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The Aspirational Constitution

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THE ASPIRATIONAL CONSTITUTION

Robin West*

What would be the consequences for modern progressive politics of the "rule of administration" proposed by Thayer a hundred years ago in his famous essay? In The Origin and Scope of the American Doctrine of Constitutional Law, it will be recalled, Thayer proposed that the Supreme Court should only rule an act of Congress unconstitutional if the act is unconstitutional "beyond a reasonable doubt," or, put differently, that the Court should not overrule a congressional act unless that act is clearly unconstitutional. Would such a rule help or hinder progressive causes? Would a more restrained Court, and a less vigorously enforced Constitution, be an improvement over our present constitutional institutions, from an explicitly progressive political viewpoint? Would it leave the Congress freer to envision, and then to realize, a more egalitarian social order, and a freer individual and collective life?

The question is complicated by the fact that Thayer's simple rule of administration appears to be susceptible to at least two plausible interpretations, each of which could have quite different consequences. First, Thayer's proposal, transported into modern politics, might be understood as urging that the Court and Congress each perform the same duties they presently perform and in more or less the same way, but that, as the title of the essay suggests, the scope of judicial review be restricted. The Congress should continue to legislate as it always has, and the Court should continue to adjudicate as it always has, but the Court should intervene and rule an act of Congress unconstitutional only if the congressional act is unconstitutional beyond all reasonable doubt. Alternatively, the rule might be understood in a quite different way. Thayer's "clearly erroneous" standard might be read as suggesting not only that the Court should, so to speak, cut the Congress some slack, but also that primary responsibility for constitutional decisionmaking should shift away from the Court and to the Congress. Under this second interpretation of Thayer's proposal, Congress, in the course of legislating, would also ex-

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1 James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129 (1893).
2 Id. at 151.
3 Id.
plicitly (instead of implicitly) determine the constitutionality of the act under consideration, and the congressional determination of constitutionality would be overturned by the Court only if it is clearly erroneous. At various points in his essay, and particularly in his final paragraph, Thayer moves back and forth between these two interpretations as though they were more or less synonymous, or at least mutually supportive. Nevertheless, on first reading, these two interpretations of Thayer's rule seem to rest on very different anxieties about constitutional morality and politics, and they seem to express very different hopes about the possibilities of change. If Thayer was worried that excessive judicial review—the "checking and cutting down of legislative power, by numerous detailed prohibitions in the Constitution"—leaves Congress "petty and incompetent" because it has "a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the Constitution allows," those problems may be alleviated by the first interpretation suggested above: cut down on the scope of judicial review, and leave Congress freer to address problems of right and justice without the inhibitory effects of constitutional nicety. If the problem, in other words, is an excess of constitutional conscience—if the problem is that because of the fear of judicial review, concern for the Constitution has actually driven out questions of justice and right from the minds of legislators—then we should indeed seek to minimize the effect of the Constitution by limiting the scope of review. That problem, however, might well be exacerbated, not abated, by the second interpretation of Thayer's rule given above, at least if we assume a Congress conscientious in its constitutional labor. For under the second interpretation, the effect of Thayer's rule of administration would be to shift to Congress the primary responsibility for the constitutionality of its actions, and a Congress itself preoccupied with constitutionalism presumably will be more worried about constitutional nicety and less worried about justice and right than a Congress that leaves the constitutional issues to the Court. If the problem is that the Constitution itself has left Congress overly concerned with legalism and not sufficiently concerned with justice, that problem will obviously not be cured by imposing on Congress primary responsibility for the constitutionality of legislative proposals.

Similarly, if the aim of Thayer's rule is to "impress[] upon our people a far stronger sense than they have of the great range of possible harm and evil that our system leaves open, and must leave open, to the legislatures, . . . so that responsibility may be brought sharply home where it belongs," then we may achieve that result by insisting on the first inter-

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4 Id.
5 Id.
6 Id. at 155.
7 Id. at 156.
pretation, but surely not the second. The first interpretation clearly expands the range of legislative options—if legislation is to be overturned only if clearly unconstitutional, then there is considerably more that Congress might do without inviting judicial intervention. By contrast, under the second interpretation—according to which Congress is to be charged with determining the constitutionality of its actions, with their decisions overturned only if clearly erroneous—the “range of possible harm and evil” may shrink, not expand, as may public awareness of it, and hence public responsibility for it. If Congress were to take seriously its obligation to pass on the constitutionality of its own proposals, and if it did so in a conscientious manner, then presumably it would tend to censor its own work product accordingly.

On the other hand, if the problem with our current understandings, as Thayer also states in his final paragraph, is that with our current distribution of responsibilities, Congress is too little concerned about the Constitution—that the legislators, “in the matter of legality, . . . have felt little responsibility; if we are wrong, they say, the courts will correct it,”8 then shifting the primary burden of constitutional decisionmaking to Congress may indeed correct that flaw: a Congress primarily responsible for the constitutionality of its own actions will presumably spend more time considering constitutional questions than a Congress that can legitimately view those questions as the sole province of the judiciary. Correlatively, if the aim of Thayer’s proposal is to encourage Congress to operate in a more constitutionally responsible fashion, then shifting primary responsibility to Congress for constitutional decisions is a sensible first step. But, here again, if the problem is that Congress does not take sufficient responsibility for the constitutionality of its actions, then the proposal understood in the first way—as simply a proposal to limit judicial review—will be inapposite. Indeed, that problem will be exacerbated, not alleviated, by an administrative rule that does nothing but limit the scope of review. A Congress already insufficiently attuned to its constitutional obligations will presumably be less, not more, sensitive to those duties under a rule of administration which weakens the sanction and lessens the consequences of unconstitutional action.

Although I will ultimately argue in this Article that these two interpretations are not quite as contradictory as they first appear, they nevertheless are in considerable tension. One way to put the problem is that the two hopes which seem to underlie the two interpretations of the rule appear to be simply incompatible hopes, and the anxieties which give rise to them seem to be incompatible anxieties. If the problem with our present arrangements is an excess of constitutionalism—that the brooding omnipresence of the Constitution leaves Congress feeling too legalistic and too little concerned with right and justice—then we should constrain

8 Id. at 155-56.
judicial review, thereby minimize the impact of constitutionalism, and leave it at that. If, on the contrary, the problem is that Congress feels too little responsibility for the constitutionality of its actions—if the problem is that there is not enough constitutional conscience—then we should enhance the felt constitutional duty of legislators. But the problem cannot be both. There quite obviously cannot be both too much and too little of a sense of congressional constitutional duty. Thus, it looks as though Thayer has blurred two very different anxieties: the fear that Congress pays too much attention to “constitutional legalism” and hence not enough attention to questions of right and justice, and the very different fear that Congress is not sufficiently attentive to constitutionalism, and relies too heavily on the Court to correct its errors. It also looks as though Thayer has blurred two very different hopes: that by limiting the scope of judicial review, Congress will be and will feel freer to consider a full range of options for good or ill, and hence be made more responsible for the morality of its actions, and that Congress might become more responsible for the constitutionality of its actions by being given primary responsibility for constitutional determinations.

Behind the confusion in the concluding paragraph of Thayer’s essay is an almost palpable ambivalence not only about judicial review, but also about the Constitution itself. Dissatisfaction with a “robust Constitution” is right on the surface of the first interpretation of the proposal given above: Thayer was clearly willing to tolerate a considerable decrease in constitutional enforcement—and hence a considerable amount of unconstitutional law—in order to achieve a Congress more attuned to right and justice and more fully responsible as a result for the full range of options open to it.9 The rather clear inference is that the Constitution itself is part of the problem, that constitutional constraints are themselves in some way incompatible with the pursuit of right and justice, and accordingly ought to be limited in scope. Dissatisfaction with judicial review is right on the surface of the second interpretation: Thayer was clearly willing to restrict the Court’s purview over what have traditionally been judicial questions and reassign those questions elsewhere in order to achieve a Congress more attuned to its constitutional obligations.10 The clear inference of this interpretation, in contrast, is that the Constitution itself is not the problem—indeed constitutional conscience would promote, not hinder, right and justice—but rather, that the problem is insufficient congressional attention to the Constitution, fostered by the shortcomings of judicial review.

