect over time, by introducing this qualification and that exception. The first approach has the downside of sending sound constitutional doctrine over a cliff. The second has the downside of making an incomprehensible jumble of the law. The response on the part of most justices is to split the difference by showing strong respect, without giving absolute fealty, to the earlier decision.

At this point, the obvious question is which decisions fall into which camp. On this score, the temptation is to allow those decisions that seem to count as mistaken “achievements” to flourish, while working hard to eliminate the consequences of other decisions that are seen as a true blot on the national character. So if, as there is ample reason to believe, the Dormant Commerce Clause jurisprudence does not follow from the text of the Commerce Clause³⁸—which reads as a grant of power to the federal government and not as a limitation on the power of the states—the tendency on the part of most justices is to let it ride because of the great benefit (here measured explicitly in classical liberal terms) of forging a single free trade zone in the United States.³⁹ But more textually minded justices, such as Justice Antonin Scalia and Justice Clarence Thomas, bridle at the strong use of the doctrine precisely because it is not tightly moored to the text.⁴⁰ For them, a narrow reading is preferred so that lots of anticompetitive state actions fall under the radar. On this question, count me with the former group that wants to push hard on a good thing, in part because I think that the broad interpretation of the Dormant Commerce

³⁸ US Const Art I, § 8, cl 3.

³⁹ See, for example, *Dean Milk Co v City of Madison, Wisconsin*, 340 US 349, 356 (1951) (striking down local pasteurization regulation that would invite “a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause”); *Southern Pacific Co v Arizona*, 325 US 761, 783–84 (1945) (striking down an Arizona state law regulating train lengths because no local police power interest justified deviation from a uniform interstate regulatory scheme).

⁴⁰ See, for example, *Camps Newfoundland/Owatonna, Inc v Town of Harrison, Maine*, 520 US 564, 610–20 (1997) (Thomas, joined by Rehnquist and Scalia, dissenting) (arguing that the Court should engage in a strict reading of the Commerce Clause rather than engaging in a policy debate).

Clause is justified in part to offset the unduly narrow reading of the Privileges and Immunities Clause of Article IV.⁴¹

Yet in some situations, the results could easily be different. There is no question that the progressives celebrate the 1937 settlement whereby the federal power under the Commerce Clause contains no known limits.⁴² On this issue, the huge anticompetitive effects of the new interpretation switch—in my view—the balance back in the opposite direction. It makes no sense whatsoever to twist the Commerce Clause beyond textual recognition in order to make the world safe for monopoly unions and agricultural cartels, which were in fact the objects of the two key cases on the issue.⁴³ On this point the progressives who celebrate the regulatory state will come, regrettably, to a different conclusion.

Balkin is right on the money when he notes that Scalia's originalism is necessarily compromised by the need to make peace with case law developments which he would never have voted for in the first place (p 13). The same of course is true of any progressive justice that has to balance *stare decisis* against his own views. So we are all in the same soup of having to decide which of the earlier precedents are kept, which are eliminated, which are read broadly, and so forth. And here we can see the difference. Balkin rightly insists that the originalist's truce with modernity is always troubled, even on areas of the greatest concern to him (p 17). He does not want to read the key New Deal decisions on labor law and agricultural regulations as deviations from the basic constitutional scheme, because that position makes it hard for him to aggressively apply modern Commerce Clause jurisprudence to new challenges to the Endangered Species Act⁴⁴ or the

⁴¹ See US Const Art IV, § 2, cl 1 (asserting that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States”). For the source of the narrow reading of this clause, see *Paul v Virginia*, 75 US (8 Wall) 168, 180 (1869) (holding that the clause does not treat corporations as citizens), overruled in part by *United States v South-Eastern Underwriters Association*, 322 US 533, 547 (1944) (stating that insurance contracts count as commerce, and that readings to the contrary relying on *Paul* make the mistake of treating the Commerce Clause as a “technical legal conception” rather than “drawn from the course of business”), superseded by statute on other grounds.

⁴² See *NLRB v Jones & Laughlin Steel Corp*, 301 US 1, 38–41 (1937) (applying the Commerce Clause to collective bargaining); *Wickard v Filburn*, 317 US 111, 125–29 (1942) (applying the Commerce Clause to agricultural marketing orders). The brief counterrevolution in *United States v Lopez*, 514 US 549 (1995), has effectively gone nowhere, given its explicit acceptance of *Wickard*. See *Lopez*, 514 US at 560–62 (restricting Congress's ability to regulate guns in school zones, while managing to uphold and distinguish the far-reaching approach of *Wickard*).

⁴³ See *Jones & Laughlin Steel Corp*, 301 US at 22; *Wickard*, 317 US at 113–14.

⁴⁴ Endangered Species Act of 1973, Pub L No 93-205, 87 Stat 884, codified as amended at 16 USC §§ 1531 et seq.

Clean Water Act,⁴⁵ insofar as they apply to isolated habitats that have no discernible connection to interstate waterways.⁴⁶ But grudging acceptance of the earlier Commerce Clause cases is exactly the right response, given the enormous risks that come from two sources under the modern synthesis. The first is the incredible reversal in the interpretation of the statute, given the deference that the courts wrongly give administrative agencies under the *Chevron* doctrine,⁴⁷ so that with one stroke of the pen the “waters of the United States”⁴⁸ can be transformed from navigable rivers to any isolated puddle on which an (interstate) duck can land. The second is that the broad definition of commerce spawns dual systems of regulation, such that the more stringent standard always takes precedent over the lesser. The proper response is therefore just what Balkin feared. Once it is recognized that the foundations of the New Deal settlement were intellectually bankrupt, the proper thought is to refuse to extend it one inch beyond its previous contours.

