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PROGRESS AND CONSTITUTIONALISM

*Robert F. Nagel**

PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT. By *Robin West*. Durham: Duke University Press. 1994. Pp. 359. \$45.

Most people, naturally enough, have a benign opinion of themselves and believe that they would like to see social conditions improve. Oddly, however, few seem especially motivated to contest the appropriation of the label “progressive” by some on the political left. The concession is not minor. If what these people favor is progress, those who disagree with them must favor either stasis in an imperfect world or deterioration. For those who, like me, have been assigned to the wrong side of the rhetorical divide, this should be insulting.¹ More important, accepting this label is intellectually limiting; it insinuates a presumed answer for a question that ought to be the subject of wide-open debate — namely, *which* direction is forward. While *Progressive Constitutionalism* contains real insights for constitutional theory, it does not say enough about the harder moral and political questions that must be addressed if there is to be any justification for the confident claim made by the book’s title.

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1. So strong is the impulse to see “progress” as an essentially uncontested attribute of the political left that academic ideologues will — if necessary — fabricate antagonists who are either amazingly ignorant or badly intentioned. For example, Professor Mark Graber says that in my political world “opponents of liberal judicial activism can do no wrong.” Mark A. Graber, *Book Review*, 12 CONST. COMM. 305, 310 (1995) (reviewing ROBERT F. NAGEL, *JUDICIAL POWER AND AMERICAN CHARACTER* (1994)). He goes on to say that I believe “[r]acism ceased to be a political factor in American public life somewhere around 1960,” *id.*, that I think that no reason exists for fearing that the suppression of obscenity might result in widespread timidity, and that I am unable to see how so-called informed consent laws might interfere with the doctor-patient relationship. *Id.* at 312. This depiction somehow arises from his reading of a book that contains: (1) a long and severe critique of the thinking of Robert Bork, as well as a criticism of the effects of judicial restraint generally; (2) a discussion of some 1960s segregation strategies that acknowledges Paul Gewirtz’s corrective ideal, which arises from “the awful, deliberate wrongs inflicted on black people for so long, the brutal sweep of continuity between past deeds and present life,” to be “a strong animating vision”; (3) a carefully balanced assessment of the reasons one might fear that suppression of obscenity could lead to an intellectually sterile environment; and (4) a specific statement that informed-consent laws interfere with the therapeutic relationship. See ROBERT F. NAGEL, *JUDICIAL POWER AND AMERICAN CHARACTER* 27-43, 124-40, 119, 89-91, 114 (1994).

I

There is much that is worthwhile about Professor West's book.² It makes some interesting and potentially far-reaching legal arguments. In emphasizing the abolitionist purposes behind the Fourteenth Amendment, West makes a needed start toward replacing rationality analysis with substantive moral claims based in constitutional history. In urging a particular meaning for the word "protection," she makes a limited but possibly important textual argument.³ The book contains strong moralizing about the need for "progressive" reforms, and, although these passages are a bit platitudinous for my taste, they are at least forthright and heartfelt.⁴ West's proposed interpretations of the Equal Protection and Due Process Clauses prove useful and interesting,⁵ even if not entirely convincing, but her book's greater significance lies in its jurisprudential and institutional analyses.

As a general rule, one of the most fundamental limitations of constitutional scholarship is its myopic fixation on appellate decisions. This fixation, which to some extent is to be expected of lawyers, is exacerbated by the incestuous relationship between judicial clerkships and the professorate and by scholars' short-sighted ideological opportunism. It distorts historical research, discourages empiricism, and diverts attention from realistic social and political analysis. More generally, it produces a good deal of tolerance for complete nonsense. *Progressive Constitutionalism* serves as a bracing antidote to all of this.

West insists that we examine the possibility that judicial interpretations of the Constitution are not merely occasionally or marginally "incorrect" but consistently and fundamentally inadequate from a moral perspective (pp. 118, 192, 282). She traces these inadequacies past the usual culprits — Republican judges, racist Framers, and so on — to the institutional context in which adjudication occurs (pp. 48, 89). She argues that this context is inherently conservative, constricted, and authoritarian (pp. 192, 282). She is prop-

2. Robin West is a Professor of Law at Georgetown University Law Center.

3. West gives little emphasis to the modifier "equal." Cf. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (arguing that the Framers understood segregation to violate the principle of equality articulated by the Fourteenth Amendment).

4. In a typical passage, she argues that progressives favor a form of social life in which all individuals live meaningful, autonomous, and self-directed lives, enriched by rewarding work, education, and culture, free of the disabling fears of poverty, violence, and coercion, nurtured by life-affirming connections with intimates and co-citizens alike, and strengthened by caring communities that are both attentive to the shared human needs of its members and equally mindful of their diversity and differences.