This ambivalence was not just an idiosyncracy of Thayer and was certainly not peculiar to his time. Indeed, the problem that gives rise to these two very different anxieties is at the heart, not the periphery, of the

9 Id.
10 Id.
idea of constitutionalism itself, at least if judicial review is understood to be a necessary feature of that idea. The Constitution limits responsibility for "questions of right and justice" because it mutes some of the possible answers to those questions, but at the same time, judicial review limits congressional responsibility for questions of constitutionality because it delegates those questions to the judiciary. As a consequence, dissatisfaction with congressional performance within a constitutional scheme of government may typically find itself expressed in terms of dissatisfaction with the allocation of responsibilities for constitutional enforcement and typically may even be manifested in the somewhat contradictory form in which Thayer expresses his anxieties. If we are concerned that Congress feels insufficiently attentive to questions of right and justice because it feels overly constrained by the Constitution, we will seek to limit the scope of the Constitution. If we are concerned, on the other hand, that Congress is insufficiently attentive to the Constitution, we may seek to somehow expand its scope, or at least increase congressional awareness of its principles. And if we have simply a vague sense that Congress is not legislating in the way it should, we may think that perhaps we should try to increase its sense of responsibility for both the right and justice as well as for the constitutionality of its actions.

In contemporary politics, this Thayerian ambivalence toward the Constitution, judicial review, and congressional decisionmaking finds an echo in the thinking of modern political progressives about the value of judicial review, the value of the United States Constitution, and the value of constitutionalism itself. On the one hand, there are a number of progressive constitutionalists who have argued over the last few years for what I have labeled above the second interpretation of Thayer's rule—that Congress should assume a greater responsibility for the constitutionality of its actions—not only for the reasons Thayer suggests toward the end of his essay, but also for the more explicitly progressive reason that by doing so it could develop more progressive understandings of constitutional mandates than those developed by the Court and could thereby ease the passage of progressive legislation. On the other hand, there are also an increasing number of progressive calls for something like the first interpretation of Thayer's proposal provided above—that the Court should limit the scope of judicial review—and again not only for the general reasons that Thayer suggests, but also for the more specifically progressive reason that due either to the conservatism of the Court or to the conservatism of the Constitution itself, aggressive judicial review of congressional acts is likely to constitute more of a hindrance than a spur to

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progressive change.\textsuperscript{12} And there are at least a few (including me) who, at the risk of inconsistency, appear to embrace both positions simultaneously.\textsuperscript{13} Thayer's ambivalence, then, no less than the rule he proposes, should resonate with modern progressives in our current political and cultural world. I would like to explore and to some degree try to resolve that ambivalence in the remainder of this Article.

In Part I, I explore the consequences for modern progressive politics of Thayer's suggested rule of administration under the first of the two possible interpretations I have suggested above—a "beyond all reasonable doubt" standard for constitutional review, the consequence of which would be to limit the scope of judicial review. I will suggest that progressives have good reason to find such a rule attractive.

In Part II, I look at the second interpretation of the rule: a mandate to transfer primary responsibility for constitutional decision making to the Congress, leaving the Court to review and overturn such determinations only when clearly erroneous. I will first argue that on first reading, the consequences of such a rule seem regressive, not progressive: a conscientious Congress might well censor its own progressive instincts on behalf of constitutionalism even more than would a conservative Court. I will then argue, however, that in spite of the regressive appearances of the second interpretation, there is a conception of the Constitution and of the nature of interpretation according to which it makes some sense to hope that a Congress responsible for constitutional decisionmaking would develop a distinctively progressive understanding of constitutional guarantees. If so, then the peculiar combination of hopes and anxieties that seems to drive Thayer's article might be not as contradictory as it first appears. If we assume that the nature of the Constitution is such that Congress could legitimately ascribe to the Constitution very different, and much more progressive, meanings than those ascribed by the Court, then the apparent contradiction between wanting a Congress freed of inhibiting judicial review of constitutionality but burdened by congressional review of constitutionality disappears.

The argument, however, that Congress could legitimately read the Constitution to mean something quite different from what the Court understands it to mean must rest on more than simply the alleged vagueness of the Constitution, as argued by Thayer, or the alleged indeterminacy of the Constitution, as propounded by modern and postmodern constitutional theorists. In order for the congressionally interpreted Constitution to be at all authoritative, those interpretations must occur within a conception of the Constitution which is both legiti-

\textsuperscript{12} See Mary Becker, Judicial Review and Women's Rights (unpublished manuscript, on file with author); Louis M. Seidman, Brown and Miranda, 80 CAL. L. REV. 673, 680 (1992) (arguing that two seemingly aggressive decisions were actually "tactical retreats").

\textsuperscript{13} I discuss this ambivalence in some detail in Robin West, Constitutional Scepticism, 72 B.U. L. REV. 765 (1992).
mate and which renders those interpretations in some sense compelling. The goal of Part II of this Article is very briefly to suggest one such conception.

I. LIMITING THE SCOPE OF JUDICIAL REVIEW

Returning to the first interpretation of Thayer’s rule, what might be the modern political consequences of Thayer’s rule of administration, understood simply as a “clearly erroneous” standard? Would such a rule help or hinder progressive political change? A fairly straightforward argument can be made to the effect that from a progressive perspective, Thayer’s clearly erroneous standard would be an improvement over our present constitutional arrangements, for three reasons.

The first reason is, loosely, historical: the “adjudicated Constitution,” by which I mean the Constitution that has been construed and applied by the courts, has proven to be a markedly conservative foundational document, and for that reason alone, a rule of restraint looks desirable. More often than not, our adjudicated Constitution has served to protect existing distributions of social, economic, racial, sexual, linguistic, and cultural power against serious threat of change. It has done so by insulating the private, social, economic, and intimate spheres of life, constituted in part by gross inequities of resources and maldistributions of power, against legislative attempts at redistribution or renegotiation of the terms of private, social, or economic struggle.14 That foundational conservatism is evidenced not only by the Lochner-era15 Court’s substantive Due Process Clause, Contract Clause, and Takings Clause jurisprudence, which insulated economic hierarchies from redistributive legislative attack, but also by the modern Scalia Court’s understanding of the Equal Protection Clause, which insulates racial hierarchies from progressive state legislative attack,16 and the same Court’s interpretation of

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the First Amendment, which insulates cultural hierarchies from legislative renegotiation through hate speech ordinances.\(^\text{17}\) Although the adjudicated Constitution obviously has from time to time been used to effectuate progressive gains and to solidify progressive victories, those moments have been rare, anomalous, and often fleeting: the victory has been, as often as not, soured by near instantaneous conservative reconstruction.\(^\text{18}\) For the most part, the clauses of the adjudicated Constitution have operated in concert to conserve present distributions of social, economic, and private power against legislative and democratic attempts at redistributing those resources or renegotiating the terms of struggle. If for no other than that reason, progressives would be well advised to break their romance with the United States Constitution. If it is true, as I have suggested, that the adjudicated Constitution is doctrinally and substantively more of a bar to than a vehicle for progressive legislation, then Thayer’s rule looks attractive indeed.