Needless to say, progressives disagree, as is evident in Judith Resnik’s essay, which endorses federalism in part because it allows progressive communities to impose strong guarantees for women against public and private discrimination when the federal government fails to act, as is now the case with the Convention on the Elimination of All Forms of Discrimination Against Women⁴⁹ (pp 274–75). Balkin is dead right therefore to state how intervening circumstances undermine the originalist enterprise. But his unsound progressive instincts (which rest on his belief in the large social welfare state) drive him to the wrong conclusion on how this problem should be handled.

III. THE SUBSTANTIVE DIFFERENCES

It should be clear from the earlier discussion that a lot of the tension in constitutional interpretation rests on the simple proposition

⁴⁵ Federal Water Pollution Control Act Amendments of 1972 (“Clean Water Act”), Pub L No 92-500, 86 Stat 816, codified at 33 USC § 1251 et seq.

⁴⁶ See, for example, *Rapanos v United States*, 547 US 715, 757 (2006) (plurality) (narrowing the definition of “waters” within the Clean Water Act to limit federal jurisdiction). See also *National Association of Home Builders v Babbitt*, 130 F3d 1041, 1057 (DC Cir 1997) (holding that § 9(a)(1) of the Endangered Species Act is within Congress’s Commerce Clause powers).

⁴⁷ See *Chevron U.S.A. Inc v NRDC*, 467 US 837, 865–66 (1984) (requiring judicial deference to agencies’ reasonable interpretations of their regulations).

⁴⁸ *Rapanos*, 547 US at 732 (“[T]he waters of the United States’ include only relatively permanent, standing or flowing bodies of water.”).

⁴⁹ Note that the treaty does not cover discrimination in favor of women, and governs both private and public actors, in the progressive tradition. See generally Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13 (Dec 18, 1979, entered into force Sept 3, 1981).

that it is not easy to turn a document that arises from the limited government tradition into a charter for massive state power. The contrast becomes exceedingly clear when we look at the essays in this collection through the classical liberal lens. The modernists who are comfortable with small government face hard questions of interpretation that require them to balance original meaning with new circumstances. They do not have to rip down the old edifice and start anew; the strong egalitarians, however, have no such choice, for they have to distort the constitutional text beyond recognition if an equal income or wealth policy is to be either consistent with, or even required by, the Constitution. The levels of aspiration make a difference. It is therefore important to first look at the progressives on issues of economic power and income equality before turning to the various protections of individual liberties under the Bill of Rights.

A. Economic Rights under the Fourteenth Amendment

In dealing with economic issues, the progressives see their vehicle of choice in § 1 of the Fourteenth Amendment. It is worth therefore briefly setting out how the text is put together before discussing the constitutional sins that are perpetrated in its name. In essence, I offer what I think to be a sensible originalist approach before turning to the progressive alternative.

1. The original reading of the Fourteenth Amendment.

Section 1 of the Fourteenth Amendment contains two sentences, which must be read with reference to each other:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁵⁰

The first sentence gives a definition of which persons count as citizens of the United States. It is “[a]ll persons” who were born or naturalized in the United States. I put aside for these purposes the knotty words “subject to the jurisdiction thereof”—which could be read as indicating that only persons born of United States citizens could quali-

⁵⁰ US Const Amend XIV, § 1.

fy for this status—to concentrate on the simple point that the first sentence was intended to overrule the *Dred Scott*⁵¹ case, which held that freed slaves were not citizens of the United States.⁵² The sentence is a big deal. Even if it does not state what the consequences of citizenship are, it confers that preferred status on former slaves. Other sources of law will answer the question of what citizenship entails, but so long as it is regarded on net as a benefit, the movement from slave to citizen counts as legal revolution. In particular, it goes far beyond the mere abolition of slavery (which in itself does not confer any civil rights) to a major transformation of the American public.⁵³

The second sentence builds on the first by limiting state power: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” We know from the previous sentence who is included in the class of citizens. And the scope of the prohibition depends on the reading of the term “privileges or immunities,” for which the best source is the definition of “privileges and immunities” in Article IV.⁵⁴ That phrase received a broad, classical liberal, interpretation in *Corfield v Coryell*,⁵⁵ which included “the enjoyment of life and liberty, with the right to acquire and possess property of every kind,” and the ability to participate in “the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.”⁵⁶ So there is a strong meas-

⁵¹ *Dred Scott v Sandford*, 60 US (19 How) 393 (1857).

⁵² *Id* at 403, 406, 453 (denying the citizenship of a freed slave in diversity cases).

⁵³ For a discussion of the difference, see Andrew Kull, *The Color-Blind Constitution* 4–6 (Harvard 1992).

⁵⁴ US Const Art IV, § 2, cl 1.

⁵⁵ 6 F Cases 546 (CC ED Pa 1823).

⁵⁶ The full passage reads:

What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.

Id at 551–52.

ure of civil and political rights that comes from tying the Privileges or Immunities Clause of the Fourteenth Amendment into Article IV.

After the Privileges or Immunities Clause come both the Due Process and Equal Protection Clauses. These rights are extended to all persons, whether or not citizens, and so aliens are not excluded. At this point the list of protections under these clauses has to be *narrower* than those conferred on the preferred class of citizens. At the very least, neither due process nor equal protection could include the right to enjoy the franchise. More controversially, it is probably the case that the rights to acquire, hold, and use property are subject to strong state limitations. The source of the protection is that *once* the property is obtained, one cannot be deprived of it without due process of law. The best reading therefore of this clause is not the broad reading that it received in *Lochner v New York*,⁵⁷ where freedom of contract (which belongs on the list for citizens) was conferred on all persons,⁵⁸ but the narrower view that holds that all individuals who have property of whatever sort are protected against its arbitrary seizure by receiving those processes that are normally due in these cases, including notice of charges, right to present evidence, and the like. The broad substantive guarantees in the Privileges or Immunities Clause obviate the need to enter into the vexed discussions of the oxymoronic substantive due process doctrine.

