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Constitutional Scepticism

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CONSTITUTIONAL SCEPTICISM

ROBIN L. WEST*

INTRODUCTION: CONSTITUTIONAL MEANING AND VALUE

Interpretive constitutional debate over the last few decades has centered on two apparently linked questions: whether the Constitution can be given a determinate meaning, and whether the institution of judicial review can be justified within the basic assumptions of liberalism. Two groups of scholars have generated answers to these questions. The "constitutional faithful" argue that meaning can indeed be determinately affixed to constitutional clauses, by reference to the plain meaning of the document,¹ the original intent of the drafters,² evolving political and moral norms of the community,³ or the best political or moral philosophical theory available⁴ and that,

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² The issue is whether [abortion] is a liberty protected by the Constitution of the United States. I am sure it is not. I reach that conclusion . . . because of two simple facts: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed.

³ For examples of originalist interpretation and defenses of originalism, see Raoul Berger, FEDERALISM: THE FOUNDER'S DESIGN (1987) (advocating the doctrine of original intent for constitutional interpretation); Raoul Berger, Against an Activist Court, 31 CATH. U. L. REV. 173 (1982) (rejecting an activist theory that the judiciary was given unlimited, unaccountable power, checked only by judicial "self-restraint"); Raoul Berger, New Theories of "Interpretation": The Activist Flight from the Constitution, 47 OHIO ST. L.J. 1 (1986) (rejecting activist theories and defending original intent); Robert H. Bork, Original Intent: The Only Legitimate Basis for Constitutional Decision Making, 26 JUDGES' J. 12 (Summer 1987) (arguing that judges must follow the intention of the framers); Robert H. Bork, The Constitution, Original Intent, and Economic Rights, 23 SAN DIEGO L. REV. 823 (1986) (arguing that framers' intent is the only legitimate basis for constitutional decisionmaking and binds judges); Antonin Scalia, Originalism: The Lesser Evil, 57 U. CIN. L. REV. 849 (1989) (asserting that framers' intent is the necessary method by which to interpret the Constitution).

⁴ For an example of "consensualist" interpretation, see Penry v. Lynaugh, 492 U.S.
because of that determinacy, judicial review can indeed be brought within
the rubric of liberalism. Taking issue with the constitutional faithful is a
group who might be called "constitutional sceptics." Scholars in this group
see, in every constitutional phrase or doctrine, the possibility of multiple
interpretations, and in the application of every constitutional method the
possibility of multiple outcomes. It follows from this indeterminacy that
judicial review cannot be easily justified by reference to liberal assumptions,
because the power of the interpreting judge irreparably compromises the sta-
bility and rationality of the "Rule of Law" so central to liberal ideals.\footnote{302 (1989) (holding that interpretation of Cruel and Unusual Punishment Clause
depends upon community consensus).}

As important as the debate over constitutional determinacy may be, its
prominence in modern constitutional theory over the last thirty years has
carried with it serious opportunity costs. Specifically, the prominence of the
debate over the Constitution's meaning, whether it can be said to have one,
and the implications for the coherence of liberalism that these questions of
interpretation seem to raise, has pushed to the background an older and
possibly more important debate about the Constitution's value. By asking
relentlessly whether the Constitution's meaning can be made sufficiently
determinate to serve the Rule of Law—by focusing almost exclusively on
whether constitutionalism is possible within liberal theory and whether liber-
alism is possible, given an indeterminate Constitution—we have neglected to
ask whether our Constitution is desirable. Does it further the "good life" for
the individuals, communities, and subcommunities it governs?

We might pose these evaluative questions in any number of ways. Has the
Constitution or the Bill of Rights well served the communities and individu-
als they are designed to protect? Are the visions of individualism, commu-
nity, and human nature on which the Bill of Rights rests, and the balances it
strikes between rights and responsibilities, or civic virtue and freedoms,
noble conceptions of social life, true accounts of our being, hospitable to

\footnote{4 Those adopting this view include Bruce Ackerman, Ronald M. Dworkin, and John H. Ely. \textit{See generally} Bruce Ackerman, Reconstructing American Law (1984); Bruce Ackerman, Social Justice and the Liberal State (1980); Bruce Ack-

\footnote{5 \textit{See, e.g.,} Mark Tushnet, Red, White, and Blue: A Critical Analysis of Constitutional Law 6-11 (1988) (contrasting some of the main elements of the liberal
and republican traditions); Paul Brest, The Misconceived Quest for the Original Under-
standing, 60 B.U. L. Rev. 204, 224-37 (1980) (rejecting originalism and defending
nonoriginalist adjudication, which accords presumptive weight to the text and original
history, but does not treat them as authoritative or binding). For an impassioned argu-
ment against the "indeterminacy thesis" on this ground, see Owen Fiss, Objectivity and
Interpretation, 34 Stan. L. Rev. 739, 742-62 (1982) (arguing against a new nihilism that
insists that objectivity is impossible and that interpretation is based on the judge's own
values).}
societal and individual attempts to live the good life? More specifically, does
the First Amendment, for example, well serve its core values of free expres-
sion, individual actualization, and open political debate? Assuming that it
does, are those values good values to have? Are they worth the damage to
our social cohesion, our fragile sense of fraternity with others, and our
attempts at community that they almost undeniably cause? Are the Four-
teenth Amendment's sweeping and majestic guarantees of "liberty" and
"equal protection of the law," appearances notwithstanding, in fact unduly
stingy? Do they simply, and cruelly, fail to guarantee a liberty that would
meaningfully protect against the most serious constraints on peoples' liber-
ties, or an equality that would even begin to address the grotesque material
inequities at the very heart of our social and economic life? Do those guar-
antees perversely protect, rather than guarantee against, those constraints
and inequities? Similarly, but from a quite different political orientation, are
Fourth Amendment guarantees simply not worth their cost in law enforce-
ment? Is it unwise to let eighteen-year-olds vote? Is the Second Amendment
the height of foolishness?

These questions—about the value, wisdom, decency, or sensibility of con-
stitutional guarantees—do of course receive some attention in contemporary
legal scholarship, but nevertheless, it seems fair to say that in spite of the
legal academy's supposed obsession with "normativity," normative ques-
tions about the Constitution have not been at the heart of constitutional dis-
course of the last thirty years. By contrast, normative questions of precisely
this sort constitute the great bulk of scholarship in other areas of law. Schol-
ars question the value of the holder in due course doctrine in commercial
transactions, the negligence doctrine or strict liability in tort law, the rules
governing acceptance of unilateral contracts in contract law, and insanity
defenses in criminal law. But normative questions are neither the subject of
constitutional "grand theory" nor, more revealingly perhaps, the subject of
doctrinal constitutional scholarship. Instead, while theoretical constitu-
tional scholarship centers on questions about the meaningfulness of the Con-
stitution and its implications for the possibility or impossibility of liberalism,
doctrinal constitutional scholarship centers on questions of the Constitu-
tion's meaning, rather than questions of its value. Thus, for example, rather
than debate whether the First or the Fourteenth Amendment is a good idea,
doctrinalists debate what the First Amendment or the Fourteenth Amend-
ment means, and theorists debate whether they have any meaning and what
it means to assert that they do or do not have meaning. In short, neither
theoretical nor doctrinal constitutional scholarship places the value, rather
than either the meaningfulness or the meaning, of the Constitution at the
heart of constitutional analysis.

That we lack an explicitly normative debate about the Constitution's value
might be evidenced by the visible effects of that absence in our substantive
constitutional arguments. Let me cite a few examples, simply to convey the
flavor of what I suggest is missing. One debate between constitutional schol-
ars arising over the last few years, and of great interest to political progres-
sives, concerns the constitutionality under the First Amendment of the attempts made by some cities and universities to control, through disciplinary sanctions, the intimidation and subordination of racial, ethnic, and sexual minorities by use of "hate speech." Those contributing to the small explosion of scholarly writing on this topic have generally taken one of two polar positions: one group of scholars and litigators (generally liberal) argues that hate speech regulations are simply unconstitutional under the First Amendment while a second, more or less minority (and generally progressive), position argues that they are constitutional, either by virtue of the similarity between hate speech regulations and traditionally accepted limits on the First Amendment, or because of limits we should imply into that amendment through the "penumbral" and balancing, or counterbalancing, effect of the Fourteenth Amendment's equality clause. The position that seems to have no adherents is that hate speech regulations are desirable, for progressive reasons, but are nevertheless unconstitutional, but shouldn't be, and that this shows that, at least from a progressive perspective, the First Amendment is morally flawed. But again, this position seems to have no adherents. Instead, those who think hate speech regulations are a good idea generally think they are constitutional while those who think they are not a good idea generally find them unconstitutional. No one seems to find them both desirable and unconstitutional, and hence exemplary of a problem with the First Amendment. No one, in other words, is led by a commitment to the desirability of hate speech regulations and a fair reading of the Constitution to take a progressive and morally sceptical stance toward the Constitution.

A second and structurally similar example involves the constitutionality of anti-pornography ordinances. Despite the wide range of conflicting feminist and libertarian positions on this issue, no one advances the apparently

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6 See, e.g., George P. Fletcher, Constitutional Identity, 14 CARDOZO L. REV. 1, 26-27 (1992) (college speech codes undesirable, unconstitutional, and at odds with our constitutional identity); Suzanna Sherry, Speaking of Virtue: A Republican Approach to University Regulation of Hate Speech, 75 MINN. L. REV. 933 (1991) (arguing against the use of university hate speech regulations); Nadine Strossen, Regulating Racist Speech on Campus: A Modest Proposal, 1990 DUKE L.J. 484 (arguing that unless words are covered by "fighting words" exception to First Amendment ordinances suppressing them are unconstitutional).