P. 162.

5. See pp. 17-18.

erly impatient with the obviously improbable but trendy claim that the Supreme Court can somehow provide an opportunity for republican deliberation (p. 283). In short, she helps to open the way for a full-scale critical evaluation of our identification of "the Constitution" with judicial interpretations.

As a corollary to this critique, West attempts to refocus attention on the political process as a means of enforcing the Constitution. In this, of course, she is not alone; modern writers as diverse as Louis Fisher, Richard Parker, Edwin Meese, and Paul Brest have sounded similar themes.⁶ West's contribution is distinctive in that, although not abandoning traditional sources of meaning like text and history, it carries a warning against importing into the political arena habits of judicialized discourse (p. 192). It is also specific and emphatic in linking political-constitutional interpretation with the possibility of an extremely ambitious "progressive" political agenda.

Given the conservative electoral gains that occurred the same year this book was published, West's argument that progressives should address their constitutional arguments to Congress may now seem to have been wildly unrealistic. Even before those gains, scholarly disdain for the legislative process was sufficiently widespread that West shows considerable independence in making this argument. Her position cannot be brushed aside on the basis either of conventional academic wisdom or episodic shifts in political alignment. She points to a record of egalitarian statutory enactments that many legal scholars ignore or take for granted. Moreover, she persuasively argues that, regardless of short-run wins and losses, fixation on the judiciary has stunted progressive thought and has isolated parts of the Left from the general public.

West makes valuable substantive contributions, but her book is also enjoyable because of the way it combines political and moral passion with a degree of intellectual self-doubt and circumspection. For example, while in many respects resolutely committed to the idea of change-as-progress and, more particularly, to the standard "progressive" agenda, West nevertheless resists crude condemnations of American history. She writes that "although no doubt in large part a succession of waves of brutality and oppression, [that history] may also contain moments of real nobility and courage" (p. 18). She says, "If we abandon the history and text of the Fourteenth Amendment . . . we may be abandoning a source of moral insight . . . that is superior to those visions our current ahistoric and

6. See LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS A POLITICAL PROCESS* (1988); RICHARD D. PARKER, "HERE, THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO (1994); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987); see also McConnell, *supra* note 3.

parochial 'selves' have managed to envision" (p. 18). More generally, even in urging the development of "a progressive constitutional faith," West admits that the project may be "terribly risky because it may very likely be either tamed, co-opted, or, at worst, revealed to be in fact . . . nothing but the foundation of a new tyranny" (p. 188).

Thus, just when West's earnest political commitments threaten to reduce parts of her book — both intellectually and stylistically — to a tedious manifesto, she pulls back and provokes critical reflection. At its best, *Progressive Constitutionalism* invites thought about the relationship between legal scholarship, political morality, and constitutionalism. For me the book prompted some questions about what, if anything, constitutional scholars have to contribute to general public debate. Specifically, do we have anything useful to say to our fellow citizens about what progress is or how to achieve it?

II

Viewed as a performance, Professor West's book — as insightful as it is for constitutional scholars — casts doubt on whether we have much to contribute to political discourse. It does so even in its most elementary aspect: *Progressive Constitutionalism* is addressed to law professors, not the general public.

Indeed, one of the least attractive features of *Progressive Constitutionalism* is that almost no effort was made to convert its chapters from the unmistakably clanking style of the law review articles that they once were. Despite a considerable amount of repetition from one chapter to the next, West tells us in each of those chapters what she is going to say, then she says it — often laboriously — and then she summarizes what she has just said. She makes specialized, clumsy references, such as "Sunsteinian" (p. 139). She displays the almost quaint otherworldliness that comes from sustained immersion in the insulated hothouse of the legal academy. For instance, West declares that "Frank Michelman . . . did more than any other to popularize the idealistic argument that 'equal protection' requires the states to guarantee a minimum level of welfare" (p. 265). These stylistic limitations raise the question of why an author who argues that constitutional arguments should be directed at Congress would write a book aimed at the world of legal academics. If, as West says, "[t]he question is where to invest our energies, how to spend our lives" (p. 289), why did she herself not do simply what she urges her colleagues to do?

Of course, Professor West may have been hoping for a kind of multiplier effect. Perhaps she concluded that while a book written for the political arena might have made for a satisfying life and

might even have had some good political consequences, a book written to influence professional colleagues might result in other books and ultimately more progressive legislation. In striking contrast to her more usual stance of insistent intellectualism, in a few places West does take on the guarded tone of a strategist.⁷ But another, deeper explanation — to use a phrase that West likes — presents itself. It presents itself because this is an explanation that easily could apply to me. It may be that West addresses her writings primarily to legal scholars because the state of constitutional scholarship is such that it is easier to make a contribution there than in general political discourse. Or, to put it another way, perhaps thinkers who have real insights to offer within the academy nevertheless have very little useful to say to their fellow citizens. The academic elite may be using its prodigious resources simply to battle back — against the tide of professional self-interest and intellectual fashion — to a level of understanding already common among the general population. We can explore this possibility by asking whether those citizens, including the members of Congress, would be especially edified by the sorts of ideas that West uses to edify us as law professors.