In the same vein, the Equal Protection Clause also applies to all persons, and it in turn is not a general guarantee of equality before the law, but a narrow (but vital) guarantee of equal *protection*, which in effect means that in dealing with possible applications of the criminal law, the sanctions that are imposed on aliens or the protections given to their liberty and property are the same as those given to citizens. Any state that labors under the sum of these rules would find it difficult to maintain totalitarian institutions. But by the same token the incomplete nature of the initial structure should be clear. It contains no limitations on the way in which the state decides to run its institutions or to dispose of its various benefits. It is for that reason that no one thought at the time that the Equal Protection Clause could block a program that gave to each former slave forty acres and a mule, or prohibit deliberations about proposed legislation in segregated halls. A vast transformation in social life, one that gave the Congress under

⁵⁷ 198 US 45 (1905).

⁵⁸ *Id.* at 57 (determining that there is no reasonable ground for interfering with the right to contract).

§ 5 of the Fourteenth Amendment⁵⁹ enormous powers to *limit* the size of state government, can be read as a coherent whole, even if it does not do all that one might have hoped for it.

The more modern concerns with the Fourteenth Amendment were that it did not go far enough, which is why the decision in *Brown* was greeted at the time with marked ambivalence in some high places.⁶⁰ But the understanding of the Fourteenth Amendment at the time of its enactment took the opposite course, namely that the scope of the Privileges or Immunities Clause would render Congress and the Supreme Court “perpetual censor[s]”⁶¹ of all state laws. Thus, in the epic *Slaughter-House Cases*,⁶² Justice Samuel Freeman Miller came up with an ingenious (and palpably wrong) interpretation of the clause.⁶³ His decision only limited the states in their ability to regulate the right that ordinary people held as federal citizens, narrowly construed, to go to Washington to petition the United States government.⁶⁴

So we now have, in spades, the kind of big-mistake problem to which Balkin alluded (pp 14–15). At this point, the simplest thing would have been to overrule *Slaughter-House*. But the path of least resistance was to stretch both due process and equal protection beyond their original limits to fill up some of the space, even if it meant extending some privileges and immunities reserved for citizens to aliens.⁶⁵ On this view, however, it looks wrong to decide *Brown* the way the Court did because the regulation of schools falls into that broad category of public benefits to which even the Privileges and Immunities Clause had nothing to say. Yet at the same time, the systematic exclusion of Negro citizens under Jim Crow so distorted the political process that we now have available a second-best justification for *Brown*—that segregation could not have survived in a society that had respected all the privileges and immunities of citizens—which the Jim Crow police state systemati-

⁵⁹ “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” US Const Amend XIV, § 5.

⁶⁰ See, for example, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv L Rev 1, 31–34 (1959) (expressing uneasiness over the constitutional legitimacy of *Brown*).

⁶¹ *Slaughter-House Cases*, 83 US (16 Wall) 36, 78 (1872).

⁶² 83 US (16 Wall) 36 (1872).

⁶³ Id at 73–74.

⁶⁴ Id at 79–80 (limiting the Privileges or Immunities Clause to rights of federal citizenship only). For the division of sentiments on the meaning of the clause, see William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* 162–64 (Harvard 1988) (rejecting Justice Miller’s approach to the Privileges or Immunities Clause for rendering its language “superfluous”).

⁶⁵ See, for example, *Truax v Raich*, 239 US 33, 43 (1915) (invalidating a statute that required employers to hire 80 percent citizens).

cally disregarded in horrifying fashion. What's a good classical liberal to do? Strike the system down root and branch, I believe. It is not elegant, to be sure, but it does get honestly to the huge question of institutional breakdown that permeates this area.

Brown itself was widely understood as a major decision that was not backed up by principle, which may well have sparked the massive resistance that followed. Oddly enough, tying the decision to the flagrant failure of Southern states to follow the other constitutional guarantees would have made it easier to enforce the decision because it would strip away the mask of public virtue on which the Southern states relied. Candor actually has some virtues in dealing with this issue, and it also has some additional benefits. The progressive authors in this volume rightly denounce the decision of the Roberts Court in *Parents Involved in Community Schools v Seattle School District No 1*⁶⁶ on the ground that it misconstrues the legacy of *Brown* when it uses the color-blind principle to thwart efforts at conscious community building in the name of a decision that sought to end the vicious forms of racial separation (pp 97, 146).⁶⁷

Given the loose rationale of *Brown*, however, some conservative justices can point to the textual pedigree of the now expanded Equal Protection Clause to achieve that result. Ironically, the alternative political breakdown rationale that I put forward now helps the progressive cause by simply holding that the Equal Protection Clause imposes few, if any, limitations on how a state decides to organize its collective life on affirmative action issues. So, as long as we are committed to public schools, it is institutionally unwise for courts to impose the color-blind norm in an age of identity politics, in which the burden of historical injustice always weighs heavily. There has to be a firm distinction between the state as regulator, where its powers should be sharply limited, and the government as manager, where its powers should be read more extensively. Affirmative action in education is the quintessential management function of local government. It cannot be that all public officials are barred from taking our national history of race relations, both good and bad, into account. Yet at the same time, there is no room for any form of affirmative action containing the narrower criminal procedure-type guarantees from the Due Process and Equal Protection Clauses. The classical liberal approach can, I think, do some justice to the nobler portions of the progressive enterprise.

⁶⁶ 551 US 701 (2007).

⁶⁷ *Id.* at 745–48 (rejecting a school redistricting scheme that used race to make children's school assignments for offending the color-blind principle of *Brown*).