But what if we assume, as countless contemporary skeptics insist we should, an indeterminate Constitution, with neither conservative nor progressive content? If we assume a Constitution of indeterminate meaning, then whether Thayer’s clearly erroneous standard would help or hinder progressive causes depends on what sort of Congress and what sort of Court one hypothesizes. One can easily construct two contrasting scenarios. First, one might imagine a conservative Congress passing legislation forbidding homosexuals from serving in the armed forces, passing a Fetal Life Protection Act making the procurement of an abortion or the provision of abortion services a federal crime, abolishing Aid to Families with Dependent Children, or amending the Civil Rights Acts to render state or private voluntary affirmative action plans civil rights violations, generously providing appropriate remedies for injured individuals. And, one might imagine a progressive Court that views much of this legislation as unconstitutional as well as unwise, but nevertheless feels itself, and in a very real sense is, restrained by Thayer’s rule of administration from ruling such acts unconstitutional violations of the Fourteenth, Thirteenth, or First Amendments because none of these pieces of legislation, whatever its demerits, is unconstitutional beyond all reasonable doubt. Alternatively, one might just as easily imagine a progressive Congress passing legislation mandating that employers provide paid leave for child care for new parents as well as comparable pay for comparable work; making rape, marital rape, and domestic violence against women criminal civil rights violations; prohibiting and providing sanctions for hate speech targeting racial, ethnic, or sexual minorities; and requiring or encouraging private affirmative action efforts to correct for past and present racial injustice. And, one might imagine a conservative Court that views


\(^{18}\) See Seidman, supra note 12; Becker, supra note 12.
much of this legislation as unconstitutional under the Takings Clause, the First Amendment, the substantive Due Process Clause, or the Equal Protection Clause, but nevertheless feels itself, and in a real sense is, constrained by Thayer’s rule of administration from finding these legislative acts unconstitutional. None of these legislative acts, one would have to admit, is unconstitutional beyond all reasonable doubt. From a progressive standpoint, under the first scenario, Thayer’s rule of administration looks unfortunate, and under the second scenario, it looks desirable. If we assume an indeterminate Constitution, then the political desirability of Thayer’s rule of administration, under this first interpretation, seems to depend on what sort of political configuration one imagines.

In the next Part, I will briefly argue that we should not assume an indeterminate adjudicated Constitution, for the simple reason that we do not have one. Our adjudicated Constitution’s meaning is relatively determinate and relatively conservative, and the delusion that it is not so is largely responsible for the incredible drain of progressive time, resources, energy, and political capital expended in this culture on progressive constitutional litigation—time which could much more profitably be expended in other ways. Nevertheless, here I want to make a much more limited point: that from a progressive viewpoint, even if we assume an indeterminate adjudicated Constitution, adoption of Thayer’s rule of administration would be an improvement over our present constitutional understandings for two different reasons.

First, simply as a political matter, we may be justified in assuming that the second, rather than the first, of the two scenarios described above (a relatively progressive Congress and a relatively conservative Court) is closer to present reality and will remain so for the foreseeable future. Not only does the “progressive Congress and conservative Court” formulation better describe our present reality than the opposite, but given the dynamics of congressional politics and judicial appointments, it is likely to remain so. But moreover, whatever may be the politics of the future Court, there is a lot of good sense in Thayer’s suggestion that for these purposes we should assume a virtuous rather than a mean-spirited Congress.19 While for Thayer, congressional virtue meant simply a Congress of informed, public-minded, rational, and intelligent citizens,20 our modern progressive conception of congressional virtue is quite different. By congressional virtue, from a progressive perspective, we mean not only the absence of corruption and some minimum of intelligence, but also real, rather than virtual, representation of various presently underrepresented groups. An ideal Congress in our time, much unlike Thayer’s, and again from a progressive perspective, is one that is truly representative of the shifting groups—defined in terms of race and

19 Thayer, supra note 1, at 149.
20 Id.
sex as well as class and ethnicity—that make up the voting and nonvoting public. This is as much a part of our ideal as the rationalist virtues Thayer suggested not because we have suddenly and inexplicably become sticklers for representative purity, but because we have good reason to believe that a Congress with a significant number of women will be more responsive to the needs of women, family, and children, and hence will be a better Congress and enact better laws because of that fact, and that likewise a Congress with a significant number of African-Americans will be less likely than an all white enclave to slight the interests of racial minorities, and hence will be a better Congress and enact better laws because of that fact. A racially and sexually mixed Congress, it is not unreasonable to suppose, would more likely sponsor progressive legislation than an all white and all male Congress, and a racially and sexually mixed Congress—one which is more truly representative, which “looks like America”—is closer to our ideal, if not Thayer’s ideal, of what a Congress should be. If we follow Thayer’s advice, then, and construct our constitutional practices against a hypothesized ideal of congressional conduct, then again from a purely pragmatic and avowedly progressive political perspective, we would be far better off operating under Thayer’s proposed rule of administration than under our present constitutional understandings.

Finally, there are also pragmatic virtues for Thayer’s proposed rule that are compatible with progressive politics, which make that rule appealing regardless of the content given the Constitution’s general clause and regardless of the determinacy or indeterminacy of the adjudicated Constitution. Judicial interpretation of constitutional phrases has the effect of validating one of several possible interpretations of the general aspirations that the Constitution articulates and invalidating others. Given the momentous gulf between progressive aspiration and present political reality, that process of validation and invalidation itself has real drawbacks; it shrinks our legislative options. I think it is fair to say, for example, that we need a far greater degree of material equality between whites, Hispanics, and African-Americans than presently exists if we are going to fulfill our aspirational ambition to live as a united community. I think it is also fair to say that we do not have a very good sense of how to go about achieving that goal. Race-specific, race-conscious affirmative action plans, for example, of the sort the Court views as constitutionally suspect, may be either an anathema to the overall end of racial equality or they may be absolutely necessary. Legislators alert to the real possi-

22 Becker, supra note 12.
23 Bruce A. Ackerman, Beyond Carolene Products, 98 HARV. L. REV. 713 (1985); Derrick Bell & Preeta Bansal, The Republican Revival and Racial Politics, 97 YALE L.J. 1609 (1988) (expressing skepticism that blacks would even be included in Sunstein’s new vision of republicanism).
bility that a hostile Court will strike down race-conscious remedial legislation obviously will be less inclined to support or even consider it, and that felt constraint on permissible means ought to be understood as a very real obstacle to racial progress. From a purely pragmatic perspective, in other words, we need—at least—a wide open and no-holds-barred public conversation about how best to achieve racial justice, and that conversation, to say nothing of the legislation that ought to follow it, is hindered, not furthered, by constitutionally imposed constraints on our options.24

Examples could be multiplied: arguments about the wisdom of controlling pornography are hindered, not helped, by concerns about the constitutionality of such regulation; arguments about the necessity of comparable worth legislation are similarly put back, not pushed forward, by the inhibitory effect of concerns over the Takings, Contract or substantive Due Process Clauses. Those inhibitory effects, in turn, would surely be ameliorated by Thayer’s rule of administration: if we felt confident that a legislative decision would not be overturned unless clearly unconstitutional, presumably we would be that much less inclined to be deterred from investing our energies in the exploration of its merits. Thayer’s rule, in other words, would enhance democratic conversation and legislative experimentation, and it might do so in precisely those areas of life in which conversation and experimentation are most desperately needed—and most drastically in short supply.