7 J. Peter Byrne, Racial Insults and Free Speech Within the University, 79 GEO. L.J. 399 (1991) (arguing that the Constitution can and should be read to afford universities the authority to prohibit racial insults by member of the academic community); Richard Delgado, Campus Antiracism Rules: Constitutional Narratives in Collision, 85 NW. U. L. REV. 343 (1991) (analyzing antiracism rules in terms of both a First Amendment and a Fourteenth Amendment problem); Charles Lawrence, If He Hollers, Let Him Go: Regulating Racist Speech on Campus, 1990 DUKE L.J. 431 (regulations both desirable and constitutional); Mari Matsuda, Public Response to Racist Speech: Considering the Victim's Story, 87 MICH. L. REV. 2320 (1989) (proposing legal sanctions for hate speech and thus rejecting an absolutist First Amendment position).
logical, and initially plausible, position that these ordinances are eminently desirable, but unconstitutional, revealing a serious problem with the First Amendment. Instead, those who view these ordinances as unconstitutional generally view them as objectionable, while those who view the ordinances as desirable generally find them constitutional as well. Again, no one is led by a commitment to the value of anti-pornography regulations and a fair reading of the Constitution to take a morally sceptical stance toward the Constitution, or at least toward the First Amendment.

Although this paper focuses primarily on the absence of progressive sceptical arguments about the Constitution's value, the same point holds regarding the absence of sceptical stances toward the Constitution reflective of other political or moral commitments. Thus, one finds few people arguing that the Constitution does indeed protect a woman's right to an abortion and, therefore, over-protects privacy, because abortion rights are morally unjustifiable. Few argue that the Constitution protects the individual's choice of sexual lifestyle and, therefore, over-protects individual choice, because homosexuality is an immoral way to live. No one seems led by a conservative commitment to the value of regulating private morality and a fair reading of the Constitution as prohibiting that regulation to the conclusion that the Constitution is morally and politically flawed. On the other hand, no one seems to believe that the Constitution does indeed fail to protect reproductive or gay rights, but that these rights should be granted, and that this shows the Constitution's inadequacy. Again, those who view abortion rights as desirable generally view them as constitutionally protected, and those who view them as unprotected generally view them as undesirable. No one seems led by virtue of their political views on abortion or sexuality combined with a fair reading of the Constitution to the conclusion that the Constitution is flawed.

The absence of these arguments in the legal literature evidences the more basic privation noted above: there is no general tradition, at least in the legal literature, of normatively sceptical constitutionalism from a liberal, progres-

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sive, conservative, or any other developed political or moral perspective. Regardless of political viewpoint, constitutional scholars are peculiarly reluctant to see either the Constitution or a particular constitutional guarantee as being at odds with our political or moral ideals, goals, or commitments.\(^{10}\) We tend to see the Constitution as an inappropriate object of criticism, and this may be even more true today than it was thirty, forty, or fifty years ago. Even in post-critical, post-modern, post-structuralist, post-feminist times, we lack a developed body of legal scholarship that takes a morally critical stance toward the Constitution and the rights it purports to protect.

The main purpose of this paper is simply to draw attention to this absence and initiate movement toward reversing the trend. By elaborating both a progressive argument against constitutionalism and a responsive progressive argument for it, I hope to show, by example, that we should develop normative arguments, grounded in politics and morality, for and against constitutional fidelity.

My second aim, however, is to try to account for the absence of normative constitutional debate. Why isn’t there a recognizable body of constitutional scholarship criticizing the Constitution, on moral or political grounds? Why do so few advocates endorse the positions noted above: that hate speech regulation or anti-pornography ordinances are desirable but unconstitutional; that the Constitution protects abortion rights, but shouldn’t; that the Constitution does, but shouldn’t, protect reproductive or gay rights; or doesn’t, but should, allow the regulation of private morality?

There is, of course, a “psychoanalytic” or “socioanalytic” explanation for the absence of constitutional doubt in the literature. Theorists, like the rest of the culture, and across the political spectrum, may find it sociologically or psychologically difficult to view the Constitution as morally problematic, or indeed even morally flawed. Either because there is so little else that binds us together as a civic culture, or, perhaps, simply out of a psychic need to identify some sort of authority in our lives who will love us as well as authoritatively guide us, we all may have a hard time seeing the Constitution itself—rather than its erroneous interpretation by a pernicious, dishonest, overly-conservative, or unduly activist Court—as being “the problem,” the

\(^{10}\) Indeed, constitutional scholars may be more reluctant to take a critical stance toward the Constitution than the general public. This might explain why constitutional scholars tend to be more sceptical of the wisdom of constitutional amendments than the latter. For example, a number of liberal constitutional scholars testified to both the constitutionality and desirability of a federal law to ban flag-burning, apparently in part because they feared that the alternative was a far more egregious constitutional amendment. See Statutory and Constitutional Responses to the Supreme Court Decision in Texas v. Johnson: Hearings Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, 101st Cong., 1st Sess. 55-64, 107-24, 222-26, 444-47 (1989) (statements of Walter Dellinger, Laurence Tribe, Charles Fried, and Cass Sunstein).
obstacle to the attainment of some desired political or moral goal. We have trouble seeing the Constitution as part of the problem rather than part of the solution, and as a consequence, we tend, both in popular consciousness and at the level of theory to blur constitutionality with morality—to see the Constitution as more or less in line with moral and political virtue. It may be that because we have this difficulty, we are disinclined to oppose the Constitution itself, rather than its erroneous interpretation, to some moral ideal, to some cherished utopian vision, or more baldly, simply to some political ambition. Although this explanation may have some merit, it also sounds a bit dated, and even nostalgic: whatever may have been the case in the past, it is difficult to believe that in the fractured, relativist, nihilist, minimally pluralist moral climate in which we presently live and argue, that we are all still afflicted with an irrational and deeply emotional affection for a foundational legal document.

The explanation advanced in this paper for our continuing constitutional fidelity is considerably less global: at least one reason for our modern reluctance to generate constitutional criticism, I will argue, might stem from the preemptive logic of the “interpretation debate” that has dominated scholarship over at least the last two decades. As mentioned at the outset, the absence of normative debate can be viewed as a simple “opportunity cost” of the prominence of interpretive debate. Thus, whatever may be the effects of our psychic or social attraction to the Constitution, the logic of the interpretation debate alone, I will endeavor to show, has made sceptical arguments regarding the Constitution’s value extremely difficult to even articulate, much less debate, even among political radicals who almost assuredly bear no excessive patriotic, civic, or psychic loyalty to the United States Constitution. I will try to show that our focus on questions of constitutional interpretation and methodology has minimally diverted our attention from questions of constitutional value, but the logic of that debate has also made questions of constitutional value difficult, for various reasons, to even raise.

The first section of this paper sketches one possible basis for a morally sceptical stance toward the Constitution. The sceptical position is grounded, again, not in the “indeterminacy thesis,” but instead in a rejection of the morality (rather than coherence) of the liberalism that informs constitutional decisionmaking, and in an affirmation of a progressive and egalitarian political and moral orientation. This section argues, very simply, that our Constitution is fundamentally and possibly irreversibly at odds with progressive egalitarianism, and that because of that it is a seriously flawed document.

The second section examines why, with only a few exceptions—notably Derrick Bell’s and Alan Freeman’s critical race theory, Mark Tushnet’s

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11 Derrick A. Bell, And We Are Not Saved: The Exclusive Quest For Racial Justice (1987) (examining the intricacies of the barriers to racial equality established in law).

12 Alan Freeman, Antidiscrimination Law: The View from 1989, 64 Tul. L. Rev. 1407 (1990) [hereinafter Freeman, Antidiscrimination Law] (examining antidiscrimina-
"rights critique," and Mary Becker's feminist analysis of the Bill of Rights—this form of constitutional scepticism—what might be called "progressive constitutional scepticism"—has not been elaborated in constitutional scholarship, despite the large numbers of constitutional writers and advocates who unquestionably hold egalitarian and progressive moral and political commitments. My argument will be that the logic of the dominant interpretive debates precludes articulation and elaboration of sceptical evaluative argument. This section then examines the costs—to progressivism as well as to constitutional discourse and theory—of the absence of this form of constitutional scepticism.

The last section sketches one possible response to the progressive constitutional scepticism laid out in section one. The response, however, is grounded neither in liberalism nor in a commitment to indeterminacy, but in the same progressive political orientation as that of the sceptics, and in a relatively determinate view of constitutional meaning. It thus rejects both liberal values and the indeterminacy critique of liberalism’s most prominent contemporary critiques. This position, which I will call "progressive constitutional faith," seeks to rebut progressive scepticism not by exploiting the contradictions and ambiguities in liberalism (and hence in received constitutional interpretation), but rather by retelling the story of constitutionalism, emphasizing its convergence, rather than divergence with progressive politics. This position, unlike progressive scepticism, has received some doctrinal and theoretical elaboration in the literature, primarily in the emerging feminist and critical race theoretical movements. Mari Matsuda’s ground-breaking characterization of “outsider jurisprudence,” Akhil Amar’s and

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15 Mari Matsuda, When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, 11 WOMEN'S RTS. L. REP. 7, 8-10 (1989) (arguing for multiple conscious-
Ruth Colker's historical writings about the original meaning of the Bill of Rights and the Reconstruction Amendments, Catharine MacKinnon's progressive interpretation of the Constitution's general equality mandate, and several critical race theorists' writings on the constitutionality of ordinances, statutes, or university regulations prohibiting hate speech are all seminal contributions to a progressive constitutional faith. This third section articulates a set of premises for this developing body of scholarship and discusses its relation to both progressive constitutional scepticism and liberal constitutional faith.

As will be apparent, both "progressive constitutional scepticism" and "progressive constitutional faith" rest not only on a rejection of the ideals of liberalism, but also on a rejection of the indeterminacy thesis propounded by its critics or, to put it positively, on an affirmation of the determinacy of the Constitution's meaning. Thus, the progressive sceptical position holds that the relatively ascertainable and determinate meaning of the Constitution is radically inconsistent with progressive ideals, and the progressive faithful position holds that that meaning is in some deep historical or utopian sense consistent with non-liberal progressive politics. Both positions obviously depend upon some degree of constitutional determinacy: for the Constitution to be pernicious or salutary, its meaning must be determinate.

This paper does not defend the claim that the Constitution has a determinate meaning, whether that meaning is fatally inconsistent or deeply consistence, a deliberate choice to see the world from the standpoint of the oppressed, as a jurisprudential method).

