

The Distributive Constitution

A progressive counter to conservative originalism needs to tell a broader story about material security and economic life. A response to Geoffrey R. Stone, William P. Marshall, Doug Kendall, and Jim Ryan.

The debate on how progressives should interpret the Constitution between Geoffrey R. Stone and William P. Marshall on one side and Doug Kendall and Jim Ryan on the other offers trenchant criticisms of right-wing originalism. [“Debating the Constitution,” Issue #21] Each piece makes a good case for the method it claims to be the best progressive rival. But both essays focus on method in isolation from substance. The reason conservatives dominate our constitutional debates is not so much that they have a killer theory of interpretation that sells well with the public. It is chiefly that they have a bolder and clearer philosophy and narrative about what kind of nation the Constitution promises to promote and redeem. Originalists’ theory of constitutional interpretation is bunk. But originalists are correct in their practical understanding of constitutional politics. Much of what lends originalism its public appeal is the narrative of a “traditional” nation that it promises to

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restore: an America dedicated to personal responsibility and limited government, private property and godliness. This narrative has aroused citizens, lawmakers, and judges to act boldly on its behalf.

In the introduction to the debate, *Democracy's* editors wrote that progressives “have not countered with their own narrative.” Unfortunately, neither have Stone, Marshall, Kendall, and Ryan. Kendall and Ryan are right that progressives should not run away from the Constitution’s text and history. But Stone and Marshall are also right that progressives only look lame when they mimic right-wing originalists and pretend that text and history can clinch many of today’s most important constitutional questions. Our constitutional text and its history are full of contending meanings and understandings. We can find in history evidence debunking the originalists’ own outlandish claims about what history, conceived as “the Framers’ intentions,” commands. We can show that judges in the real world do not follow originalist dogma. But to prevail on behalf of our constitutional outlook and interpretations we also need a counter-narrative of our own—an account of past constitutional contests and commitments that adds up to a vision of the nation that the Constitution promises to promote and redeem. That is what enables particular interpretations and arguments to tap into the broad popular impulse of keeping faith with our past.

Progressives stand for gender equality, cultural diversity, and racial justice; they defend the rights of the most vulnerable. These substantive commitments resonate with Stone and Marshall’s familiar idea that judicial activism is warranted on behalf of relatively powerless and unpopular minorities. But they don’t tell us what kind of nation the Constitution promises to secure for *all* Americans. What kind of nation is it that must include all its members in the constitutional fold?

The authors’ silence may stem from the fact that there are key elements of progressive politics whose constitutional salience progressives have forgotten. Work and opportunity, material security and insecurity, poverty and dependency: For generations of reformers, their constitutional importance was self-evident. Laissez-faire government, unchecked corporate power, and the deprivations and inequalities they bred weren’t just bad public policy—they were constitutional infirmities. Today, with the important exception of employment discrimination, these concerns have vanished from progressives’ constitutional landscape.

We need to recall this constitutional outlook on economic life because it supplies some of the unifying threads that our current progressive discourse lacks. Such an outlook does not call on courts to take heroic actions against the other branches. Rather, it reminds lawmakers that there are constitutional stakes in attending seriously to the economic needs and aspirations of ordinary

Americans. In doing so, it provides a sturdier basis on which to uphold regulations that the right has begun to assail once more. At the same time, it offers a baseline of popular constitutional commitments to all Americans alongside the courts' necessary interventions on behalf of minorities and the most vulnerable Americans who may be callously excluded.

We are all familiar with the laissez-faire American constitutional tradition. Right-wing originalists are bent on reviving it. But there is an opposite tradition: the rich, reform-minded *distributive* tradition of constitutional law and politics. We need to remember this tradition, and to examine how it arrived at its present invisibility.

The distributive tradition is as old as the Constitution. Its gist is simple: Gross economic inequality produces gross political inequality. You can't have a constitutional republic, or what the Framers called a "republican form of government," and certainly not a constitutional democracy, in the context of gross material inequality among citizens, for three reasons: It produces an oligarchy in which the wealthy rule; it destroys the material independence and security that citizens must have in order to think and act on their own behalf and participate on a roughly equal footing in the polity and society; and it impedes access to basic goods that are the foundation of dignity and standing in one's own eyes and in the eyes of the community.

The Framers believed that personal liberty and political equality required a measure of economic independence and material security. They declared that the new national Constitution, plus equality of rights and liberty at the state level, would ensure just that measure for all hard-working white men and their families. Eighty years later, this same political economy of citizenship animated the Fourteenth Amendment. Its main aim was to give African-American men the same rights of contract and property that were thought to ensure white men the opportunity to pursue a calling and earn a decent livelihood. In the wake of industrialization and urbanization, reformers proclaimed that the United States needed a "new economic constitutional order" securing the old promises of individual freedom, opportunity, and well-being.

Amid these turn-of-the-century battles over economic life, and the growing concentration of power in corporations and widening class inequalities, Progressivism was born. The heart of Progressivism lay in the contest between wealth and commonwealth. This struggle prompted the great popular interpreters of the Progressive Constitution to proclaim that in industrialized America social justice was indispensable for legal justice. Figures like Teddy Roosevelt, Louis Brandeis, Jane Addams, and Herbert Croly insisted that the United States

could not remain a constitutional republic without social and economic reform. America was becoming a corporate oligarchy; working people were wage slaves, ciphers, and servants, ill-equipped for democratic citizenship.