II. CONGRESSIONAL RESPONSIBILITY FOR CONSTITUTIONAL DECISIONMAKING

The progressive case for the first interpretation of Thayer’s rule of administration, then, is fairly straightforward: progressive causes are more likely to be helped than hurt by such a rule for three reasons. First, the adjudicated Constitution itself is so overwhelmingly conservative that any constraints on its reach would be for that reason alone a good thing. Second, even if we assume an indeterminate Constitution, the meaning of which is entirely determined by the political predispositions of the Court, it is more likely that such a rule would inhibit a conservative Court from overturning progressive legislation than the other way around. Finally, regardless of the political makeup of the Court and Congress and regardless of the determinacy of the Constitution, progressive gains require a degree of legislative experimentalism that judicially imposed constitutional constraints inhibit.

If, however, what Thayer meant by his proposed rule of administration is something closer to the second interpretation I suggested above—that Congress should shoulder the primary responsibility for deciding the

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24 I am indebted to Mary Becker for helping me see that this really is a separate argument. Becker, supra note 12.
constitutionality of the acts it passes and that the Court should overturn those decisions (and therefore the legislation they affect) only if they are clearly erroneous—then the matter is more complicated. It is not nearly so clear that Thayer’s rule, understood in this way, would be an improvement over our current constitutional understandings. The obvious problem with Thayer’s proposed rule, understood in this second way and again from a progressive perspective, is that it is not clear that Congress’s relative inattentiveness to constitutional questions is bad. If, as suggested above, the Constitution is an irredeemably conservative document, then the likelihood that Congress will respond sensitively to the moral demands of distributive justice seems to be lessened, not enhanced, by Thayer’s proposed rule of administration. In other words, if modern progressives are right to worry that the Constitution itself is incompatible with egalitarian political outcomes, then the most likely outcome of Thayer’s rule of administration under this second interpretation might be opposite to the outcome under the first: given the conservative nature of the Constitution itself, a Congress more attuned to constitutional questions might be less likely to consider, much less pass, legislation supporting a progressive agenda seemingly antithetical to the Constitution’s core commitment to the conservation of present distributions of economic and social power. Thus, the consequences of these two interpretations of Thayer’s proposal, no less than the different anxieties and hopes that seem to generate them, seem to point in diametrically opposed directions.

The regressiveness of this second interpretation may not be as great as it first appears, however. As a number of commentators have recently argued, congressional interpretation of the Constitution might lead to constitutional meanings quite different from, and arguably more progressive than, those meanings ascribed to the Constitution by the Court. Put negatively, and minimally, it seems fair to say that the assumption that delegation to Congress of primary responsibility for constitutional decisionmaking would hinder progressive politics rests on a questionable understanding of constitutional meaning—that the meaning of the Constitution would be unaffected by such a shift. In other words, both the progressive undesirability of the proposal under the second interpretation and the apparent contradiction between the two interpretations disappear if Congress could give the Constitution a meaning more in line with the demands of right and justice (in Thayer’s terms) or with egalitarian ideals (in progressive terms) than that given it by the Court. If the Constitution, when interpreted by Congress, means something different, and specifically something more in line with progressive aspirations, than the meaning which it has historically been given by the Court, then it is not inconsistent to advocate both greater congressional responsibility for

25 See, e.g., Cass Sunstein, The Partial Constitution 9-10 (1993); Brest, supra note 11; Lawrence G. Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212 (1978); West, supra note 11.
constitutional decisionmaking and greater congressional sensitivity to progressive egalitarian aspirations facilitated by a weakening of traditional judicial review.

And indeed, as a number of commentators have argued,\textsuperscript{26} it is not hard to imagine that a Congress composed of constitutional interpreters who are somewhat more progressive than the conservative Court could and very likely would interpret the Constitution so as to permit any number of progressive legislative initiatives that the Court in recent years has tended to view as constitutionally suspect. It is not even hard to imagine such a Congress interpreting the Constitution as not just permitting but requiring progressive legislation. Although the modern Court surely would not adopt such an interpretation, one can imagine, for example, a progressive Congress reading the Fourteenth Amendment’s equal protection guarantee to require Congress to pass legislation assuring greater—more equal—police protection against private violence directed toward women, poor people, African-Americans, and gays and lesbians. Such a reading, it could even be argued, is closer than our present multietiered “rationality review” to the original meaning of the Equal Protection Clause intended by the Reconstruction Congress that passed it—a Congress also faced with the problem of unchecked private violence against one group of citizens by another.\textsuperscript{27} The proposed Violence Against Women Act\textsuperscript{28} as well as the nascent civil rights bill aimed at protecting gays and lesbians against gay bashing\textsuperscript{29} could without much stretching be viewed as logical outgrowths of the Ku Klux Klan Act that inspired the Fourteenth Amendment, and accordingly as the modern cornerstones of a progressive congressional interpretation of the Equal Protection Clause. Similarly, with almost no stretching, one can imagine a progressive congressional constitutional committee interpreting the Thirteenth Amendment to require some sort of federal affirmative action aimed toward the reparation of the African-American community for the continuing harms visited upon it by the aftermath of slavery and white racism. Such legislation could readily be understood as the logical outgrowth of the aspiration of “forty acres and a mule” that informed the Thirteenth Amendment, and accordingly as the modern cornerstone of a progressive congressional interpretation of the Thirteenth Amendment.\textsuperscript{30} To take a final example, one can imagine a progressive congressional constitutional committee requiring the liberty prong of the substantive Due Process Clause to require federal legislation insuring positive liberties,

\textsuperscript{26} See authorities cited supra note 25.
\textsuperscript{27} I have argued this in more detail in Robin West, \textit{Toward an Abolitionist Interpretation of the Fourteenth Amendment}, 94 W. VA. L. REV. 111 (1991).
rather than simply to prohibit the denial of negative liberties. Such a reading also may be closer to the Clause's original meaning than that presently embraced by the Court.\textsuperscript{31} Examples could obviously be multiplied.

Thus, freed of the conservative ideology of the present Court and, perhaps more importantly, freed of the institutional responsibility of the Court to interpret the Constitution only in such a fashion as not to demand remedies beyond the realistic powers of the Court, it is not unreasonable to think that Congress could interpret the open-ended phrases of the Constitution in a way far more conducive to progressive ends than has the Supreme Court, with the end result being a body of constitutional law that looks far different, both in form and content, than that which we have today. The proposed Violence Against Women Act,\textsuperscript{32} the proposed Freedom of Choice Act,\textsuperscript{33} various affirmative action guarantees, the Americans with Disabilities Act,\textsuperscript{34} and, potentially, a civil rights bill for gays and lesbians would become not only permitted by such a congressional reading of the Thirteenth and Fourteenth Amendments, but constitutive of their meaning. And finally, if that is right—if, by virtue of their different overall political orientations and their different institutionally determined remedial powers, Congress could interpret the Constitution's general phrases in a manner conducive to progressive ends, and if, under Thayer's rule of administration, such interpretations would not be clearly erroneous—then the distance between the two interpretations of Thayer's proposal may not be as great as first appeared, either generally or from a progressive perspective. In short, if the Constitution can fairly be read as requiring some measure of social, racial, economic, and sexual egalitarianism, then a Congress sensitive to its constitutional obligations will surely not for that reason be deterred from egalitarian considerations.

One can, then, easily imagine such a Congress, and one can construct, without too much stretching of the primary materials, arguments to support their progressive outcomes. But it does not follow from the fact that these progressive interpretations are imaginable, or even that the arguments in support of them have merit, that these interpretations—so dramatically different from those reached not just by this Court, but by most Courts over the last two hundred years—would have any meaningful constitutional significance: that they would be, in a word, authoritative. Would they, in other words, be truly constitutional arguments—true to the Constitution we have, true to our understanding (whatever it may be) of what the Constitution is, true to our sense of

\textsuperscript{31} I have argued this elsewhere. See Robin West, Reconstructing Liberty, 59 Tenn. L. Rev. 441 (1992).