16 Akhil R. Amar, Our Forgotten Constitution: A Bicentennial Comment, 97 Yale L.J. 28 (1987) (analyzing how history is used to interpret our supreme law and how we can make history by changing it); Akhil R. Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. Chi. L. Rev. 1043 (1988) (asserting that constitutional amendments need not be limited by the Article V amending process or judicial review and that, instead, amendment should be by direct appeal to, and ratification by, the people); Akhil R. Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131 (1991) (proposing an integrated overview of the Bill of Rights, illustrating the interaction between that document and the Constitution as originally drafted and refuting the notion that they represent two very different types of regulatory strategies); Amar & Widawsky, Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney, 105 Harv. L. Rev. 1359 (1992) (arguing that child abuse is analogous to slavery and that the Thirteenth Amendment therefore imposes an affirmative obligation on the state to prevent it); Ruth Colker, Antisubordination Above All: Sex, Race and Equal Protection, 61 N.Y.U. L. Rev. 1003, 1058-66 (1986) (proposing a new model for equal protection analysis, antisubordination, which finds it inappropriate for certain groups in society to have subordinated status because of their lack of power in society as a whole and would eliminate power disparities between groups).


18 See supra note 6.
tent with progressive ideals. It suggests instead that if we must first put aside doubts about whether the Constitution has an ascertainable meaning to debate, question, or affirm the Constitution's value from non-liberal political perspectives, then, in the spirit of pragmatism, we should put those doubts aside and see what may follow. Perhaps the doubts and faiths that may then come to the surface—doubts about the Constitution's worthiness rather than about its objectivity—might prove as central, innervating, and imperative as the questions of meaning and interpretation that continue to preoccupy our critical energies.

I. PROGRESSIVE CONSTITUTIONAL SCEPTICISM

Progressives have both substantive and methodological reasons to be sceptical about the Constitution's value. I define "progressivism," in part, by its guiding ideal: progressives are loosely committed to a form of social life in which all individuals live meaningful, autonomous, and self-directed lives, enriched by rewarding work, education, and culture, free of the disabling fears of poverty, violence, and coercion, nurtured by life-affirming connections with intimates and co-citizens alike, and strengthened by caring communities that are both attentive to the shared human needs of its members and equally mindful of their diversity and differences. Much of this guiding ideal, however, is shared by liberals. What distinguishes progressives from liberals is that while liberals tend to view the dangers of an over-oppressive state as the most serious obstacle to the attainment of such a world, progressives, while agreeing that some obstacles emanate from the state, argue that for the most part the most serious impediments emanate from unjust concentrations of private power—the social power of whites over blacks, the intimate power of men over women, the economic power of the materially privileged over the materially deprived. From a progressive perspective, it is those concentrations of private power that must be targeted, challenged, and reformed by progressive political action. That action, in turn, will often involve state intervention into the private spheres within which hierarchies of private power are allowed to thrive, and that simple fact will commonly pit the progressive strategy of ending private domination against the liberal goal of minimizing the danger of an oppressive state.

This difference between progressives and liberals largely accounts for the degree of conflict between their respective analyses and goals. For example, liberals and progressives generally agree, and lament, that the freedom of gays and lesbians to form and maintain nurturing intimate relationships is threatened by discriminatory state action. At the same time, progressives, far more than liberals, are sensitive to the degree to which that freedom is threatened by the continuing and seemingly unshakable hegemonic rage of an intolerant, abusive, and often violent minority of heterosexual private citi-
zens. That hegemonic rage, not just state action, must somehow be challenged and transformed if gays and lesbians are to thrive. Similarly, liberals and progressive feminists agree, and lament, that the freedom of women to engage simultaneously in well-compensated work, in public life, and in a rewarding home and family life is threatened by discriminatory state law. Still, the dramatic and well-publicized split between liberal feminists and progressive feminists reflects the extent to which progressive feminists, unlike liberal feminists, realize that women's lives and freedom may be endangered more by private, intimate, economic, and social systems of power and control than by pernicious or discriminatory state action: by, for example, a family structure that saps women's time, energy, and self-esteem with unequal distributions of demanding and unpaid domestic labor; the social acceptability of private sexual violence and coercion in marriage and intimacy that threatens women's safety and drains women's sense of self-possession and self-will; and the prevalence of unequal compensation for work of comparable responsibility and difficulty that deprives women of material security, self-esteem, and independence. If we call these systems of private coercion, intimate violence, and economic disempowerment "patriarchy," then it seems that patriarchy exists and perpetuates itself to a considerable degree independent of "state action," discrimination or otherwise. Awareness of, and concern about, that social fact distinguishes progressive from liberal feminists.

Similarly, from a progressive perspective, African Americans and other ethnic minorities are hindered in their search for meaningful freedom and full civic equality, not so much by discriminatory state laws or actions as by the continuing and escalating presence of a virulent white racism in virtually all spheres of private, social, and economic life. Awareness of, and concern about, that complex social fact in large part distinguishes progressive "critical race theorists" from their one-time liberal allies. To take one final example, the poor in this society are hurt not nearly so much by pernicious or discriminatory state actions as by concentrations of private economic power. Again, concern over the centrality of this social fact distinguishes progressive from liberal politics on issues of class. Generally, what defines a progressive political perspective is simply the awareness that the greatest obstacles to enjoyment of the good life valued by liberals and progressives alike are not actions of any sort taken by states or state officials, but concentrations of private power, whether of a patriarchal, racist, homophobic, or capitalist sort.

If that progressive insight is basically correct, then at least two problems exist with the scheme of individual rights and liberties protected by the Constitution. First, the Constitution does not prohibit the abuse of private power that interferes with the equality or freedom of subordinated peoples. The Constitution simply does not reach private power, and therefore cannot possibly prohibit its abuse. Even the most far reaching liberal interpretations of the Reconstruction Amendments—the only amendments that seemingly reach private power—refuse or fail to find either a constitutional
prohibition of private societal racism, intimate sexual violence, or economic coercion or a constitutional imperative that the states take affirmative action to eradicate it. Justice Harlan's famous liberal dissent in *Plessy v. Ferguson*, for example, made painfully clear that, even on his reading of the amendment (which, of course, would have outlawed Jim Crow laws), the Fourteenth Amendment does not challenge the sensed or actual cultural and social superiority of the white race. More recently, Justices Brennan and Marshall's argument in their dissent in *City of Richmond v. J.A. Croson Co.*, that the state *may* remedy private discrimination if failure to do so would enmesh the state in those discriminatory practices, did not suggest that the Constitution *requires* the state to address private discrimination. Similarly, virtually no liberal judges or commentators have read the Constitution and the Reconstruction Amendments to require that states take affirmative action to address the unconstitutional maldistribution of household labor, with its serious, well-proven, and adverse effects on women's liberty and equality. No liberal court or commentator reads the Constitution to require that states or Congress take action to protect against homophobic violence and rage, or to protect against the deadening, soul-murdering, and often life-threatening effects of homelessness, hunger, and poverty. The Constitution apparently leaves untouched the very conditions of subordination, oppression, and coercion that relegate some to "lesser lives" of drudgery, fear, and stultifying self-hatred. For that reason alone, the Constitution appears to be fundamentally at odds with progressive ideals and visions.

The incompatibility, however, of progressivism and the Constitution goes deeper. Not only does the Constitution fail to prohibit subordinating abuses of private power, but, at least a good deal of the time, in the name of guaranteeing constitutional protection of individual freedom, it also aggressively protects the very hierarchies of wealth, status, race, sexual preference, and gender that facilitate those practices of subordination. Thus, the Constitution seemingly protects the individual's freedom to produce and consume hate speech, despite its propensity to contribute to patterns of racial oppression. It also clearly protects the individual's right to practice religion, despite the demonstrable incompatibility of the religious tenets central to all three dominant mainstream religions with women's full civic and political equality. It protects the individual's freedom to create and use pornography, despite the possible connection between pornography and increases in private violence against women. It protects the privacy and cultural hegemony of the nuclear family, despite the extreme forms of injustice that occur within that institution and the maldistribution of burdens and benefits visited by that injustice upon women and, to a lesser degree, children. Finally,

19 163 U.S. 537, 552 (1896) (Harlan, J., dissenting) (stating that the Fourteenth Amendment targets discrimination by law, rather than societal discrimination).

20 488 U.S. 469, 528 (1989) (Marshall, J., joined by Brennan & Blackmun, JJ., dissenting) (arguing that the program setting aside a percentage of contracts for minorities is constitutional).
it protects, as a coincidence of protecting the freedom and equal opportunities of individuals, both the system of "meritocracy" and the departures from meritocracy that dominate and constitute the market and economy, despite the resistance of those systems to full participation of African Americans and hence despite the subordinating effects of those "markets" upon them. Very generally, the Constitution, incident to protecting the ideational, economic, and familial spheres of individual life against the intrusive effects of benign and malign legislative initiatives, protects that realm of private, intimate, social, and economic culture that creates and then perpetuates a spirit of intolerance toward, alienation from, and active hatred of subordinated persons. By so doing, the Constitution not only fails to protect against that subordination, but it also fails to exhibit neutrality toward it: it nurtures precisely those patterns and practices that are most injurious to the economic opportunities, the individual freedoms, the intimacies, and the fragile communities of those persons already most deprived in the unequal and unfree social world in which we live.

Finally, this incompatibility of the Constitution with progressive ideals is neither momentary nor contingent. It is not a product of false or disingenuous interpretation by a particular court or Justice hostile to progressive politics. Rather, the Constitution's incompatibility with progressive ideals stems from at least two theoretical and doctrinal sources that lie at the heart of our constitutional structure: first, the conception of liberty to which the Constitution is committed and, second, its conception of equality.

First, as is often recognized, the Constitution protects a strong and deeply liberal conception of what Isaiah Berlin has termed the "negative liberty" of the individual to speak, think, choose, and labor within a sphere of noninterference from social, community, or state authority. As is less often recognized, however, the Constitution creates and protects these spheres of noninterference not only in preference to, but also at the cost of, the more positive conceptions of freedom and autonomy necessary for progressive change. The cultural, intimate, private, and economic spheres of noninterference protected by the Constitution are the very spheres of private power, control, and coercion within which the positive liberty of subordinated persons to live lives of meaning is most threatened. Thus, the Constitution protects the rights of producers and consumers of racial hate speech and pornography so as to protect the negative liberty of those speakers and listeners. By doing so, it not only fails to protect, but also actively threatens, the positive freedom of women and African Americans to develop lives free from fear for one's safety, the seeds of racial bitterness, the "clouds of inferiority," the interference with one's movements, and the crippling incapaci-

21 SIR ISAIAH BERLIN, Two Concepts of Liberty, in Four Essays on Liberty 118 (1969) (distinguishing the "negative" liberty to do as one pleases within a designated sphere from the "positive" liberty to live a particular kind of life).
ties to participate fully in public life occasioned by the constitutionally protected cultures of racism and misogyny. The negative liberty of the individual heralded and celebrated by liberalism is not only inconsistent with, but also hostile to the positive liberty central to progressivism, simply because protection of "negative liberty" necessarily creates the sphere of noninterference and privacy within which the abuse of private power can proceed unabated. The Constitution is firmly committed to this negative rather than positive conception of liberty, and is thus not only not the ally, but also a very real obstacle, to progressive ideals.