2. Progressive equal protection law.

Modern equal protection of course has gone off in a different direction, which presents its own set of difficulties. At least one of the essays in this volume tries to work within the present framework of the Equal Protection Clause. Mark Tushnet tries to understand the role of the “state action” doctrine in interpreting the clause (pp 69–77). That familiar doctrine provides that the Equal Protection Clause is triggered only if the state takes some action that abridges the right of a person whom the clause protects. The initial protestation here is that the Equal Protection Clause does not use the words “state action,” but speaks about actions that “deny” individuals of their rights.⁶⁸ Tushnet notes that the narrow reading of state action would only cover cases where the government seized a person arbitrarily but not where it did not intervene to save someone from seizure (p 70). His thesis is that “the state-action doctrine is not really about what the state does, but what it has a *duty* to do” (p 70). So if there is a duty to protect individuals against certain forms of discrimination, for example, simple inaction will not protect the state. The leading case of *Burton v Wilmington Parking Authority*⁶⁹ (p 72) opened up this can of worms when it held that the state had engaged in discrimination when it did not include in a restaurant lease a clause that prohibited racial discrimination by the tenant.⁷⁰ In my own view, this case does not fit the paradigm because it deals with state distribution of its own property, which is the largest gap in the entire constitutional structure. But the government oversight in *Burton* is so easy to identify and so easy to correct, that it is understandable why the Court took this first step.

Unfortunately, it is not so clear what the next step looks like under Tushnet’s bold thesis, for at no point does he tell us what affirmative duties could be imposed on the state through the Equal Protection Clause. That is not a problem where the question is whether the state applies the applicable norms of criminal or civil procedure in evenhanded ways to all citizens. What makes this more difficult is that the most obvious duty that we can think of is that which comes from the original Lockean social contract, whereby the individual surrend-

⁶⁸ See US Const Amend XIV, § 1.

⁶⁹ 365 US 715 (1961).

⁷⁰ *Id.* at 720, 725–26 (finding state action in the refusal to include a covenant that barred discrimination by a lessee of government property).

ers some of his property in exchange for the protection of the state.⁷¹ There is no doubt that the state has some duty to create a police force, but it is highly unlikely that the payoff from a breach of that duty is a private right of action against the public officials. There is some irony here. Judges are willing to create private rights of action in tort against landlords and universities and bars that do not protect their tenants, students, and customers from assault.⁷² Yet they are notoriously reluctant to impose that duty on police forces, which often receive explicit forms of sovereign immunity.⁷³ Those cases raise incredible difficulties in asking anyone to protect people against unknown assailants. But even when the state has taken a helpless child into custody in order to protect it against a parent known to be abusive, no tort action flows under the Equal Protection Clause from the state's palpable neglect of its duty.⁷⁴

Tushnet duly grapples with the infinite variations on these claims for relief in these failure to intervene cases (pp 74–77), but cannot come up with any definitive constitutional principle. Nor is that a surprise. The gulf between affirmative duties and positive actions, which is large in tort law, does not disappear because we have moved to a constitutional arena. Unless, therefore, the plaintiff can pinpoint some explicit relationship in which the state has assumed the duty to compensate, this equal protection approach will go nowhere. The Constitution is not high powered in dealing with the government distribution of benefits, except in a few cases, of which the Establishment Clause⁷⁵ is perhaps the best example insofar as it prevents at the very least preferential treatment of some, or all, religious institutions.⁷⁶

⁷¹ See Locke, *Second Treatise of Government* §§ 138–40 at 73–74 (cited in note 9) (treating individuals as surrendering some property to the government in order to receive greater security for what they retain).

⁷² See, for example, *Kline v 1500 Massachusetts Avenue Apartment Corp.*, 439 F2d 477, 488 (DC Cir 1970) (imposing on a landlord a duty to protect tenants from third-party criminal assaults in the common hallway of an apartment building).

⁷³ See, for example, *Riss v City of New York*, 240 NE2d 860, 861 (NY 1968) (dismissing a damage claim against a city police department for failing to provide special protection after a plaintiff had been threatened by a former suitor).

⁷⁴ *DeShaney v Winnebago County Department of Social Services*, 489 US 189, 202–03 (1989) (dismissing a claim for damages against a department of social services for failing to prevent child abuse).

⁷⁵ US Const Amend I.

⁷⁶ For the endless difficulties in deciding on these discrimination claims, see, for example, *Zelman v Simmons-Harris*, 536 US 639, 648–64 (2002) (upholding an Ohio program creating school vouchers that were valid at both religious and nonreligious schools against a challenge under the Establishment Clause), discussed in William P. Marshall's *Progressives, the Religion Clauses, and the Limits of Secularism* (pp 238–39).

I left Tushnet's exposition with a real sense of how difficult it is to deal with hard issues of modern equal protection law. I do not have that attitude of cautious disagreement in other essays that use the Fourteenth Amendment as a sledgehammer to transform American government and social institutions at both the state and national level. The key problem here starts with the willingness to use the Privileges or Immunities, Due Process, and Equal Protection Clauses to forge a transformation of limited government into the modern welfare state. Here are some examples of the up-and-down quality of progressive thought. Bruce Ackerman offers a "Citizenship Agenda" (pp 109, 117) that does far more with the Privileges or Immunities Clause than Bushrod Washington ever dreamed in *Corfield*.⁷⁷ Now we are told that we should "expand and deepen the privileges of national citizenship. Women's suffrage during the Progressive Era, Social Security during the New Deal, the antidiscrimination laws of the civil rights era—all provide notable examples" (p 110). More reverie, less analysis. But notice once again the radical differences. States were always allowed to give women the vote. But extending suffrage to women seems to follow powerfully from the notion that *all* individuals born in the United States should be citizens of the United States. But it requires a subtle transformation of the guarantee to reach that result. Prior to the Fourteenth Amendment, there was no uniform practice on the question of whether only citizens could vote. But elaborate property qualifications, for example, often meant that not all persons, whether citizens or aliens, could in fact vote. So long, therefore, as women who were citizens prior to the adoption of the Fourteenth Amendment could not vote, it follows that all women, black and white, need not be granted the vote after the extension of citizenship to all persons. A more inclusive definition of citizenship does not change its incidents. Historically, that was surely the understanding, which is why it took a constitutional amendment to bring about the necessary change.⁷⁸ Any classical liberal, of course, has to welcome that development even if he recognizes that the Privileges or Immunities Clause, which worked a transformation on slavery, did no such thing on explicit forms of sex discrimination that were at the time built into the fabric of American law. Of Social Security and the sex discrimination laws, little comment need be made. Broadening the class of citizens does nothing to change

⁷⁷ 6 F Cases at 551–52.