\textsuperscript{34} 42 U.S.C. §§ 12101-12213 (1990).
what the Constitution should be—or would they be, rather, simply political arguments with the rhetorical flourish of constitutional language? Would there be, indeed, any connection at all between these progressive interpretations of the Constitution and the authoritative Constitution that in some sense binds us? If, as I have argued above, the adjudicated Constitution has at its core irredeemably conservative content, what significance, if any, can attach to a legislated Constitution that gives rise to very different and profoundly incompatible interpretations? These questions are the questions that Thayer's proposal truly raises, particularly if his proposal is taken seriously as urging greater congressional attention and lesser judicial attention to the Constitution. Would the different, but presumptively reasonable interpretations a progressive Congress might generate, if left untouched by a conservative Court constrained by a clearly erroneous standard, be authoritative? And if not, would they be, in any recognizable and meaningful sense, constitutional interpretations? Or would they simply be disguised political arguments? If they were the last, would the ultimate consequence of Thayer's proposal be simply a diminution—perhaps to the vanishing point—of the role of the Constitution in modern life?

There are two possible arguments—one bad, one good—that the answer to these questions is yes, that even dramatically divergent (and more progressive) congressional interpretations of the Constitution would be authoritative and hence "constitutional" in some important sense, meaning minimally that they would hold some claim over what George Fletcher has recently called our "constitutional identity." The first argument, although widely held, is not ultimately successful, so let me start with it. One could argue that the sort of progressive congressional interpretations I have suggested above would indeed be authoritative, or at least would be as fully authoritative as those provided by the Court, simply because, as suggested by Thayer himself in his article and as elaborated by countless modern and postmodern proponents of indeterminacy, the meaning of the Constitution is surely sufficiently indeterminate to admit of more than one plausible—or reasonable—interpretation. The argument would simply be that the Constitution's meaning is no more essentially conservative than it is essentially anything else, and it is therefore as open to Congress as it would be open to a more progressive Court to find in that document constitutional support for progressive, no less than for conservative, outcomes. If we assume an indeterminate rather than determinate Constitution, then a progressive Congress is likely to find in the Constitution progressive meanings, just as a conservative Court will find in the same document conservative meanings. And if that is true, then there is no reason to withhold the authority from the one that is granted as a matter of course to the other.

36 Thayer, supra note 1, at 144.
The assumption that the Constitution's meaning is truly indeterminate, in other words, goes a long way toward resolving the apparent contradiction in Thayer's proposal. Even assuming that judicial review has overdeterred Congress from considerations of right and justice, it has done so only because of a particular crabbed meaning imposed upon it by the Court, not because of the essential meaning of the Constitution itself. Accordingly, Congress could both be more attuned to right and justice and at the same time shoulder responsibility for authoritative constitutional interpretation by simply interpreting the latter as requiring nothing but the former. In other words, constitutional integrity does not undercut the general goals of right and justice if constitutional integrity does not meaningfully restrain or restrict judgment.

The problem, however, (or at any rate the incompleteness) with this essentially negative resolution of the contradictory hopes, anxieties, and consequences at the heart of the two possible interpretations of Thayer's proposal—that they dissolve under an indeterminate Constitution—should be as obvious as its virtues: the indeterminacy of the Constitution, while facilitating the development of divergent congressional interpretations, in no way mandates those interpretations. As a consequence, while the indeterminacy of the Constitution does indeed undercut the authority of any particular interpretation of it—as both the propounders and the critics of the indeterminacy thesis generally insist—and hence undercuts the authority of regressive interpretations, it also undercuts the authority of any alternatives. A congressionally generated, progressive interpretation of the Constitution, even if permissible, if only one of an infinite number of possible interpretations, has no claim whatsoever upon our collective conscience, no power to constrain our collective choices, and in short, no authority to guide our collective life. Although the indeterminacy of the Constitution in a sense resolves the appearance of contradiction in Thayer's two proposals by facilitating alternative and presumably more progressive interpretations of the Constitution, it does so at the not insignificant cost of stripping the Constitution of any authoritative, supra-political force. If the Constitution's meaning simply reiterates—because it mirrors—the political convictions of its interpreters, then the Constitution is not only not an authoritative source of guidance but it is redundant, and even more so should the interpretation emanate from congressional rather than judicial deliberation. To be a constitutional interpretation—an interpretation of the Constitution, rather than an interpretation of an interesting historical political document—a constitutional interpretation must be authoritative—it must have some claim to our collective deliberations and our individual reasons for acting. And, for an interpretation to be authoritative, it must follow in some way from a conception of the Constitution and not simply from the political commitments of its interpreters.

The indeterminacy claim, in short, is not going to be of much help in
salvaging the coherence of Thayer’s proposal. This should not be a surprise to indeterminacy’s most adamant proponents. The indeterminacy thesis is and has been a tremendously potent tool for delegitimizing power: it strips the interpreter of the peculiar form of authority that comes from attributing one’s own decisions to the commands of a univocal text. For precisely that reason, however, it is of no use whatsoever to those who seek to confer power where it has not previously resided, as do proponents of congressional constitutional interpretation. Such proponents do indeed seek to decentralize or at least to delimit the authority of the interpretation of the Constitution given by the Court—thus the illusory gains of indeterminacy. But they seek to do so in order to ultimately assert the authority of a different interpretation provided by Congress. If congressional interpretations of the Constitution are permissible for no better reason than that there are simply no constraints on constitutional meaning, then even if permissible, those interpretations will have no constitutionally persuasive force. There is no reason to reject them out of hand, but there is no reason to accept them either. Whatever authority, persuasive or otherwise, that might emanate from the fact that the progressive interpretation is a constitutional one—that it stems from a shared national, intergenerational community, that it transcends politics, that it is the product of consensual government, that it emanates from “We the People,” or whatever—disappears in the face of indeterminacy. Whatever the political argument for putting forward the progressive legislation in question, then, it will gain nothing by being conjoined with a progressive constitutional argument regarding its constitutional status. The progressive constitutional interpretation one might provide is simply superfluous—and hence not constitutional—if it is a permissible meaning only because the Constitution is in some significant sense meaningless.

The second argument, the argument I want to endorse, also rests on a view of the nature of interpretation. Although it is often confused with the indeterminacy thesis, it is quite different and has very different consequences. According to the “reader-response” school of interpretive theory, at least as it has been developed by Stanley Fish, a text’s meaning is not determined by the text or the text’s authors, but rather by some set of purposes, needs, or interests of the relevant interpreting community. A text, then, does not determine its own meanings; rather, its meaning is a product of the process of interpretation. Although often confused with the indeterminacy thesis, this reader-response thesis, which for brevity I will simply call the “interpretation thesis,” is quite different. The differences between them carry significant differences for our understanding of the compatibility or incompatibility of the ideas of constitutionalism and legal authority and, therefore, ultimately, for the significance of the second interpretation of Thayer’s rule of administration. Those differences, then, and the reason for the confusion between them, are worth exploring in some detail.
What is typically meant by the interpretation claim, at least by reader-response theorists, is not that a text has multiple meanings, but that the text itself does not determine its own meanings. A text, then, is "indeterminate" in the sense that the text itself is not determinative of its meaning. But it does not follow that a text does not have a meaning, nor does it follow that a text has or can have multiple meanings. Rather, it follows only that to the extent that the text's meaning is determinate, something other than the text itself is doing the determining. The meaning of a text may be determined by the social milieu in which it is read, the institutional demands of the profession or discipline that has some interest in the document, or the set of expectations which the community of readers brings to documents of the general category of which the particular text is an instance. If those constraints are themselves sufficiently entrenched, then the text's meaning will be very determined indeed. On the other hand, if those constraints are not particularly entrenched, then it will not be. But it is the community, its expectations, and its needs—not the text—that is doing the determining. The point of the interpretation thesis is not so much to insist upon the ultimate plasticity of texts. Indeed, the determinacy of a text, if the interpretation thesis is right, is an entirely contingent question: whether a text is or is not determinate depends upon the homogeneity of the needs, interests, and expectations of the community of interpreters who have some use of it. Rather, the point of the interpretation thesis is simply to underscore the fact that it is the community of readers, their needs, interests, and purposes which is doing the constraining, not the text itself.