Second, the Fourteenth Amendment's mandate of equality, rather than being a limit to the Constitution's celebration of liberty, is also a bar to progressive progress, the heroic efforts of progressive litigators, judges, and commentators to prove the contrary notwithstanding. The "equal protection of the laws" guaranteed by the Fourteenth Amendment essentially guarantees that one's membership in a racially or sexually defined group will not adversely affect one's treatment by the state. As such, the mandate powerfully reinforces the liberal understanding that the only attributes that matter to the state are those shared universally by all members of the community: the possession of equal dignity, the power to form one's own plan of life, and the universal aspirations to autonomy and so forth. Precisely this understanding of equality, grounded in the liberal claim and promise of universality and equal treatment, however, renders the Equal Protection Clause an obstacle to progressive progress. The need to acknowledge and compensate for the individual's membership in profoundly non-universal subordinate groups—whether racially, sexually, or economically defined—is what distinguishes the progressive political impulse from the liberal. It is precisely that membership in non-universal groups, and the centrality of the non-universal attributes that distinguish them, that both liberalism and the liberally defined constitutional mandate of equality are poised not simply to ignore, but also to oppose. It is, then, both unsurprising and inevitable that the Fourteenth Amendment's Equal Protection Clause is understood as not requiring, and indeed forbidding, the state and public interventions into private, intimate, and economic spheres of life needed to interrupt the patterns of domination, subordination, and inequality that continue to define the lives of those within these protected private realms.

Methodologically, the Constitution is also hostile to political and moral progressivism, simply because it elevates one set of moral values above others, relegating non-constitutional ideals or visions to the sphere of the "merely political." The Constitution's peculiar status as a bridge between liberal morality and aspirations and positive law, although much heralded by liberal philosophers and constitutionalists, poses a triple danger to progressive ideals. First, because the Constitution is indeed law, and law in the ordinary as well as extraordinary sense, it imprints upon the liberalism on which it rests the imprimatur of positive legal authority. One set of political convictions hence receives not only the persuasive authority derived from its merits, but also the political, willed authority of the extant, empowered, pos-
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Positive sovereign. These ideals simply are, as well as ought to be; and they are in a way that makes compliance mandatory. Second, because the Constitution is law in the extraordinary as well as ordinary sense, the positive political authority imprinted upon the liberal morality of the Constitution is of a higher, permanent, and constitutive sort. It severely constrains moralities and aspirations with which it is inconsistent in the name of the community from which it purportedly draws its sovereign authority. Thus, it is not just "the law" that is hostile to non-liberal moral aspirations, such as progressivism. It is also, more deeply and meaningfully, "we the people"—all of us, the inter-generational community of citizens—for whom the Constitution speaks and from whom it draws its authority that is hostile to the ideals with which it is inconsistent. Third, because the Constitution is also undeniably a moral as well as legal document, the authority it embodies is exercised not only coercively—telling us who we must be—but also instructively—telling us who we ought to be. It defines and confines not just our options—as does any law, higher or lower—but our aspirations as well. For all three reasons, the Constitution is not just a peculiarly authoritarian legal document, but is also authoritarian in a peculiarly parental way. Like a parent's authority over the identity of his or her children, the Constitution both persuades us to be a certain way and it constitutes us in a certain way. It creates us as it defines a morality to which we will and should subscribe.

For all of these reasons, the Constitution is methodologically as well as substantively hostile to progressive politics. The moral authoritarianism at its core is in many ways conducive to the reverence for the individual and distrust of the mass so central to liberalism, but it is inimical to the egalitarian, inclusive, and largely communitarian methods—the grass roots politics at the local level and the participatory democracy at the national and state level—that must form the foundation of genuine progressive change. Effective political challenges to the subordination of some groups by others must rest on a fundamental change of human orientation in both the dominated and oppressing groups: the dominated must come to see their interests as both shared with each other and opposed to the interests of the stronger; and the stronger must come to embrace empathetically the subordinated as sufficiently close to their own identities to be "of their concern." Neither progressive end—the mounting of sufficient power within the ranks of the subordinated through cross-group organizing or the challenge to the received self-identity of the strong—is attainable through the legal, coercive imposition of a particular moral paradigm that characterizes constitutional methodology. In fact, the moral and legal authoritarianism at the heart of our constitutional method will almost invariably frustrate it.

These three attributes of our Constitution—its commitment to negative liberty at the cost of positive liberty, its individualist and universalist, rather than particularist and anti-subordinationist understanding of equality, and its moral authoritarian methodology—are just three possible grounds for scepticism about the Constitution's compatibility with progressive politics. If progressive politics are necessary for moral progress, then these three
attributes are also grounds for scepticism about the compatibility of the Constitution with moral progress in this country.

This list is obviously not exhaustive. Other reasons grounded in progressive morality may exist for doubting the wisdom of the constitutional project. At the same time, the whole of the Constitution is certainly not adverse to progressivism, and some features of the Constitution, at least when properly viewed, may promote progressive projects. Nevertheless, it seems fair to say that at least the twin concepts of liberty and equality with which the Constitution is aligned, as well as our constitutional method, are not neutral toward progressive politics and ideals and collectively constitute a potent political, moral, and even social force against the realization of those aspirations.

II. THE ABSENCE OF PROGRESSIVE CONSTITUTIONAL SCEPTICISM

Why is it that neither this progressive case against the value of the Constitution, nor any of its implications for particular issues, has a sizeable number of adherents in the legal profession, or has received more than occasional elaboration in constitutional scholarship? Although I have labelled the sceptical stance toward constitutionalism outlined above "progressive," it is by no means only those who think of themselves as political progressives who align themselves with some part of a progressive agenda. Political orientations generally are not monolithic, and progressivism in particular can be embraced in part by persons at virtually all points along the political spectrum. Thus, a sizeable number of liberals making up the mainstream of constitutional discourse, the vast majority of critical legal scholars, a probable majority of feminist legal theorists, most critical race theorists, and at least a few conservative legal theorists subscribe to some subset of "progressive" political commitments. The question posed above might be framed in this way: of the scores of constitutional writers favoring progressive political commitments, why do only a handful also believe that these progressive initiatives are truly unconstitutional, revealing a serious moral failing in our constitutional scheme? Why are almost all of these more or less progressive writers, activists, and thinkers seemingly convinced that their beliefs are consistent with the Constitution? In contrast to whatever scepticism, nihilism, or simple pessimism progressives hold toward the Court, the public, Congress, and our public institutions, why are they so relentlessly optimistic about the Constitution itself? Why do so few think that, because of its deep incompatibility with progressive political and moral goals, the Constitution, although desirable at times, generally does more harm than good, and that we would be better off without it?

Perhaps the main reason is purely strategic. From a jurisprudential perspective, the absence of normative debate about the Constitution reflects a seemingly perverse refusal to apply the lessons of legal positivism to the doc-

23 See discussion supra pp. 771-73.
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...ument applied as a matter of course in other areas of the law: we actually find it difficult to separate the Constitution "as it actually is" from our moral ideals of "what it should be," although we have few difficulties separating the law of negligence, the holder in due course doctrine, or the consideration doctrine from our ideals of what tort, commercial, or contract law should be. We have not achieved the positivist "separation of law and morality" in the constitutional sphere that we seem to embrace almost automatically in most other areas of law. But this may not be as surprising, or inconsistent, as it first appears. The positivist insistence on the separation of "the law" on the one hand and its merit or demerit on the other—the separateness of the actual and the ideal—ensures a clear perception of the law's true nature, a logical prerequisite to meaningful criticism and hence reform. Only by first understanding what the law is, the positivist argues, can we determine what it should be, and only after we see what it should be can we reform it. But, perhaps what is distinctive about the constitutional context is that there simply is no realistic chance of "reforming" the Constitution, and hence no sensible reform-based motive for insisting on the positivist separation of the Constitution "as it is" from the Constitution "as it ought to be." Given the permanence, the higher status, and the "constitutiveness" of constitutional law, what one achieves through insistence on the moral inadequacy of the Constitution is not the clear-headedness essential to its enlightened reform stressed by the classical legal positivists, but rather one's own exclusion from the community whose audience is sought.

From a purely strategic perspective then, there may simply be no gain and considerable cost from the positivist insistence on separating the constitutional "is" from the constitutional "ought." The Constitution is simply not amenable to the gradualist, piecemeal, liberal reform that positivism facilitates. Criticizing the Constitution may too closely resemble criticizing the earth for revolving around the sun. Although neither as natural nor as unchangeable as the law of the earth's rotation, the law of the Constitution is considerably more resistant to change than the criminal codes or private law regimes to which Bentham and his positivist followers directed their critical and reformist attentions. The costs of asserting the incompatibility of the Constitution with one's own moral and political values are high, and obvious. Once the unconstitutionality of a favored reform is conceded, marginality is virtually assured. Given the dominance of lawyers in constitutional discourse and their continuing commitment to change the world through law, the absence of a critical perspective that fails to achieve meaningful reform and delegitimizes the very values according to which the law is found wanting may not be so surprising.

Strategy alone, however, does not tell the entire story. After all, many, if not most, constitutional theorists are not litigators, or even aspire to be litigators. No matter how many of the last generation of grand constitutional theorists were one-time law clerks, there are now many contemporary constitutional theorists who have no secret or express urge whatsoever to tie their constitutional views to a potential argument for effectuating a desirable
legal change. The absence of normative scepticism from constitutional discourse must have causes other than the strategic desire to back the winning horse, coupled with the obvious truism that an argument that concedes unconstitutionality to argue the immorality of the Constitution will lose in court every time.