⁷⁸ US Const Amend XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation.").

the prior understanding of what rights citizenship confers. And negative, not positive, rights were the hallmark of the time. The effort to “expand and deepen” is no such thing. It is just an effort to inject the progressive program of positive rights into a provision that bears no such meaning.

Ackerman is, moreover, not content to use national citizenship as a wedge for defending the progressive reforms of the twentieth century. He also wants to defend the broader idea of national citizenship, and therefore offers three proposals, none of which has the slightest constitutional pedigree to advance their ideas of differing merit. His first scheme is to give each citizen fifty “patriot dollars” that can be spent on political campaigns and nothing else (pp 112–13). Of course they can spend their own money, but in this instance, they have no other purpose for this money. In one sense, I prefer this proposal to the current system that awards block grants to candidates that reach certain minimum thresholds. It allows for decentralized decisions that help the fringe parties that are normally locked out of the national debate, and thus has good Hayekian roots.

Ackerman’s second proposal for “Deliberation Day,” a national holiday two weeks before elections, is an effort to spur citizens to talk among themselves if they so choose (pp 113–14). It might work, although I would be reluctant to commit public resources to a program which suffers from the risk that the only people who would participate are those with extreme views who seek to take over public forums, something they cannot do with a \$50 gift to a favored political party.

Unfortunately, the third proposal to give each high school graduate \$80,000 to be funded largely by a 2 percent capital tax on the rich goes over the edge (pp 116–17). The impulse for this proposal is the widening income inequality after 1970 (p 115)—much of which could be attributed to the Great Society reforms of the previous decade.⁷⁹ But let us put aside any dispute over the origin of the current inequality, because this proposal has no way to cure it. Any valuation tax has enormous administrative difficulties because it requires an annual evaluation of all sorts of assets that do not have clear market values: homes, future royalty streams, partnership interests, shares in closed corporations, and the like. It is like an estate tax, only imposed annually. It hardly makes sense to have many of our most productive citizens spend their time in annual disputes that will pile up over the

⁷⁹ See Charles Murray, *Losing Ground: American Social Policy 1950–1980* 56–66 (Basic Books 1984) (presenting economic data indicating that the Great Society reforms did not reduce poverty).

years. Nor would this scheme make sense even if it could be administered at zero cost. One common feature of all these progressive economic proposals is that they do not give two figs about innovation and incentives. But a capital tax of 2 percent roughly translates into a 25 percent tax on income, assuming a Panglossian portfolio that generates 8 percent, some of which is attributable to inflation. But as much wealth as is tied up in non-income-producing assets, the burden on cash distributions is much higher. Combine this with a progressive income tax, and there quickly will be no rich to tax, an effect that began after the last financial meltdown.⁸⁰

This pie-in-the-sky attitude toward other people's money is reflected in other efforts to use the Fourteenth Amendment as an engine for massive wealth redistribution. Goodwin Liu uses his distinctive notion of national citizenship to propel an aggressive vision of educational equality in the United States (pp 126–28). He is surely right on the disparities, but offers no explanation as to their origin, and little guidance as to their constitutional cure. He sees in the initial clause of the Fourteenth Amendment an invitation to make “national citizenship meaningful and effective” (p 127). We are not talking, Liu insists, about options. Rather, “the grant of congressional power to enforce citizenship rights implies a constitutional *duty* of enforcement” (p 127). There are no apparent limitations on how this should be done. The Congress that has power under § 5 of the Fourteenth Amendment to enforce its obligation with appropriate legislation thus can enact any program it wishes as part of its constitutional mandate.⁸¹ What could be done with meaningful and effective education could presumably be done with meaningful and effective jobs, housing, and health care as well. The first clause of the Fourteenth Amendment thus is separated from everything else. And the clear emphasis of the Fourteenth Amendment to guard against state violations of individual rights—a serious issue during and after Reconstruction—gets lost in the dustbin of history. The budgetary implications of this system are nowhere explored, and its institutional implications are ignored. This threadbare, context-free interpretation of the Fourteenth Amendment makes us almost pine for Sunstein's dubious minimalist approach, with which it is obviously inconsistent.

⁸⁰ David Leonhardt and Geraldine Fabrikant, *After 30-Year Run, Rise of the Super-Rich Hits a Sobering Wall*, NY Times A1 (Aug 21, 2009) (reporting on huge capital losses of the rich in 2008).

⁸¹ See US Const Amend XIV, § 5 (“Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

There are no shortcuts here. The only forthright way to deal with these extravagant claims is through a careful rendering of the clause in context. It would be just horrible if the skeptic could seize on Liu's excesses to justify a position of acquiescence in the status quo. Unfortunately, that is the lesson that is taken by Eric Posner and Adrian Vermeule, both in their *New Republic* review of this volume and their other constitutional writings.⁸² But that position makes it appear as though the Constitution stands for nothing. The last thing that we need to combat wild overreadings of particular clauses is a generalized skepticism that applies indifferently to all constitutional arguments. What is needed is a specific response that folds the Fourteenth Amendment into the classical liberal small-government tradition.

The juridical excesses that are committed in the name of national citizenship are duplicated by similar efforts to press the Equal Protection Clause into the service of the progressive agenda. Robin West, for example, takes the view that the missing piece in current equal protection jurisprudence is the legislative enforcement of aggressive egalitarian norms (p 79). In her view, the usual interpretations of the Equal Protection Clause ignore the possibility of using the clause to reduce economic inequality (pp 85–86). She recognizes that judicial enforcement of this norm will not work, but then insists that a correct reading of the clause requires the legislature to pick up the slack (pp 84–86).