Although it is by now a widely held one (at least by lawyers), the belief that it follows from the interpretivists' claim that the readership of a text determines meaning, that a text has multiple meanings, which in turn strips any particular interpretation of authority, rests on a misunderstanding of the interpretation thesis and in particular a confusion of it with the indeterminacy thesis. It has indeed become commonplace in the legal literature to assume, and to assert, that the interpretation thesis propounded by Fish and other reader-response theorists implies that a text, including a legal and constitutional text, can have a multitude of meanings. This is the position advocated by a number of critical legal scholars, and it is more or less the position attacked by Owen Fiss in his justly famous piece, Objectivity and Interpretation. It is the position behind the claim of the Critical Legal Studies movement, and the fear of its critics, that the interpretation thesis, like the indeterminacy thesis, in some important way undermines the law's claim to legitimacy. But in spite of its widespread currency in law, the notion that the interpretation claim implies that a text can have many or even an infinite number of

38 Owen M. Fiss, Objectivity and Interpretation, 34 Stan. L. Rev. 739 (1982).
interpretations with an equal claim (and therefore no claim) to validity is wrong: that is not, at any rate, what the claim means to a number of its most prominent advocates.

The interpretation thesis, properly understood, frees us of the illusion not so much that a text has only one meaning, but rather that it is the text itself, rather than the community of readers, that determines its meaning. The point of the interpretation thesis, then, is not that a text’s meaning is indeterminate; quite the contrary, the meaning of a text may be fully determined, but if so, it is determined by institutional, professional, or cultural attributes of the community of its interpreters, rather than by the text itself. It follows, significantly, that a text’s meaning is never a function solely of the text itself, and it also follows that a text might not carry the same meaning from one institutional context to another. But it does not follow that an interpretation of a text loses its claim to authority. Within a given interpretive community, one interpretation may well be authoritative, and its claim to authority within that context will be some combination of its intellectual and political power. In the constitutional context, then, the interpretation thesis, like the indeterminacy thesis, frees up, so to speak, constitutional interpretations from inquiries into the plain meaning of the document: whatever the meaning of a text, it is not conveyed by those sources. Unlike the indeterminacy thesis, however, the interpretation thesis does not suggest that the Constitution has no meaning or has an infinity of meanings, and it does not imply that any particular interpretation of the Constitution will have no authority. What it does imply is that the authority of a proposed constitutional interpretation—the merits of a claim to constitutional meaning—will to some degree be a function of the fit between that claimed interpretation and the purposes, needs, and interests of the community of interpreters interested in the text. Whether an interpretation of the Constitution will even be recognizable as an interpretation of the document, whether it will count as a good interpretation, and whether it will be acknowledged as the best and hence most authoritative, will be largely a matter of the degree to which the interpretation feels right—follows naturally—in the light of the shared institutional identities of the Constitution’s interpreter and his critics.

In the constitutional context, the difference between the interpretation thesis and the indeterminacy thesis is a difference that matters. It is not just important, but is in some sense mandatory that an interpretation of the Constitution be authoritative and not just plausible. Indeed, Owen Fiss is probably right to think that if an interpretation does not claim to be authoritative, it is not for that very reason an interpretation of the Constitution. The Constitution by definition simply is that document, or that set of beliefs, or whatever, that has some hold on our behavior, our beliefs, and our collective and individual identity. If whatever we are considering does not have that sort of authority, chances are good it is
not a constitution. An interpretation of the Constitution that does no more, and claims to do no more, than simply reiterate the interpreter's politics, then, is not just redundant, but it is even in a sense anticonstitutional; it is the antithesis of the idea of constitutionalism. An interpretation of the Constitution must claim authority over our political identities; otherwise, whatever else it may be, it simply is not constitutional interpretation.

That the interpretation thesis and the reader-response movement are widely viewed, and feared, as having "problematized" all of this is ironic. The most important insight of the reader-response understanding of the nature of interpretation, at least for constitutionalists, is that far from stripping the Constitution of authority, the interpretation thesis actually accounts for it. For if this understanding of the nature of interpretation is right, then the otherwise mysterious authority of the Constitution—its peculiar claim on our behavior and beliefs—is relatively easy to explain: its authority derives from its convergence with the defining purposes and interests of the various communities that from time to time have an interest in its interpretation. Correlatively, if the interpretation thesis is right, then the relative merits of a particular interpretation, and hence the authority of an interpretation, are a function of the degree to which it renders the Constitution convergent with or divergent from those defining purposes. This hardly strips the Constitution of authority; quite the contrary, it accounts for it in a way that resonates with, rather than detracts from, the participatory and democratic ideals of constitutional forms of government.

At any rate, if we assume for purposes of argument that the reader-response understanding of the nature of interpretation is right, then to return to the second interpretation of Thayer's rule of administration, the question whether a progressive congressional interpretation of the Constitution would or could ever be authoritative depends upon whether there are any attributes of a hypothetical community of congressional constitutional interpreters which might in turn suggest an interpretive context within which the progressive interpretations of the constitutional phrases suggested above would seem to be—and in fact would be—authoritative, rather than simply permitted. If the answer to that question is yes, then it would make some sense to think that Congress might meaningfully and correctly interpret the Constitution in a more progressive way than has the conservative Court, and if that is right, then it also makes some sense to argue that both freeing Congress from the constraints of judicial constitutional review and subjecting it to the constraints of congressional constitutional review might encourage legislation at once both more constitutional and more progressive. Although what follows is necessarily almost entirely speculative, it seems to me that the fundamental differences between judicial and congressional purposes, and the distinguishing features of legislative as opposed
to judicial lawmaking, imply at least three foundational differences between the core content of what I have been calling the "adjudicated" and the "legislated" Constitution. Those differences, in turn, might imply an authoritative rather than simply permitted progressive interpretation of our constitutional guarantees.

The first difference between the legislated and the adjudicated Constitution has to do with the generic nature of a constitution. As a number of reader-response theorists have argued, the interests, expectations, and purposes of an interpreting community can profoundly affect the identity of the interpreted text, and the identity of a text, in turn, will effect the text's meaning. To use a now overworked example, an Agatha Christie novel, when read by casual readers expecting a detective story and seeking a particular kind of entertainment, carries with it one set of meanings, but if read by readers expecting a philosophical treatment of the nature of death might carry a very different set of meanings.39 Within the community of readers seeking, expecting, and responding to a detective story, the text has a determinate set of meanings, and in fact, presumably, a fairly narrowly determined set of meanings. Within that community, that set of expectations, that set of shared needs and purposes, some readings are clearly wrong and some better than others. On the other hand, within the community of readers looking for a treatise on death, the same text has a different, but possibly equally determined, set of meanings. Within that context, there are similarly some readings that are clearly wrong and some superior or inferior to others.