In this section I will argue that the absence of normative scepticism from constitutional discourse is also attributable, at least in part, to the logic of the poles of the interpretive debates concerning the Constitution's meaning, its meaningfulness, or meaninglessness that currently dominate constitutional scholarship. Both the constitutional faithful—those who insist upon the determinacy of constitutional meaning and hence legitimacy of constitutional review within the framework of liberalism—and the constitutional sceptical—those who challenge the determinacy of the Constitution and hence the compatibility of judicial review with liberal theory—are, for different reasons, unlikely to pursue sceptical arguments about the Constitution's value, even if they adhere to the progressive political or moral premises on which that scepticism might be grounded. Thus, the absence of progressive scepticism about the Constitution might reflect the degree to which the now standard debate over interpretivism has captured the terms of constitutional discourse. Whatever the case concerning the wisdom of refraining from constitutional critique for strategic reasons, there is no good reason, I will argue, to allow the debate over interpretation to preempt debate over constitutional value. To the degree that the absence of a morally sceptical stance regarding the Constitution reflects a commitment to one or the other of the poles of debate over meaning, we should put aside, if we cannot resolve, the latter, so that we can again focus our attention on the former.

A. The Progressive Critique and Liberal Constitutional Faith

All members of the constitutionally faithful pole of the debate adhering to the determinacy of constitutional meaning and to the compatibility of the constitutional enterprise with liberal premises will be disinclined to express progressive critiques of constitutionalism. For those purposes, the constitutionally faithful should be divided into two subgroups: the "traditional liberals" and a possibly larger group with mixed political commitments who might be called "progressive liberals."

First, of the sizeable number of the constitutionally faithful who are traditional or classical liberals, the disinclination to see whatever merit there is in the progressive case against the Constitution is fairly easy to explain. The traditional liberal, simply by virtue of his or her politics, will be relatively inattentive to the harms of subordination occasioned by the private sphere and insulated by constitutionalism. The progressive critique of the Constitution will, therefore, have no strong intuitive appeal. For this group, the constitutional commitment to the insularity of the private sphere converges

24 See supra text accompanying notes 1-4.
perfectly with the political belief that the private sphere is the sphere of autonomy, growth, and self-actualization, rather than the "hellhole" of violation and subordination described by progressives. There is a perfect fit, in other words, of the coercive morality of the Constitution and the aspirational morality of traditional liberal politics. When the Constitution is correctly interpreted, it aligns with correct liberal moral commitments. There is simply no merit to the progressive critique.

This characterization of "traditional liberalism," however, obviously does not fairly describe the broad political commitments of persons within the "constitutionally faithful" camp of the interpretation debates. A sizeable number of the constitutionally faithful are committed to some aspect of progressive politics. The hard question, then, is not why the traditional liberal is blind to the progressive critique of constitutionalism, but why those who are committed to constitutional determinacy and method but also sympathize with at least some progressive goals and methods, nevertheless shy away from attacking directly the morality of the Constitution. For them, the refusal to see the unconstitutionality of politically desirable progressive proposals as arguments against the Constitution must stem not from politics, but from a view of the Constitution as rooted in a higher, deeper, more "constitutive," or simply "prior" morality, and not simply a more coercive legal command. Hence, for this group, the unconstitutionality of proposals based on a politics incompatible with the constitutional mandate carries with it the moral justification of their demise. For the constitutionally faithful theorist who views some progressive proposals as politically wise, their unconstitutionality implies not the limits of the morality or justification of the Constitution, but rather the limits of the morality of the proposals themselves. It may be a politically and hence morally "good thing" to limit access to hate speech or pornography, but it must be a constitutionally and hence super-morally "better thing" to restrain our desires to do the (merely) politically right thing. For the constitutionally faithful, the Constitution provides a higher norm both positivistically and morally, and therefore the "lower" moralities with which it conflicts must simply give way. Their virtue cannot suggest fault with the Constitution itself.

The logic of constitutional faith, one might assume, eventually brings about a concrete reordering of moral and political priorities and a reordering of epistemological perceptions of the social world as well. To accommodate the moral and legal commitment to the priority of the constitutional norm in the face of an unconstitutional but desirable political proposal, the faithful constitutionalist must either elevate to new heights the stakes of departing from the constitutional norm or denigrate the evil the unconstitutional progressive proposal was designed to remedy. It is, then, not surprising that, in the hate speech and antipornography examples, the negative liberty of individual consumers of that speech achieves almost mystical status for faithful constitutionalists, while the harms caused by hate speech and pornography are trivialized. This simultaneous elevation of individual liberty and trivialization of group harm in turn affects the way the faithful constitutionalist
sees the world. The harms occasioned by pornography, hate speech, and unequal distributions of domestic labor all become not just trivial, but even invisible. Their evil is "trumped" out of existence by the perceived evil of limiting a negative right. There is then no disabling conflict between the constitutional morality to which the faithful constitutionalist is definitionally committed and the political morality that may conflict with constitutional morality. The "moral dissonance" always present in the faithful constitutionalist's position is reduced to nothing through the altering of the perceptual landscape.

It is when this perceptual reordering becomes impossible that the faithful constitutionalist will switch sides and argue the constitutionality of progressive schemes designed to eradicate these harms. The harm may be so visible, concrete, and public that its trivialization requires just too great an act of will. Or, the presence of the evil may be as central to the theorist's world view as is the essential morality and determinacy of the Constitution. In either case, the moral dissonance between the Constitution and political morality must be reduced by some route other than trivialization of the harm or elevation of the constitutional value. The harm and the evil of purely private discrimination is one such example. The harm is simply too obvious and the evil too great to permit the "trumping" of this harm by the higher constitutional value of protecting the private sphere. For the faithful constitutionalist, however, even the undeniable harm of private discrimination cannot become an argument against the unassailable Constitution. Consequently, the faithful constitutionalist must find statutes or ordinances designed to remedy this evil compatible with the Constitution, either by carving exceptions to the private/public distinction or, more typically, by blurring the distinction between public and private. Not surprisingly, we have a huge body of liberal constitutional scholarship finding state action in almost any conceivable act of discrimination, but almost no liberal constitutional scholarship arguing that the prevalence and evil of constitutionally unassailable private discrimination shows that the state action requirement, itself firmly grounded in constitutional principle, is morally unjustified.

The constitutionally faithful theorist also harboring some commitment to progressive political methodology similarly risks moral dissonance created by the methodological incompatibility of the communitarian and collectivist methods of progressivism and the authoritarian methods of constitutionalism. As the faithful theorist reduces the risk of substantive dissonance by reorienting his perceptions of the social world to trivialize the private harms occasioned by subordination in the private sphere, he is inclined to minimize the risk of methodological dissonance by simply reorienting his perceptions of the virtues and vices of progressive methods. The vast majority of constitutionally faithful liberals harboring at least a fondness for the participatory democracy central to progressivism effect the accommodation between the Constitution's methods and the methods of progressive politics by simply attributing to participatory democracy the same majoritarian vices that constitutional methodology is perfectly poised to correct when directed against
democratic excesses of a conservative or reactionary political hue. Whether the democratic wish being frustrated is the conservative desire to punish flag-burners or dispensers of contraception, or the progressive desire to punish or penalize hate speech or pornography, the constitutionally faithful liberal will argue that democracy has outreached its moral justification. In both cases she can readily conclude that constitutional methodology is perfectly designed to identify and rectify the excess. It just doesn’t matter whether the democratic desire has come to fruition through the progressive methods of coalition building, consciousness raising, and democratic participation or through the politics of reaction and hate-mongering. In either case, the peculiar dangers to the individual and to the private sphere posed by majoritarianism are present, and in either case, the Constitution and the courts are poised with methodological perfection to eliminate them.

There is one major exception to the preceding descriptive account. Perhaps one of the most significant developments in legal academic thought over the last decade is that, for at least a few constitutionally faithful liberals committed to some progressive goals and methods, this traditional accommodation of constitutional method and participatory democracy has become untenable. This relatively new experience of an unacceptable degree of dissonance between the authoritarianism central to traditionally conceived liberal constitutional methodology and the participatory democracy celebrated and relied upon by progressive politics has given rise to the arguably oxymoronic academic movement known as “liberal civic republicanism.” Liberal republicans are, perhaps, best defined by their insistence that the dissonance between the authoritarianism of traditional constitutionalism and the democratic methods of progressivism must be reduced in some way that does not simply denigrate the value of participatory democracy. Two solutions have been fruitfully explored in neo-civic liberal-republican literature.

First, for some liberal republicans, notably Frank Michelman and Owen Fiss, the tension between the methods of constitutionalism and progressivism can be lessened by reconceiving the function, role, and content of judi-

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25 Frank Michelman, Law’s Republic, 97 YALE L.J. 1493 (1988) (contending that only through a modern reconsideration of constitutional thought can we hope to make sense of the American belief that political liberty calls for a government “of the people, by the people”); Frank I. Michelman, Foreword: Traces of Self-Government, 100 HARV. L. REV. 4, 66-73 (1986) (exploring migration of self-government from the people to the Court); see also Cass R. Sunstein, Beyond the Republican Revival, 97 YALE L.J. 1539 (1988) (asserting that the common opposition between liberalism and republicanism is a false one).


27 Owen M. Fiss, A Life Lived Twice, 100 YALE L.J. 1117 (1991) (focusing on Justice William J. Brennan and his achievements as a liberal Justice on the Supreme Court); Owen M. Fiss, Reason in All Its Splendor, 56 BROOK. L. REV. 789 (1990) (examining the importance of procedural fairness before the deprivation of life, liberty, or property); Owen M. Fiss, State Activism and State Censorship, 100 YALE L.J. 2087 (1991) (stating
cial review to align with progressive politics. The methodological contradiction between progressivism and constitutionalism is, therefore, reduced by rethinking constitutional methodology. Constitutional processes can then be seen as actually doing the work of progressivism, and thus obviating the progressive politics with which constitutional methodology traditionally conceived is inconsistent. The judge, according to this view, should do precisely what, from a progressive point of view, would otherwise be done by coalition-building and consciousness changing: the judge should insist that law reflect public values that in turn reflect the good of the whole, rather than the elevation of private values and the private sphere, reflecting only the supremacy of an hegemonic group. The judge is not only the idealized progressive legislator, but also the speaker for the idealized outcome of a grass-roots progressive political campaign. She speaks for the mobilized subordinated and realigns and reorients the self-identity of the powerful, forging a new, more expansive community. The tension between constitutionalism and participatory, progressive democracy is lessened by casting the judge as the guardian of participatory democracy.