Presumably this can mean only state legislatures, as the Equal Protection Clause does not apply to the United States. West does not address the implications of fifty such programs running simultaneously. Instead, she focuses on the word “of” to make the strained argument that the usual negative rights interpretation only gives rights “against” law, which is a far narrower category (pp 80–81). I find the point mystifying because the obvious reading is that all the laws that protect criminal defendants, for example, must be applied equally to all persons. The word “of” has a perfectly coherent meaning without the push for an egalitarian agenda. But what is missing here is, again, any substantive defense of the agenda against the criticism that it will lead to the general impoverishment of a nation by killing off the opportunities that all persons at all levels have to advance in a system of

⁸² Posner and Vermeule, *Outcomes, Outcomes*, *New Republic* at 47 (cited in note 1) (arguing that the progressive movement needs not the proposals of 2020 but “a prolonged exile in the wilderness, chafing against an extreme conservative-originalist Court”). See Eric A. Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* 6 (Oxford 2007) (advocating that “deference to government should increase during emergencies” because the costs of scrutinizing constitutional claims at that point are higher).

small government that works to protect the property rights and economic liberties of all citizens. Redistribution games are always negative-sum in wealth, which means that once the taxes are imposed, there is less to go around than before. Market exchanges are positive-sum, given the gains from trade. West, like Liu, should offer some systematic justification for a massive proposal that looks to be ruinous on its face. Yet of the incentive, innovation, and public choice difficulties with her proposal, there is not so much as a word.

B. Political and Social Liberties

On the economic front, then, the modern exponents of the progressive movement fall into two camps. The first offers no active protection to property and contract, and thus does nothing to protect these institutions from legislative destruction. The second goes one step further and finds duties under the Fourteenth Amendment for the national government to engage in acts of economic destruction. Yet as noted above, the mood changes when the progressives leave the area of income equality and talk about issues that are more modest in scope. I shall say less about these essays because on balance I tend to agree with much of what they say, such that any disagreements are ones that could be resolved by further reflection and dialogue.

In this vein, Robert Post's discussion of freedom of speech seems to touch many of the right notes. The progressive element in his position is that he thinks that political speech with an eye toward greater public discourse is the primary object of First Amendment protection (p 179). His sensible view sees free speech as an aid to public democratic institutions, along the lines of Alexander Meiklejohn (pp 179–81). At one point he quotes Meiklejohn for the proposition that “[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said” (p 181). The last half of this statement seems true, but perhaps not the first, for surely we should never accept a world that allows one person who takes a position to block the participation of others on the same side. Indeed one page later Post himself endorses the “right freely to participate in the formation of public opinion” (p 182).

I think that this point of view should lead him to be wary of any and all restrictions on campaign contributions and speech. The failure to be so wary led Justices John Paul Stevens and Sandra Day O'Connor off the rails in their misguided joint opinion in *McConnell v*

Federal Election Commission,⁸³ precisely because they appealed to the “sober-minded Elihu Root” who “advocated legislation that would prohibit political contributions by corporations in order to prevent the great aggregations of wealth, from using their corporate funds, directly or indirectly, to elect legislators who would vote for their protection and the advancement of their interests as against those of the public.”⁸⁴ Why these powerful interests, who regularly sue each other, should all vote the same way was not explained. Nor is it always clear that the public interest lies in throttling corporations who are, especially in progressive times, often subject to oppressive legislation by populists who wish to overregulate and overtax them.

Post of course had no way of knowing that *McConnell* would be in the cross-hairs of the conservative counterrevolution in free speech. But the recent, bitterly divided decision of the Supreme Court in *Citizens United v Federal Election Commission*⁸⁵ undid much of the damage in *McConnell*, which it overruled in large measure. *Citizens United* showed that there is still some libertarian fight in the conservative wing of the Supreme Court. It also revealed a group of determined justices who went out of their way to avoid an minimalist approach, noting rightly that some ad hoc accommodations on such exotic statutory delicacies as what counts as an “electioneering communication” provide little guidance to others on what speech is permissible and what not. Far from railing against corporations, the Court’s majority took the position that the corporation’s members do not forfeit any speech rights in virtue of adopting the corporate form.⁸⁶ The defenders of the old order put forward harbingers of doom about the failure of this brave new world. Stalwarts, such as Russell Feingold, have argued that ordinary individuals will find their speech is “drowned out by

⁸³ 540 US 93 (2003). For my views, see Richard A. Epstein, *McConnell v. Federal Election Commission: A Deadly Dose of Double Deference*, 3 Election L J 231, 235–36 (2004) (arguing that the best way to control special interests is to reduce the scope of federal power). The issue was recently before the Supreme Court in *Citizens United v Federal Election Commission*, 530 F Supp 2d 274, 282 (DC Cir 2008) (hearing an appeal of a court order denying a movie producer’s motion for a preliminary injunction of the FEC), which tightens the prohibitions on corporate speech sustained in *Austin v Michigan Chamber of Commerce*, 494 US 652, 668–69 (1990) (placing prohibitions on corporations to make individual political contributions). The Supreme Court overruled much of the *McConnell* decision in *Citizens United v Federal Election Commission*, 130 S Ct 876 (2010), which I strongly supported, see Richard A. Epstein, *Free Speech for Corporations: Undoing the Progressive Mindset*, Forbes.com (Sept 1, 2009), online at <http://www.forbes.com/2009/08/31/free-speech-corporations-opinions-columnists-richard-a-epstein.html> (visited Nov 3, 2009).

⁸⁴ 540 US at 115 (quotation marks omitted).

⁸⁵ 130 S Ct 876 (2010).

⁸⁶ Id at 886.

wealthy corporations with their own special-interest agendas.”⁸⁷ Why this is true is not at all clear so long as corporations have different points of view and often fear that any pointed political speech will alienate the consumers who disagree with them without securing greater loyalty of those who share the corporate point of view.