In a similar way, the different institutional purposes of Congress and the Court might suggest profoundly different understandings of what a Constitution is, which might in turn suggest different understandings of what the Constitution means. Perhaps because it is so widely understood, it is often forgotten, and hence worth spelling out, that the judicial system in general, and the Supreme Court in particular, exists to do legal justice—narrowly, to treat the present case "A" like the past case "B," but broadly, to guarantee some continuity between the past and the present by conserving the legal traditions of the past and using those traditions to render coherent the social predicaments of the present. Given that general institutional purpose, it makes perfect sense to think of the Constitution as the textual embodiment of those legal traditions which in turn represent the culmination of our most profound historical struggles. The Constitution, in the adjudicative context, and given the legal purposes of the judicial branch, represents the authoritative past's guidance for our present predicaments. Whether or not one insists on an originalist reading of constitutional meaning, within the judicial context one's theory of constitutionalism, and hence of constitutional interpretation

39 Fish uses the Christie example in his response to Dworkin in Stanley Fish, Working on the Chain Gang: Interpretation in Law and Literature, 60 TEX. L. REV. 551 (1982).
and meaning, almost inevitably will draw on some aspect of our past. Even if not the original intent of its authors, when we ask what the Constitution dictates about some modern predicament, within the judicial context, most of us are typically seeking authoritative guidance from the past in order to forge a continuous identity between that past we are given and the future we create. The constitutional text, within that context, is the text we read to illuminate the authority of our history.

Congress, in contrast, does not exist to do legal justice, either narrowly or broadly conceived. Rather, it exists to do distributive justice and to give authoritative voice, not to our traditions from the past, but to our present aspirations for the future. It exists, very generally, to construct a bridge, so to speak, between those present aspirations and our future, not between our present predicaments and our past. It is not unreasonable to think, then, that were the Congress to seek out constitutional guidance, it would look to the Constitution not for authoritative guidance from our traditions, or indeed from any aspect of our shared past, but rather, authoritative guidance from our moral and political aspirations, and particularly, our aspiration for distributive justice. The congressional Constitution, then, might sensibly be understood as a "constitutional" recordation not of our traditions, but of our aspirations—not a history of where we have been, but a speculative and avowedly utopian assessment of where we might go. Within that context, were we to ask what the Constitution tells us about a predicament, we would be asking not what might be the lesson of historical traditions, but rather, what might be the lesson of our very contemporary hopes and dreams. The Constitution of any particular moment would be our sense of how we might best constitute our collective and individual identity. An understanding of the original, historic, or traditional Constitution of our pasts would of course be relevant to the task of identifying as well as interpreting the content of that aspirational Constitution. But it would by no means be identical with it.

The Constitution, of course, identifies itself as law, and indeed as the supreme law, but this does not undercut the possibility of an aspirational Constitution—a Constitution of present aspirations rather than a Constitution of recorded historic victories. For, if the reader-response school's understanding of textual interpretation is right, then the jurisprudential nature of law, no less than the political nature of the Constitution, is contingent upon the institutional purposes and needs of the community of law's interpreters. Within the judicial context, and given judicial purposes, law is that which facilitates the primary obligation of courts to do legal justice—to treat like cases alike. Law consists of those rules of decision recorded in precedent that enable a court to fashion and apply general rules to particular cases in a way which will respect not only the particularities of each case, but far more importantly, the similarities of each case to some relevant aspect of our shared past. Constitutional law,
then, if it is to be a part of law, must take the form of precedential rules of decision enabling the similar constitutional treatment of future with past cases, through the familiar methods of analogical reasoning.

Within the congressional context, and given congressional purposes, it is not unreasonable to ascribe to the idea of law—and particularly the idea of a higher or supreme law—a quite different essential jurisprudential nature. Congress, again, does not exist to do legal justice, to treat like cases alike, or to judge in a way so as to respect the similarity of present circumstances with past precedent. To the contrary, Congress has as its central mission the alteration, the deviation, and the transformation—not the conservation—of the past. It exists to bring our present circumstances in line with our ambitions and aspirations of the future, not to bring our present circumstances in line with the authoritative traditions of the past. The law relevant to such an endeavor, then, including the constitutional law, would not, presumably, be a law of binding historical precedent in search of similarly situated present circumstances. It would be a law of ideal moral principles—those principles of distributive justice toward which our politics aspire. The congressional Constitution no less than the judicial Constitution would be law, but the significance of the appellation would be quite different. The law of which the congressional Constitution would be an instance would be a law of moral principle and high ideals, not, as is the case with the judicial Constitution, a law of precedent and past rule facilitating the provision of legal justice.

For these two reasons alone, congressional interpretation of the Constitution might produce authoritative meanings more conducive to progressive change than those produced by the Court. And again, the argument is not simply that the constitutional text, like any text, can have an infinite number of meanings, can therefore have progressive as well as conservative meanings, and is therefore likely to be interpreted in a progressive manner by legislators who happen to be more progressive than the present political composition of the Supreme Court. Rather, congressional interpretation of the Constitution might be freed of the conservatism of judicial interpretation because of the quite different purposes that define each branch. The purpose of adjudicating law is conservation and preservation—respect for the traditions of the past is indeed at the heart of the work of doing legal justice. Maintaining continuity with what has gone before is a way of making sense of our present lives, and it is that form of integrity—that urge to maintain our collective identities through the affirmation of our similarities with our history—that constitutes much of the work of judicial or adjudicative law.40 Given that the Constitution is itself a part of law, it is inevitable that constitu-

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40 For an argument to the effect that this is the underlying justification for the rule of precedent, see Anthony T. Kronman, Precedent and Tradition, 99 YALE L.J. 1029 (1990).
tional law, when understood as a part of judicial work, will take on a conservative hue: the idea of constitutionalism in that purposive context simply underscores the ideal of legalism. Law exists to provide a mechanism for maintaining continuity with the past, and constitutional law exists to provide a mechanism for maintaining continuity with the most definitive and ennobling moments of that past. But it does not follow that either law or the Constitution, when undertaken by a community of interpreters unified by a very different set of motivating and defining purposes, will think of, perceive, or use either concept in the same way; in fact, what follows is quite the contrary. If the conservatism of constitutional law, of the concept of constitutionalism, and of the concept of law is in part a product of the purposes of the judicial community of its interpreters, as suggested by the reader-response work in interpretive and hermeneutic theory, it then follows that an interpretive community defined and constituted by a different set of purposes might develop quite different understandings.

Substantively, the different defining purposes of the Congress and the Court might imply drastically different understandings of at least two of our basic constitutional values: the liberty and the equality which are each in some way guaranteed by the Fourteenth Amendment. First, as I have argued elsewhere, the Court’s insistence on a formal rather than a substantive interpretation of the Equal Protection Clause, with its antiprogressive consequences for race-conscious affirmative action plans designed to eradicate substantive, not just formal, inequality, might be a function not only of the conservative leanings of the particular Justices, but also of the Court’s role, shared by all courts, as a dispenser of formal justice. Formal justice requires that likes be treated alike, and the Court’s regressive jurisprudence of the equality provision of the Fourteenth Amendment simply applies that standard (in an admittedly wooden way) to legislatures: legislators must treat all like groups alike, race is not a distinction that should make a difference, and consequently benign as well as malign race-conscious legislation is unconstitutional. An institution such as Congress, committed and constituted, as it is, by the mission of distributive rather than formal justice, might well be led to a quite different understanding of equality and, therefore, a different conclusion regarding the constitutionality of affirmative action. A commu-

41 See Bruce Ackerman, We the People (1991).
nity of interpreters organized for the purpose of redistributing resources so as to create substantive equality—rather than organized for the purpose of adjudicating cases so as to respect formal equality—might see in the Fourteenth Amendment’s guarantee of equal protection a quite different, and far more egalitarian, mandate.