A second group of liberal neo-civic republicans, notably Cass Sunstein and Paul Brest, effects the accommodation of authoritarian constitutional methodology and participatory progressive method by identifying the representative branches of government, rather than the judiciary, as the primary locus of constitutional decisionmaking, or more simply, by democratizing constitutional method. For this group as well, the potential methodological clash between constitutionalism and progressivism is somewhat averted. The dissonance between participatory politics and authoritarian constitutionalism is reduced not by rendering the judge the spokesperson and guardian of the value of participation, but rather, by identifying the participatory branch of government as the site of constitutional decisionmaking.

Although strengthening the strategic resources of constitutionalism, this new development reinforces the basic point that, for all liberals and progressive-liberals committed to the determinacy of the Constitution and the legitimacy of the constitutional enterprise within liberal theory, the conflict between progressive political aspirations and constitutional substance and method will constitute not a challenge to the moral legitimacy of the Constitution, but instead, a constitutional, and hence moral, burden on progressiv-

that the principle of freedom that the First Amendment embodies is derived from the democratic nature of our society and is essential for collective self-determination).

28 Sunstein, supra note 25.

29 Paul Brest, Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine, 21 GA. L. REV. 57 (1986) (exploring whether Congress has the ability to engage in constitutional interpretation); Paul Brest, Constitutional Citizenship, 34 CLEV. ST. L. REV. 175 (1986) (arguing that the Supreme Court is not authorized to decide issues of public morality); Paul Brest, Further Beyond the Republican Revival: Toward Radical Republicanism, 97 YALE L.J. 1623 (1988) (stating that we must abandon our obsession with courts and work toward decentralization and democratization).
ism itself. Consequently, even among the constitutionally faithful liberals sympathetic to progressive ends, progressive politics and progressive moral aspirations are to some degree delegitimized. This muting of the sceptical voice among liberal and progressive-liberal constitutionalists is unfortunate. As I will argue below, there are real costs from the muting of progressive doubts about the moral or political value of the Constitution. But it is also unfounded, and it is unfounded even within the assumptions of the very liberal tradition that presumably inspires constitutional faith.

The muting of scepticism is unfounded because there simply is no connection between the determinacy of the Constitution—the hallmark of constitutional faith—and the Constitution’s morality. The notion that there is some connection, implicit in volumes of liberal writing on the Constitution and explicit in the remainder, rests on the fallacious argument that because the Constitution’s indeterminacy would imply its illegitimacy, and its illegitimacy in turn would imply its immorality, therefore, the Constitution’s determinacy must imply both its legitimacy and morality. Not only is this wrong, but it is also profoundly illiberal. Conceding the necessity of determinacy to liberal legitimacy, it does not follow that the Constitution’s determinacy is a sufficient condition of its ultimate political morality, for two reasons. First, determinacy may be a necessary but not a sufficient condition of legitimacy. Even a fully determinate Constitution might be illegitimate for reasons independent of its determinacy. Second, and more importantly, legitimacy may be a necessary but not a sufficient condition of morality. Even a fully “legitimate” constitutional enterprise—legitimate, for example, within the contours of either liberal or republican political theory—may be immoral for reasons independent of its legitimacy.

In other words, only through conflation of determinacy with legitimacy, and then legitimacy with morality, does interpretive faith in the determinacy of the Constitution become moral faith in its ultimate justification. No conceivable grounds, however, justify that double conflation. Determinacy no more exhausts political legitimacy than political legitimacy exhausts moral justification. The mistaken notion that it does reflects either the profoundly illiberal view of the state as fully justified if “legitimate”—rather than as fully justified if, and only if, truly liberatory—or the equally illiberal view that that which has traditionally been valued must continue to be valued, regardless of our changing appreciation of the burdens and harms it inflicts, or, using the Deweyan phrase for the “nerve” of liberalism, regardless of our changing “intelligence” about the effect of that object on our felt, experienced lives.

B. The Progressive Critique and Constitutional Scepticism

Constitutional sceptics—those who doubt the determinacy of constitutional phrases, and hence the compatibility of the Constitution with liberal

30 See supra text accompanying note 5.
political theory—are also disinclined to embrace a progressive normative critique of the Constitution, even if they subscribe to progressive political and moral goals and methods. This fact alone is surprising because constitutional sceptics for the most part are members of the critical legal studies movement, a legal academic movement that itself may be defined by a commitment to progressive, left-wing, or radical politics. Thus, one may legitimately assume that most constitutional sceptics subscribe to most if not all of the progressive political commitments described above, and would therefore be inclined to assert the moral and political desirability of progressive political proposals designed to remedy abuses of power within the private, intimate, or social sphere. Yet, even from the sizeable number of progressive, feminist, or critical constitutional writers committed to the indeterminacy thesis and clearly supportive of progressive causes, one finds very little scholarship critical of the Constitution. The question remains, why?

The main reason may be strategic; but again, strategy alone cannot be the whole story. Although there may be others, one additional reason for the lack of criticism of the Constitution from constitutional sceptics may be that the logic of constitutional scepticism precludes moral criticism: for constitutional sceptics, neither the meaning nor the method of the Constitution is sufficiently determinate to be pernicious. If a text has potentially contradictory meanings, it can hardly be faulted for its substantive political implications, for it quite literally has none. Thus, for the sceptic, the Constitution’s apparent incompatibility with progressive causes can hardly be attributed to the Constitution. Instead, the impulse to attribute these outcomes to the Constitution, the sceptic argues, rather than to its human interpreters and appliers, evidences the bad faith that the indeterminacy thesis is in part designed to uncover. The Constitution and the liberal tradition it purports to serve are sufficiently malleable to be susceptible to non-liberal, illiberal, conservative, tyrannical, or progressive interpretations. That it has received any particular interpretation or application, therefore, is a function not of its content, but of the constraining influences of the interpretive community or the political predilections of the interpreting judge. It follows that there is no reason, intrinsic to the constitutional text, for the Supreme Court’s persistently non- and anti-progressive application and interpretation of the Constitution. Although the Court has generally read the Constitution to burden and limit the reach of affirmative action programs, for example, nothing in the document mandates that result. Consequently, the political inclinations of the judiciary, or the communities from which that group is drawn, must explain their interpretation. The Constitution itself can be read either to permit or to invalidate such plans. Similarly, the Constitution neither permits nor forbids hate speech ordinances. That it is read in such a way by liberal commentators and the Supreme Court, is not attributable to the language, content, or history of the Constitution, but rather to the constraints of the politics of the judge or community responsible for the interpretation.

The progressive critique of constitutional methodology is also obscured by the indeterminacy critique at the heart of constitutional scepticism. The
Constitutional scepticism authoritarians of constitutionalism so antithetical to progressive political methodology simply disappears if the Constitution has no definitive meaning: if the indeterminacy claim is sound, the Constitution cannot be authoritative. A text that can mean either A or not-A can hardly be characterized as authoritative. If the indeterminacy thesis is right, the authoritarianism of constitutionalism cannot be attributed to the Constitution itself, although it might be attributable to the institutional forms, such as judicial review, responsible for its implementation. Not surprisingly, of the constitutional sceptics drawn to progressive political methods, few find any serious basis for moral, as opposed to epistemological, scepticism.

Here again, though, the inferences seem flawed. Constitutional scepticism no more obviates the need for normative constitutional criticism than constitutional faith undercuts its credibility. First, even if the Constitution is contradictory in precisely the way claimed by the sceptics—so any legal rule that is intended to specify results by reference to its content can be manipulated to reach contradictory results—it does not follow that the constitutional tradition, as opposed to the constitutional document, fails to render determinate results—results which, if history is a guide, are profoundly hostile to progressive politics. The indeterminacy thesis shows merely that the constitutional text, coupled with liberal theory, does not entail determinate results. But it does not follow that constitutional results are indeterminate. It only follows that it is not the text—the law—that does the determining. If we understand the constitutional tradition to be that which determines outcomes, and understand that tradition to include the politics of the community, the predilections of the judge, and in short the hegemonic and choice-denying inclinations of the judge's social context, then not only are constitutional outcomes determined, they are despairingly over-determined. They are over-determined, furthermore, by the very social and private forces of racism, misogyny, and classism that render progressive interpretations of the same document untenable. The felt determinacy of the Constitution and its felt incompatibility with progressivism hold regardless of the indeterminacy of the document and of liberalism itself.

Furthermore, it is worth noting that, to the extent that the indeterminacy critique is motivated by a European and existentialist impulse to unmask the otherwise denied responsibility of the judge for her political choices, the consequences of that critique are deeply paradoxical and self-defeating. On the one hand, the indeterminacy thesis, if true, precludes the judge from avoiding responsibility for the political and moral consequences of her decisions by cloaking them in the garb of a disingenuous legalism. On the other hand, however, the same critique exonerates the Constitution's authors. Peculiarly, the same indeterminacy critique that highlights the human responsibility of the present interpretive community or judge simultaneously obscures the equally human responsibility of the text's authors. Texts no less than interpretations have consequences, and one would expect a movement committed to demystifying the human authorship of, and hence responsibility for, institutional facts to be sensitive to the very real conse-
quences of chosen words, and hence the responsibility for those consequences of the text's drafters. The indeterminacy critique muddles that responsibility as it denies the meaningfulness of the written text. It accordingly confuses the authority upon which that responsibility is predicated, and hence the moral dangers implied by the subsequent deference to textual authoritarianism so central to traditional constitutional method.

Whatever the merits of these arguments, however, it seems fair to say that constitutional sceptics view indeterminacy as obviating the need for progressive normative critique, just as constitutionally faithful liberals view constitutionalism as undermining the justification of progressive critique. For one group the critique is obviated; for the other its justification is undermined. All of this happens with no examination of the merits. The logic and framework of interpretive debates over the Constitution's meaning and meaningfulness have obscured debate over the Constitution's ultimate value by making the debate either illegitimate or moot. We might, therefore, be wise to consider putting aside our doubts about constitutional determinacy to look afresh at questions of constitutional value.