We can, of course, speculate at great length about the consequences of this shift. My own view is that the transformations in general political discourse will be less seismic than the critics fear. But the key analytical point is the intimate connection between weak rules of property and the probable wisdom of public deliberation. If local forces know that their political participation can lead to heavy transfer taxes against corporations, the guarantees of freedom of speech allow political forces to organize, and thereby to magnify, the risks of expropriation of corporations—and diminish the risk of expropriation *by* corporations. The great virtue of Post’s careful exposition of the issue is that it does not preclude reasoned response.

Much the same can be said of Larry Kramer’s plea for remembering the wisdom of the anti-Federalist in underscoring the need for local participation in matters of local concern (p 167). But here too it is important to register the same concern, for the nature of that participation critically depends on the structure of the property rights in the local community. Deciding which public projects to build and where to place them could be an important exercise in community action. But allowing local communities to downzone their political enemies and upzone their friends is less edifying. My own long-held view is that deliberation works best when property rights are secure against expropriation.⁸⁸ But it is not surprising that the role of property rights in a democratic society is nowhere addressed in this volume.

That said, other essays continue to work well because they show a keen awareness of the relevance of classical liberal principles. The two essays on church and state by Noah Feldman (p 221) and William P. Marshall (p 231) are admirable models of a balanced approach from which everyone could learn. The key theme in both essays is a search for balance in church-state relationships that tries to respect the original accommodation of the Framers in modern times. There is no tirade

⁸⁷ See comment of Senator Russell Feingold, *Who is Helped or Hurt by the Citizens United Decision*, Wash Post (Jan 24, 2010), online at <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/22/AR2010012203874.html?hpid=opinionsbox1> (visited Feb 12, 2010).

⁸⁸ See Richard A. Epstein, *The Necessity for Constrained Deliberation*, 24 Harv J L & Pub Pol 159, 161–62 (2000) (arguing that weak property rights encourage corrupt political deliberation and lead to unsound legislation).

against originalism here. In fact, both Feldman and Marshall are deeply respectful of past tradition, and neither rails out against conservatives or libertarians. Feldman works hard to defend the classical synthesis that the state shall neither compel religious obedience nor prevent the expression of religious beliefs. Exactly how this is to be done in modern times when the state is more involved in general activities than previously is not easily stated in an era of great religious fragmentation. In light of this context, Feldman seems surely correct that it is easier to leave people alone to pray as they please (or do not please) than it is to maintain the noncoercion principle in the face of ever greater public involvement in such matters as educational funding for evangelical schools (pp 226–27).

Marshall pursues a parallel theme in other contexts. He starts out with a qualified endorsement of a separationist agenda whose chief benefit is the prevention of a one-sided state endorsement of any particular religion (pp 231–32). But once again he shows a keen awareness that, at least in the religion context, too much of a good thing is a bad thing. Marshall cautions us to be aware of the dangers in public funding of private education for everyone but religious individuals (pp 236–37). In this regard, he mentions three restrictions that should be imposed on religious institutions that receive public moneys. One is a prohibition against discrimination. The second is a guarantee that there is no disparate benefit to religion, or burden on it. And the third (which seems redundant) is a prohibition against funding purely religious activity (pp 239–40).

Here I want to focus on the first of these restrictions, which holds that religious organizations should not be able to discriminate in favor of their coreligionists in the operation of their programs (p 239). I regard this condition as compounding the mistake of the undue progressive faith in applying antidiscrimination laws to private parties. That restriction to my mind could impose a public orthodoxy that we would do well to resist. The parity between religious and nonreligious organizations is more easily preserved if each is given total freedom in deciding which individuals should benefit from participation in the program. Religious balance comes, albeit imperfectly, from groups of all persuasions applying for the funds. This hands-off approach gets rid of heavy administrative costs, and also disposes of the real problem, which is that some restrictions (such as a requirement of co-ed classes) make it impossible for certain groups to participate in the program. If the public uneasiness with allowing all to participate is so great, then we can reduce or eliminate the program, which is hardly the end of the world for a small-state classical liberal.

In a similar vein, it is hard for any classical liberal to take issue with William Eskridge's plea for greater plurality in the definition and structure of the family (pp 249–51). Freedom of association is a good classical liberal norm, and the imposition of a marriage *license* should give rise to concern to anyone who believes in small government. It need not follow that the Constitution was meant to embody this libertarian preference, and as much as I support gay marriage on theoretical grounds, I fear that the well-established morals head of the police power makes regulation of all sexual affairs permissible.⁸⁹ Put otherwise, *Bowers v Hardwick*⁹⁰ is in my view more faithful to the constitutional history than *Lawrence v Texas*,⁹¹ where Justice Kennedy uses the same free-form jurisprudence that got him into such intellectual hot water in *Kennedy v Louisiana*.⁹²

By contrast, I do not have the same friendly response to Dawn Johnsen's full-throated defense of *Roe v Wade*⁹³ under a progressive conception of liberty (pp 258–59). My objection is not based on some variation of Sunstein's constitutional minimalism, but rather on the view that the one-sided claim of liberty for the mother does not attempt to take into consideration the health and safety of the fetus, to which it necessarily attaches zero weight. In this regard, efforts to counsel people to avoid foolish pregnancies or to put newborns up for adoptions are fine, even if *Roe* is not. Many critics of *Roe* treat the case as a return to a *Lochner*-type judicial intervention, which would be wonderful if it were true. But in *Lochner* the key point was that the ten-hour maximum-hours statute functioned to distort competition in labor markets and was therefore not properly directed to the government's legitimate interest in health and safety.⁹⁴ That same argument cannot be made here. While there are many ambiguities with abortion that I cannot plumb in this Review, it should be sufficient to note at this point that Johnsen's expansive view of a mother's liberty vis-à-vis

⁸⁹ For a discussion, see Richard A. Epstein, *Of Same Sex Relationships and Affirmative Action: The Covert Libertarianism of the United States Supreme Court*, 12 S Ct Econ Rev 75, 79–98 (2004) (tracing the decline of the morals head of the police power as it applies to sexual matters).

⁹⁰ 478 US 186, 189 (1986) (rejecting a challenge to the constitutionality of a Georgia sodomy statute under the Ninth and Fourteenth Amendments).