The New Deal brought this progressive constitutional vision to partial fruition. Franklin Roosevelt and the New Dealers didn't only proclaim that Congress had the power to enact New Deal legislation—it had the duty to do so. In speeches and radio addresses, FDR set himself the task of constitutional narration and interpretation to win the nation's support for what he termed a "redefinition of rights in terms of a changing and growing social order." "Every man has a right to life" and a "right to make a comfortable living," he proclaimed. The nation "owes to everyone an avenue to possess himself of a portion of [the nation's wealth] sufficient for his needs, through his own work"; "economic or social insecurity due to old age...infirmity, illness or injury...[or] unemployment" was an injury to liberty itself. Thus, alongside education, "training and retraining," and decent work and pay, FDR's "Second Bill of Rights" set out to guarantee decent housing and social insurance, including health care.

Interpretations of the Constitution stand no chance in public debates unless wedded to a narrative about the values it embodies.

But it was an incomplete triumph. The main legislative embodiments of the second bill—the National Labor Relations, Fair Labor Standards, and Social Security Acts of the 1930s—were great achievements, but all of them had been crafted to exclude African Americans. More encompassing and inclusive bills enjoyed solid backing from Northern Democrats (and broad but bootless support from disenfranchised southern blacks and poor whites), but a coalition of Southern Democrats and conservative members of the minority Republicans thwarted FDR's and New Dealers' efforts to enact national health insurance, remedy the many gaps and exclusions in the Social Security Act, and create a federal commitment to full employment. Thus, the constitutional bad faith—on the part of both parties, and in fact most of white America—that had led all three branches of the federal government to abandon Reconstruction and condone Jim Crow and black (and poor white) disenfranchisement in the South did more than deprive black Americans of civil and political rights for almost another century. It also prevented all Americans from securing the full boon of Roosevelt's second bill of rights.

After the 1940s, social rights talk fell into disuse. New industrial unions had emerged as the only powerful, organized constituency for social and economic rights, but they fashioned a robust *private* welfare state by bargaining for private

entitlements to job security, pensions, and health insurance for their members. Meanwhile, much of the work of post-World War II liberal and progressive constitutional law and politics focused on overturning the racial and gendered exclusions that blighted the private welfare state and labor market and the segmented and caste-ridden system of public social insurance bequeathed by the New Deal. In this prosperous postwar era, progressives largely forgot the distributive constitutional tradition. The idea that the Constitution speaks to the shape of our political economy and the terms of economic life began to seem simply a shibboleth of the far right.

The former constitutional law professor in the White House has offered some eloquent commentary on the Constitution and its commitments. In characteristically muted fashion, Barack Obama's familiar narrative echoes the account of the progressive Constitution I've sketched here. It starts by proclaiming fidelity to the founders, the "farmers and scholars, statesmen and patriots who had traveled across an ocean to escape tyranny and persecution." In the next breath, though, it affirms that the Constitution is a work in progress, transformed by the Civil War and Reconstruction and later amendments. And recall the key words in Obama's constitutional phrase book: "a more perfect union." Progressives could gain a firmer footing on the contested ground of racial justice in the twenty-first century by attending to what Obama has had to say about the "part of our union that we have yet to perfect." When he talks in this constitutional key, it is the tangled knot of race and class at the heart of the narrative that he evokes: "the complexities of race in this country that we've never really worked through." Many white Americans have come to resent affirmative action and civil rights laws because they have been abandoned by a plutocratic government and "a corporate culture rife with...greed...[and] economic policies that favor the few over the many." Obama laments that they come to see opportunity "as a zero-sum game, in which your dreams come at my expense."

The Constitution, then, promises real equality of opportunity; it calls on all three branches of the national government to ensure that *all* Americans enjoy a decent education and livelihood, a chance to engage in the affairs of their communities and the larger society, and a chance to do something that has value in their own eyes. That is a key part of the liberty and equality that America promises everyone. It means that Congress has not only the authority but the duty to govern economic and social life to underwrite these promises; and the judiciary has the duty to ensure that the vulnerable are not callously excluded. This broad constitutional narrative is no less venerable and resonant than the

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Republicans' story of rugged individualism, free enterprise, and the rights of property. And like the latter in the hands of conservatives, this progressive narrative may flow from the broader realm of constitutional politics and culture into the countless interpretive judgments a liberal-minded justice makes, as she decides not only headline-grabbing constitutional issues but also questions of statutory construction, federal pre-emption, and the like.

Our national constitutional dialogue is still without a strong defense of the basic precepts of the progressive constitutional tradition. The methodological debate between Stone and Marshall and Kendall and Ryan is an important one, but it misses the bigger picture. Neither of their interpretive strategies stands much chance in the public debates they hope to sway unless it is wedded to a narrative about the values the Constitution embodies and the promises that faithful interpretation of the Constitution is supposed to keep. In a moment of great economic pain and growing inequalities, the moral and political insights of the progressive constitutional tradition have never been more apt. A Brandeis or FDR would not pretend to know how to fix our post-industrial political economy, but he would say that we can't keep liberal democracy without some measure of social democracy. The deep fears of hitherto secure "middle class" Americans that they and their children will end up impoverished ensure that if these problems aren't addressed, there may well be an illiberal, authoritarian set of responses to come.

Constitutionalism is not a toolkit of economic policy proposals or institutional fixes. And all the plausible policy ideas to solve our current impasse face severe political headwinds. But progressives need to be arguing that there are constitutional stakes in overcoming our public problems. They need to demand that we address our unequal and unfair society as though our constitutional democracy depended on it. After all, it does. **■**