C. Progressive Politics and Constitutional Discourse

The absence of a tradition morally sceptical toward the Constitution from a progressive perspective has weakened progressivism, weakened our constitutional debates, weakened constitutional interpretation, and consequently, possibly weakened the Constitution itself. Progressivism is injured in at least two ways. First, there are obvious adverse political consequences if it is both true and unacknowledged that our constitutional guarantees of individual rights and liberties fail to guard against abuses of private power and affirmatively protect the spheres in which those abuses occur. The second type of damage, however, is more subtle and possibly more serious. The lack of a clear understanding of the obstacle to progressivism posed by constitutional guarantees further denigrates the "outlaw" position of the disadvantaged in this society simply because the advocacy of measures deemed both anti-communitarian and anti-individualist through their unconstitutionality is not consistently coupled with a critique of the Constitution that delegitimizes those initiatives. The tendency of all subordinated persons toward self-belittlement by trivializing the nature of their injuries is geometrically enhanced by the self-perception that their injuries do not exist because their infliction is constitutionally protected. To insist on the injustice of it is to injure, in a profound—because constitutional—sense, the entire community of which both the dominant and subordinate are a part. The understanding of the harms suffered by subordinated persons in the private realm is thereby frustrated when those injuries are perceived as having been the occasion of unconstitutional, and hence deeply immoral, legislative initiatives. The battle for passage of a progressive statute or ordinance, such as a hate speech regulation or an anti-pornography ordinance, destined to be found unconstitutional becomes the occasion not of greater public consciousness of the uni-
queness, nature, and intensity of the suffering, but rather an occasion for obliterating difference by blurring the harm sustained by hate speech or pornography with other injuries sustained by other factions seeking ends at odds with constitutional guarantees. Greater understanding of the degree to which the Constitution frustrates progressivism would at least clarify the nature of the problem and might potentially demystify and hence dethrone and “untrump” constitutional morality.

A clearer understanding of the systemic threat to progressivism posed by constitutionalism that might be gained through a sustained debate over the value of constitutionalism might also enhance the quality of constitutional dialogue. Mainstream liberal constitutional discourse is presently characterized by an almost obsessive refusal to acknowledge or examine the nature of the costs of constitutional rights and liberties because of the logic and structure of rights themselves: the right exists to preclude precisely such cost-benefit analyses. Because there is no social cost that a right does not theoretically “trump,” from a liberal perspective there is simply no reason to assess the costs of rights, and plenty of reason not to: assessment only threatens societal respect for the right in question. Nevertheless, this refusal to address the consequences of rights ultimately leaves them groundless, as well as dangerous. The right must implicitly, if not explicitly, rest on some intuition that in the long run the benefits of having a right—whether self-actualization, autonomy, intimacy, privacy, meritocratic treatment, or economic self-determination—outweigh any costs incurred by its possession. Failure to examine the wisdom of this balance in light of our expanding knowledge of the experience of persons most vulnerable to the harms occasioned by those rights, and failure to countenance the possibility that perhaps the balance ought to be re-struck, does not constitute “liberalism” in its best light; far from it. Instead, it constitutes a deeply conservative, traditionalist, and even reactionary posture toward the possibility of change and a profoundly illiberal rejection of the use of pragmatic knowledge to come to grips with an evolving social world.

The absence of a sustained tradition of normative constitutional scepticism also hurts the Constitution, in precisely the way that John Stuart Mill warned: unexamined institutions, ideas, and cultures become fossilized, non-vital, superstitiously worshipped, and then perversely discarded echoes of their original impulses. This is surely as true of liberal ideals, institutions, and cultures as it is of the unexamined and uncriticized conservative traditions and religions that Mill ridiculed.

Finally, we should remember that the Constitution is merely difficult, not impossible, to change. It can be changed fundamentally through amendment, interstitially through judicial interpretation, and in fact if not form through patterns of practice occasioned through changes in consciousness. The strategic impulse to insist upon the constitutionality of unconstitutional

31 J.S. MILL, ON LIBERTY (1859).
progressive initiatives, because of the sense that the Constitution itself cannot be changed, may be unduly pessimistic. Reform through critique is not utterly beyond the pale in constitutional dialogue or doctrine. Although the Constitution may be fundamental law, it is a fundamental charter of our self-understanding, as well, only if we permit it to be. Although a changed self-understanding is surely not a sufficient condition of change in a fundamental law, it is undeniably a necessary one. Failure to achieve it because of a sense of futility does nothing but render the immutability of an anti-progressive Constitution a self-fulfilling prophecy.

III. THE LATENT POSSIBILITY OF A PROGRESSIVE CONSTITUTIONAL FAITH

Perhaps the greatest cost of the lack of a sustained tradition of normative constitutional scepticism on progressive grounds is that it has very likely impeded the development of a responsive tradition, which might be called a "progressive constitutional faith." Progressive constitutional faith might best be described in contrast to other constitutional approaches. First, unlike constitutionally faithful liberals, constitutionally faithful progressives would aim to tie the determinate meaning of the Constitution, ascertained through its text, history, and supporting moral philosophy, not to liberal hopes, fears, and ideals, but instead to progressive ones. But, unlike constitutional sceptics, progressive faithful constitutionalists would assert the possibility of a progressive interpretation of the Constitution not on the grounds of the Constitution's meaninglessness, but on the grounds of the position's fundamental correctness. The claim would be that the Constitution really means what the progressive insists, carries accordant obligations, and consequently mandates a progressive conception of community to which we all ought adhere. The possibility of a progressive interpretation of the Constitution, in other words, would rest not upon the real or perceived contradictions latent or explicit in liberalism and the potential for interpretive exploitation that those contradictions entail, but upon the Constitution itself—its progressive meaning, history, and text, and the political and moral philosophy against which it should and must be interpreted. Thus, unlike liberal faithful constitutionalists, with whom they share a belief in constitutional determinacy, progressive constitutionalists would ground constitutional meaning in progressive rather than liberal politics. And lastly, unlike constitutional sceptics with whom they share their politics, constitutionally faithful progressives would emphasize not the Constitution's indeterminacy, but rather those constitutional events and textual passages that support the claim that the Constitution is at least as concerned about the abuse of private and social power as it is patently concerned with the abuse of public and political power, and is at least as methodologically convergent with ideals of participatory democracy as it is explicitly concerned with the limits of majoritarian will.

On this view, the anti-progressive content and method of the Constitution
that presently seem so inextricably interwoven with its text and history is revealed to be not just indeterminate, but wrong: a modern (as well as post-modern), transitory, and misguided moment. The identification of public, rather than private, power as the concern of the Constitution, the preference for negative over positive liberty at the heart of both the First Amendment and the Fourteenth Amendment's Liberty and Due Process Clauses, and the insistence on a formal rather than substantive understanding of the Equal Protection Clause is central not to the Constitution itself—whether understood as its text, its history, or the best political philosophy that might sustain it—but rather to the politics and felt contingent needs of the modern and post-modern world. Once seen as an unnecessary and false reading of the Constitution, the path is then cleared for a more accurate and progressive understanding of constitutional mandates and responsibilities.

Doctrinally, progressive constitutional faith would have to rest primarily on a rereading of the central message, meaning, and history of the Fourteenth Amendment. The modern understanding that the Fourteenth Amendment only reaches state action that operates injuriously upon subordinated groups, according to this view, is the result of a handful of erroneous opinions, beginning with the nineteenth century civil rights cases\(^2\) and culminating with the modern state action cases.\(^3\) Historically, the Fourteenth Amendment, like all the Reconstruction Amendments, was intended to ensure that the states refrain from inflicting injury upon subordinated groups and take affirmative action to guarantee that private power not be used to re-enslave the recently freed.\(^4\) By principled extension, therefore, the amendments taken as a whole ought to be understood as requiring the states to guard against not only their own complicity in the domination of subordinate groups, but also the domination of those groups themselves, and to act affirmatively to end it. On this reading, “equal protection of the law” requires Congress to ensure that the states not only legislate in a fair and rational manner, but also that Congress protects against private subordination, whether that subordination occurs through the relationship of slave and master, of wife and husband, or of employee and employer when the parties possess radically unequal control of resources. The Due Process Clause fundamentally requires that the states ensure that

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\(^{2}\) See e.g., Civil Rights Cases, 109 U.S. 3 (1883) (holding that Fourteenth Amendment claims require a showing of state action).

\(^{3}\) DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 195-97 (1989) (holding that the Due Process Clause does not impose upon the states an affirmative obligation to protect a son from an abusive father).

only the state be empowered to deprive people of their utterly positive liberty to work, live, participate in politics and culture, and sustain meaningful intimate relationships, and that the state only do so with due process of law. The amendment taken in its entirety, then, means that the states must take any necessary and possible action to guarantee that private social life will not regress to anything resembling either the relationship of enslavement of the slave era or the private exploitation and coercion that followed it. If the Fourteenth Amendment was intended to mean that its clauses are at least as concerned with the abolition of private relationships of subordination as with public abuses of political power, then the constitutionality of progressive proposals designed to eliminate patterns of subordination logically follows. Indeed, they are not simply constitutional, but also constitutionally mandated.

Methodologically, progressive constitutional faith would view the Constitution as mandating a method of decisionmaking and a style of discourse convergent with the progressive commitment to restrain majoritarian excess, bigotry, mistakes, or ill-will through the progressive tools of participatory democracy, collective political action, and social responsibility, rather than with the liberal commitment to correct those evils through an intellectual ideology that combines glorification of the abstract individual with contempt of the concrete majority, and an institution that imposes that ideology through coercion rather than through persuasion. It would claim that a reformed constitutionalism—one emphasizing legislative and citizen participation, persuasion over coercion, and anti-subordination—could shed itself of the authoritarianism of traditional constitutional discourse, yet retain the obliqioriness of constitutional meaning without which constitutionalism loses its value, whether to progressive or liberal self-understandings. To be constitutional as well as progressive, a progressive constitutional method would have to discover a means of ascertaining communal and communitarian self-understanding that implies the inclusion, unity, fraternity, sorority, mutual recognition, and obligation that makes constitutionalism a significant claim upon our social life and individual existence. To be progressive, the constitutional method must be respectful of dissent, non-coercive, non-authoritarian, and at least somewhat pluralist. The articulation of this constitutional method is a far greater challenge for a progressive constitutional faith, I think, than the historical, textual, and philosophical work required to justify a progressive interpretation of constitutional rights and liberties.