⁹¹ 539 US 558, 578–79 (2003) (overruling *Bowers* by striking down a Texas sodomy statute as applied to consensual sodomy within the privacy of the home).

⁹² 128 S Ct at 64–65 (holding that the Eighth Amendment prohibits the imposition of capital punishment for the rape of a child).

⁹³ 410 US 113, 164 (1973) (holding Texas criminal abortion statutes unconstitutional under the Fourteenth Amendment).

⁹⁴ 198 US at 64 (striking down maximum-hours statute for some bakers as a labor measure outside the scope of the police power).

her offspring (pp 264–65) bears no connection with traditional views of liberty, on reproduction, or on anything else, which are more universalist in their aspirations.

The last area that needs some brief comment is international affairs. I have already indicated my objections to the importation of foreign law into the American constitutional debate, and think that these sources should be read solely for the strength of their arguments. They have on this view the same level of authority as any brief or law review article. But it hardly follows from that position that we should turn a blind eye to potential forms of domestic abuse of constitutional authority, or give any special privileges to American citizens who are charged with serious offenses against the United States.⁹⁵ To the contrary, it seems clear that neither habeas corpus nor due process applies only to citizens. Both apply equally to aliens regardless, in my view, of where they are held in captivity. On this matter therefore, I think that Jack Balkin has written a sensible essay that tries to balance the competing interests of liberty and security under the Foreign Intelligence Surveillance Act⁹⁶ (pp 206–08).

In addition, I also applaud David Cole (with whom I have worked on national security issues) for arguing that the failure of a democratic Congress to stand up to excessive uses of government power captures what is best in the progressive tradition, precisely because it is so closely aligned with the classical liberal concerns with government power (p 297). This battle has to be fought on two fronts. The first is to meet on historical grounds the excessive claims of presidential power in his role as commander-in-chief.⁹⁷ The second is to insist that congressional authorization is not a fail-safe ground for the constitutional assertion of federal power. Let punitive legislation be

⁹⁵ See Brief of Amici Curiae Richard A. Epstein, Bruce Ackerman, Randy E. Barnett, and Geoffrey R. Stone in Support of Petitioner, *Hamdan v Rumsfeld*, No 05–184 (US filed Jan 6, 2006) (available on Westlaw at 2006 WL 42067) (arguing that the military commission established by the President to try alleged non-US war criminals was inconsistent with the Uniform Code of Military Justice), which I coauthored with Aaron M. Panner, Joseph S. Hall, and Mary Ann McGrail of Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC.

⁹⁶ Foreign Intelligence Surveillance Act of 1978, Pub L No 95-511, 92 Stat 1783, codified at 50 USC §1801 et seq (creating “a court which shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States under the procedures set forth in this Act”).

⁹⁷ See, for example, Federalist 69 (Hamilton), in *The Federalist* 462, 464–65 (Wesleyan 1961) (Jacob E. Cooke, ed) (contrasting the President’s limited position as commander-in-chief with the more extensive powers of the British monarch and the governor of New York). For my views, see Richard A. Epstein, *Executive Power, the Commander in Chief, and the Militia Clause*, 34 Hofstra L Rev 317, 320–24 (2005) (claiming the President as commander-in-chief must follow congressional mandates in the military and intelligence arenas).

adopted unanimously, and Congress is still bound by the procedural requirements associated with habeas corpus and due process. Cole is right to give high marks to the justices (including Republican appointees) who stood up to both the executive and legislative branches in striking down provisions of the Military Commissions Act.⁹⁸ Once again the overall moral is clear: progressive thought does well when it progresses along classical liberal lines that set a presumption against excessive government power.

CONCLUSION

The question of proper constitutional interpretation requires us to develop coherent views on matters of language and theories of statecraft. The great genius of much, but not all, of the United States Constitution is that it puts its exquisite control over language into the service of a coherent political objective. In my view, the principles of limited government should apply across the board. The Constitution does not take so large a view of the subject matter. But even though the correspondence between classical liberal theory and constitutional text is not perfect, it is significant enough so that the former is often an instructive guide to the latter. Within this framework, we can identify strong elements of good sense on both the conservative and progressive side of the current debates. It is equally clear that both groups are capable in different areas of going seriously off the rails. The point of this Review of *The Constitution in 2020* is to sort out the good from the bad, and in doing so, it turns out that a coherent classical liberal view does a good job of sorting out the wheat from the chaff for each of the traditional rivals.

The point here is not to disagree with the conclusions of these essays on some cynical ground that all standard theories of constitutional interpretation are wrong. I disagree therefore strongly with Posner and Vermeule when they condemn all conservative appeals to originalism as “pernicious” and all progressive efforts to forge a coherent constitutional vision as results-oriented.⁹⁹ It is not enough for them to

⁹⁸ *Boumediene v Bush*, 128 S Ct 2229, 2276–77 (2008) (striking down provisions of the Military Commissions Act). See Military Commissions Act of 2006, Pub L No 109-366, 120 Stat 2600, codified in relevant part at 28 USC § 2241. See also *Hamdi v Rumsfeld*, 542 US 507, 538–39 (2004) (rebuffing the President’s claim to unilaterally detain without a hearing a United States citizen captured in Afghanistan). *Hamdi*’s limitation to United States citizens is suspect, if only because the text of the Due Process Clause refers to the broader “persons” without offering a preferential status to citizens.

⁹⁹ Posner and Vermeule, *Outcomes, Outcomes*, *New Republic* at 47 (cited in note 1) (disparaging both progressive and originalist theories).

stand outside the fray and announce that all participants to it are just driven by their own political agendas. The Constitution was a great achievement of statecraft. There are many wrong turns in its interpretation, but the only way that we can get to some sensible overview of the subject matter is to believe that this ambition is attainable and then work hard to achieve it. On these grounds, a sensible classical liberal theory allows us to select the best from both the conservative and progressive agendas.