Similarly, the Court’s institutional purpose has heavily influenced, if not determined, its understanding of the content and value of individual liberty. Given our overriding political scheme, the Supreme Court exists not only to do legal justice, but also to constrain and limit the powers of the other branches of government. Given that purpose, it is not surprising that the Court has understood liberty as meaning individual liberty from pernicious state power; such an interpretation underscores the Court’s role as a watchdog of excessive state power. A Congress constituted and defined by the quite different purpose of limiting—by redistributing—not state power, but private power—whatever the form that private power might take—could surely understand the guarantee of liberty at the heart of both the First and the Fourteenth Amendments as protecting not the liberty of the individual against pernicious state power, but the liberty of the individual against infringement by powerful private sources of oppression. Were it to do so, it might view the constitutional protection of that liberty as requiring, rather than prohibiting, state regulation not only of the economic market, but of the linguistic and cultural markets as well.

A Congress, itself in part defined by its goal of distributive rather than formal or legal justice, that conscientiously sets out to interpret a Constitution situated within our egalitarian and redistributive aspirations rather than by our conservationist traditions, constrained by principle rather than precedent, and informed by the values of substantive equality and individual liberty from private and intimate oppression rather than by the values of formal equality and liberty from the state, would very likely—even naturally—read the Constitution as requiring—not simply permitting—quite different, and far more progressive, interpretations of our constitutional guarantees than those reached by the Court. For example, if we take seriously the threat to liberty posed by private power, then the silence of the battered spouse or the incest victim or the abused child is of at least as much concern as the silence of the intimidated government dissenter. Friends of the First Amendment should be as concerned to eliminate the censorial power of domestic violence as they are concerned to eliminate the censorial power of the overzealous state. An interpretive community freed of the judicial purpose of limiting state power and animated by the general purposive goal of distributive justice might, then, be more inclined to understand the Fourteenth Amendment’s mandate to Congress to insure the guarantees of the First Amendment as requiring Congress to take some action to address the wave of private, domestic, severely silencing, and largely unchecked violence still
visited upon thousands of women and children yearly by the men in their intimate lives.

Similarly, if we take seriously the threat to liberty and equality posed by the intimidating power of dominant culture, then the silence of the school-bound African-American child, cowed by the insult to and neglect of her culture by her white Eurocentric education, should be of as much concern as the silence of the hypothetical political party intimidated into silence by the powers of the omnipotent state. An interpretive community such as Congress, charged with the task of achieving redistributive justice, might view the nascent attempts to address that silence through a diversification of public school curricula not as prohibited, but as in furtherance of the liberal and pluralist goals of the First Amendment. To take one last example, if we take seriously the threat to substantive equality posed by grotesque maldistributions of material resources between majority and minority communities of citizens, then the substantive inequality visited upon the African-American community through the mechanisms of the labor market should be of at least as much concern as the formal inequality visited upon that community by a segregative, state-sponsored Jim Crow legal regime. Attempts to address that substantive inequality through affirmative action plans designed to remedy the effects of private and societal racism might be viewed as required, not prohibited, by Fourteenth Amendment guarantees of equality by an interpretive community constituted by the goal of distributive rather than legal justice.

Although relevant to congressional constitutional interpretation, the original intent of the Constitution's framers, as well as the prior historical understandings of constitutional meaning reached by the Court, would not be determinative, just as modern aspirations and moral principles, although relevant to judicial constitutional interpretation, are not determinative. Rather, the historical understandings of the Constitution would be a part—albeit a peripheral part—of a larger body of doctrine which collectively would constitute the doctrine of aspirational constitutional law. Closer to the core of that body of law would be those congressional acts designed to achieve an equal society of free individuals, including, for example, not only the Civil Rights Acts, but also the Americans with Disabilities Acts, the proposed Violence Against Women Act, and the potential Gay and Lesbian Civil Rights Act. Closer yet to the core would be our specific aspirations for substantive equality and freedom from private coercion. And at the core would be the true ideals of liberty and equality toward which aspirational and political goals are, or should be, aimed.

III. Conclusion

There is, of course, no reason to think that Thayer envisioned or would endorse a progressive and aspirational interpretation of the Con-
stitution of the sort I have described. Nevertheless, he must have envisioned some significant difference between those interpretations of the Constitution likely to be reached by the Court and those interpretations feasibly reached by Congress, if he was serious in his contention that a Congress freed of excessive judicial constitutional intervention, but nevertheless constrained by its own reading of the Constitution, would be more likely than otherwise to legislate toward the ends of right and justice. I have tried to suggest some reasons, in the rather different context of modern politics, to think that this belief might have been justified. There are reasons, in other words, beyond the ultimately self-defeating belief in the indeterminacy of the Constitution, to think that Congress could reach authoritative understandings of the Constitution that would be quite different from those reached by the Court. There are even good reasons to think that those decisions might be principled and not merely political. Assuming they would be principled and assuming they would not be clearly erroneous, then, following Thayer, a Court concerned with minimizing the conflict between constitutionalism and participatory democracy should uphold them—thus respecting not only the impulse behind the second interpretation of Thayer’s rule of administration, but the impulse behind the first as well. A conscientious Court, in other words, should refrain from declaring such interpretations unconstitutional, not just because by practicing self-restraint the unelected Court thereby negatively promotes participatory democracy by staying its own undemocratic hand, but also because by respecting the different, even radically different, interpretations of the aspirational Constitution rendered by the Congress, the Court positively promotes congressional and hence popular responsibility for those democratically shared principles that constitute us. Not coincidentally, it would by doing so also further the democratization—long overdue—of the Constitution itself.

It is highly unlikely today that Congress will accept primary responsibility for active constitutional decisionmaking. It might be easy to imagine a progressive Congress coming up with progressive constitutional arguments, but it is very hard to imagine what set of circumstances, or what political scenarios, might prompt such a drastic administrative change in congressional and judicial behavior. Nevertheless, it is important to envision alternative understandings of the Constitution, just as it is important to fashion progressive constitutional arguments, even in the absence of a realistic chance of their acceptance by the conservative Court: constitutional arguments of the traditional sort create losers and outsiders, and the simple act of envisioning alternative understandings of our collective constitutive identity might to some degree counter that existential exclusion. All I have sought to emphasize here is that in developing those alternative understandings, it would behoove us to consider not just alternatives to received meanings of constitutional phrases, but alternatives to received understandings of the idea of constitutionalism.
and the idea of law, which jointly create an interpretive context within which those alternative understandings might attain some true constitutional authority, and hence some real moral claim on our felt loyalties, principles, and allegiances. Those alternative understandings of the essence of the idea of constitutionalism, and the essence of the idea of law, in turn might be prompted not so much by jurisprudential speculation as by institutional imagination: the content of the idea of constitutionalism and the content of the idea of law seem to be contingent on the purposes and ideals of the institution charged with the task of law and constitution making.

A rule of administration shifting responsibility for those tasks, then, from one institution to another, as suggested by Thayer a hundred years ago, might carry in its wake changes in our understanding of the nature of law, of the nature of a constitution, and hence of the nature and content of the constitutional law being made. What those changes might be, should a (hypothetical) conservative and conscientious Court, in the interest of promoting a more participatory and aspirational Constitution, yield to the authority of an equally hypothetical progressive congressional constitutional interpretation, is an almost entirely academic question; it is hard to see its practical import in a world in which such a dramatic shift of interpretive power is unlikely to occur. But that does not make it unimportant. It is only through asking questions of the sort Thayer raised, and by giving free rein to the speculations to which they give rise, that the possibility of even perceiving, much less realizing, any Constitution close to the understandings and aspirations of the people is kept real. Thayer's rule of administration, if understood as requiring congressional responsibility for generating authoritative constitutional interpretations, is as far from modern practice as it was a hundred years ago. But notwithstanding the air of paradox, perhaps that is the source of its modern relevance.