It remains to be seen whether a progressive constitutional faith could ultimately be sustained. It seems to me that there are enough "constitutional moments" in our political and social history to suggest that it could be, from the passage of the Reconstruction Amendments and their fundamental challenge to the most extreme forms of private subordination, to the attempt in the post-Lochner era cases to reject an interpretation of the Constitution
prohibiting the states or Congress from addressing private subordination, and to the Warren Court's decision in *Brown v. Board of Education*, which at least arguably was concerned not only with state-ordered de jure segregation but also with the injurious consequences of private racism, inflicted through the protected and private spheres of speech, education, and the "culture" of racism. Of course, if the Constitution—or at least the Fourteenth Amendment and the rights "incorporated" by it—is centrally concerned with private power, its abuse, and the injuries of racism, poverty, and sexism occasioned by its abuse, then the vast bulk of modern cases concerning those rights are wrong, and the legislative, adjudicative, and social work of implementing the true meaning of those amendments has not yet begun. That, however, ought not count against the plausibility of a progressive constitutional faith. It only restates two obvious and noncontentious points: first, at this point in history, any progressive constitutional faith would constitute a dissident tradition, and second, the Constitution articulates an aspirational morality that we have only occasionally glimpsed and that we have not yet begun to honor.

Now, for reasons easily summarized because they directly mirror those outlined above, the dominance of debate over the status of the Constitution's meaning has stymied the development of a progressive constitutional faith. Neither constitutionally faithful liberals nor constitutional sceptics have much stake in the articulation of a progressive constitutional faith and, for that reason alone, the dominance of interpretation debates focused on the coherence of liberalism has somewhat retarded progressive understandings of constitutional meanings. First, liberal constitutional faith is defined by its commitment to the proposition that the Constitution's meaning, as well as


36 347 U.S. 483, 495 (1954) (holding that racial segregation of public schools violates the Fourteenth Amendment).

the justification for its imposition against the democratic will, must be drawn from the liberal tradition—a tradition that is generally hostile to progressive initiatives and understandings. A liberal faith then might share with a progressive faith a belief in the meaningfulness of the Constitution, but the meanings ascribed by the two movements are inevitably in near-diametrical opposition.

Second, constitutional sceptics, although sharing the politics of progressive constitutional faith, would have as little interest in the articulation of a view of the Constitution as essentially furthering progressive causes as they have in the articulation of a criticism of the Constitution as essentially hostile to those initiatives, for at least two reasons. First, if the Constitution's meaning is necessarily indeterminate, then it can no more be tied to progressivism than to liberalism. There is presumably no political commitment that does not share in the instability and the extreme contradictoriness of liberalism. Indeterminacy is, after all, a function not of particular politics, but of language and life. If the interpretive sceptic is right, therefore, progressive constitutional faith is impossible. Progressive, no less than liberal, constitutional faith is ruled out by the inevitable indeterminacy of the language with which the faith is constructed. Second, given the contradictions of liberalism, progressive initiatives can be argued to be either constitutional or unconstitutional. Therefore, progressive constitutional faith, and the determinate progressive politics on which it is predicated, is also strategically unnecessary. Indeterminacy is sufficient to facilitate progressive political goals.

Nevertheless, in spite of the preemptive nature of the interpretation battles, a small but growing number of progressive constitutional theorists subscribe in some form to a progressive constitutional faith. Much of it comes from critical race theory. Mari Matsuda's general characterization of "outsider jurisprudence" as well as her particular reconstruction of the First Amendment to support the constitutionality of hate speech regulations was seminal to this tradition, as was Charles Lawrence's interpretation of Brown as being centrally concerned with expressions of private racism, and hence supportive of the same conclusion. Patricia Williams's and Kimberlé Crenshaw's early defense of rights as conducive to liberalism and to pro-

38 Matsuda, supra note 15, at 9 (asserting that "the multiple consciousness I urge lawyers to attain is not a random ability to see all points of view, but a deliberate choice to see the world from the standpoint of the oppressed").

39 Matsuda, supra note 7, at 2321 (arguing in favor of criminal and administrative sanctions as an appropriate response to racist speech).

40 Lawrence, Regulating Racist Speech, supra note 37, at 439 (arguing that segregation was racist speech).

41 Patricia Williams, Alchemical Notes: Reconstructing Ideals from Deconstructed Rights, 22 HARV. C.R.-C.L. L. REV. 401, 404 (1987) (arguing against the part of critical legal studies that rejects rights-based theory).

42 Kimberlé W. Crenshaw, Race, Reform and Retrenchment: Transformation and
gressive racial goals, pre-visioned much of the direction of this movement. All of these essays stand in marked contrast not only to the liberal positions on the First Amendment or on the nature of rights that they are directly and doctrinally concerned to counter, but also to both the constitutional scepticism of the critical legal studies movement and the progressive scepticism of such critical race theorists as Derrick Bell, Alan Freeman, and, perhaps, Richard Delgado. Against progressive scepticism, the progressive constitutional faithful argue that, properly read, the Constitution indeed supports and perhaps requires these regulations. Furthermore, against the constitutional scepticism of the critical legal studies movement, they assert that the Constitution requires precisely what they argue it requires, not because of the contradictions latent in its clauses or in the liberalism behind it, but because of the progressivism of the Constitution itself.

Feminists have also contributed to this tradition, none more so than Catharine MacKinnon. Professor MacKinnon's argument that the Equal Protection Clause is directly concerned with a wide range of abuses against women, and directly requires the states to do something about them, stands in direct opposition to both liberal arguments limiting equal protection to rational categorizations of similarities and differences and to sceptical progressive claims that the Fourteenth Amendment's promise of equality is not merely irrelevant to women's progress, but indeed, hostile to it. Finally, it stands in striking opposition to the paradigmatic critical claim that, because of its indeterminacy, the Fourteenth Amendment has no meaning, pernicious or progressive, which can be effectively criticized or implemented.

All of these arguments, the positions they imply, and the twin premises of both constitutional fidelity and progressive politics on which they explicitly or implicitly rest, are richly suggestive of the possibility of a progressive constitutional faith. As paradoxical as it may sound, it seems to me that further

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Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1336 (1988) (arguing that, because racism is a central ideological underpinning of American society, critical legal studies should focus on it as well as on legal consciousness).

43 Bell, supra note 11 (using the mode of a fairy tale to explain why racial equality has not been achieved in the more than 30 years since Brown v. Board of Education).

44 Freeman, Antidiscrimination Law, supra note 12, at 1408-09 (arguing that recent Supreme Court cases ruling against affirmative action programs are not the result of recent historical whimsy, but are “firmly rooted in the contradictory character of antidiscrimination law, the agenda of which was constrained at the outset by abstract principles of formal equality that would surely reassert themselves in time”).

45 Richard Delgado, Norms and Normal Science: Toward a Critique of Normativity in Legal Thought, 139 U. Pa. L. Rev. 933, 937 (1991) (arguing that critiques of normativity in legal studies “place[] the reformer in no worse position than he or she occupied before, and [are] no more threatening to the cause of social transformation than earlier critiques of law-as-logic or law-as-empirical-science”).

46 MacKinnon, supra note 17, at 1297 (arguing that because the “similarly situated” requirement controls equality claims, the laws of sexual assault and reproductive control have not been subject to constitutional attack).
development of this tradition is, at one and the same time, utterly futile, deeply utopian, absolutely necessary, terribly risky, and one of the most imaginative, fecund, and important shared enterprises presently ongoing in the legal academy. It is utterly futile because the particular positions regarding progressive legislation that a progressive constitutional faith implies will not prevail in the immediate or foreseeable future in any institutional form. It is deeply utopian in that it envisions a reconstructed understanding of our history and constructs an extraordinarily appealing vision of our distant, if not immediate, future. It is absolutely necessary because it may be impossible to attain progressive goals in this culture as long as the morality and the coercive power of the Constitution are understood, rightly or wrongly, as in direct opposition to those progressive goals. It is terribly risky because it may very likely be either tamed, co-opted, or, at worst, revealed to be in fact—as well as in the imaginations and arguments of modern liberals—nothing but the foundation of a new tyranny. It is imaginative, important, and fecund because it carries the possibility of a profoundly new understanding of our constitutional history and of constitutional meaning, and hence carries the possibility of a new and quite radical constitution.

Conclusion

The implications of a progressive constitutional scepticism are fairly obvious and quite momentous. If the Constitution is irreversibly and deeply hostile to progressive political action targeted at abuse of power in private, intimate, and economic spheres of life, it is imperative that at least progressives know that fact, and highly desirable that the rest of us know it as well. It should occasion strategic rethinking by the former and a sustained re-examination by the rest of the community of the relative costs, benefits, virtues, and burdens occasioned by the rights and liberties that we all, to varying degrees, either “enjoy” or suffer.

The implications of a progressive constitutional faith are also quite momentous. As Catharine MacKinnon, echoing Bruce Ackerman, has suggested, such a faith, if it can be sustained, mandates a rethinking of the identity of “We the People” in whose behalf the Constitution is implemented, and by whose hand it was, and is, recreated. This paper has argued definitively for neither of these opposed positions, but has offered instead the far more modest claim that both have merit, both need an elaboration that is presently more frustrated than furthered by the terms of contemporary constitutional debate, and both would contribute mightily to progressive politics and to our constitutional self-understanding.

At the risk of courting paradox, I would like to suggest that it is not at all unthinkable or even irrational for individual progressive theorists, litigators, or political actors to harbor both sceptical and faithful attitudes and beliefs regarding constitutional fidelity. Catharine MacKinnon’s work stands as a stunning example of the possibility of rationally subscribing to both a constitutional faith and scepticism. She has authored some of the most devastating and insightful progressive criticisms of the liberal Constitution and some
of the most convincing arguments that the Constitution can, and must, be read to require progressive initiatives intended to end patriarchy. This is not self-contradiction, but an example of pragmatic wisdom. Whether the Constitution can be interpreted to promote progressive politics, or whether it is implacably hostile to such efforts, is a momentous question that need not be resolved in a moment or a lifetime. It certainly is a question that matters, and it is one we ought not lose sight of, nor allow to be muffled by the seemingly endless debates over the Constitution's ultimate compatibility with a more liberal, but arguably less appealing, political vision.