Consider West's interpretation of the Fourteenth Amendment. According to her, the abolitionists wanted the Equal Protection Clause to ensure that "every individual is equally free of all conditions which could potentially subjugate his will to some sovereign power other than the state" (p. 31). The object was to make people autonomous by making them free "of other rulers, masters, or superiors" (p. 39). West explains the "minimal" principle established by this moral attack on slavery as follows:

[W]e have an absolute, incontrovertible right not to be subject to any sovereignty other than the state. From this absolute right [is] derived . . . a right to be free of those conditions which, if unchecked by the state, generate separate sovereignties, including, at least, a right to be free of private violence and extreme material deprivation. [p. 36]

Thus the marital rape exception is unconstitutional, as is the failure to provide some level of police protection and welfare rights (pp. 35-37). Moreover, the "current reach" of equal protection might include a right to education, abortion, and homosexual marriage (p. 39).

7. She says, for instance, that "we might . . . profitably reconceptualize the ideal of liberty." P. 140. Later she urges that progressives "emphasize not the Constitution's indeterminacy, but, rather, those constitutional events and . . . passages that support the claim [that the Constitution is compatible with progressive objectives]." P. 183. She also says, "[o]nly after we reinject into constitutional thought and law a self-consciously moral dimension will it make sense to call for greater participation by the community in constitutional processes." P. 192. In imagining constitutional arguments in a political forum, she alludes to the construction of progressive claims "without too much stretching of the primary materials." P. 303.

This position suffers from all the problems that attend those magical arguments from "principle" that somehow permit decisions that had to do with one set of circumstances to resolve questions arising out of strikingly different circumstances. West rather uncritically relies on Ronald Dworkin's distinction between concepts and conceptions as her answer to these problems (p. 31). Nevertheless, her "sole-sovereignty principle" should interest constitutional scholars because it helps break the intellectual logjam created by a fascination with the rationality of legislative classifications that is still a significant influence on judges and some academics.⁸ It also represents an alternative to expansive and historically ungrounded claims that equal protection requires full, substantive equality (pp. 28-29).

But what could the sole-sovereignty principle add to public debate? The answer is: little, if anything. It is obviously true that people cannot and should not be made free of the will of all others besides "the state." To begin with, in our federal system there is more than one government that is authorized to coerce individuals. More important, children are subject to parents, employees to employers, parishioners to clergy (not to mention God), workers to unions, and all of us to the moral pressures that neighbors and the broader community create. It adds virtually nothing to public debate to declare that all of these relationships make us, in some measure, subservient. Everyone knows that, and the hard questions that people face have to do with the kinds and degrees of dependence that are necessary or even healthy. If used loosely, as a free-floating device to undermine those relationships that progressives dislike, then the sole-sovereignty principle is either a very partial argument or simply unconvincing rhetoric.

The principle might, however, be used systematically to undermine all relationships that impinge on the will of the individual.⁹ This version of the principle would, I hope, have no general appeal. The twentieth century has presented us with uncontrovertible evidence about the undesirability of the kind of subservience created when the only entity authorized to subjugate the will of individuals is the state.¹⁰

8. See Robert F. Nagel, *Is "Rationality Review" Rational?*, 116 *PUB. INTEREST* 75 (1994); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 *COLUM. L. REV.* 1689 (1984).

9. West herself, of course, does not want a homogenized society. For instance, she does not argue for governmental repression of religious groups, even those she depicts as oppressive. See p. 114.

10. On the ideological bases of unitary regimes, see A. JAMES GREGOR, *CONTEMPORARY RADICAL IDEOLOGIES: TOTALITARIAN THOUGHT IN THE TWENTIETH CENTURY* 318-47 (1968). On operationalizing unitary rule in a complex industrial society, see Carl J. Friedrich, *The Failure of a One-Party System: Hitler's Germany*, in *AUTHORITARIAN POLITICS IN MODERN SOCIETY: THE DYNAMICS OF ESTABLISHED ONE-PARTY SYSTEMS* 239 (Samuel P. Huntington & Clement H. Moore eds., 1970).

Like political zealots, we law professors for some reason tend to be fairly tolerant of brave but silly claims like the sole-sovereignty principle. But how would it sound if you said to your neighbor or your senator, "Every individual should be equally free of all conditions that would potentially subjugate his will to some sovereign power other than the state"? Perhaps I am overly optimistic, but I believe you would have a hard time getting anyone's attention or, if you did, you would not — for good reasons — be taken seriously. Moreover, the insights that compensate in the intellectual world of legal education would have little power for nonscholars. Ordinary people, after all, are not as constrained as are law professors by the lure of rationality analysis; nor does the ideal of full, substantive equality have much of a following outside the academy.

This is not to deny that more specific, less intellectualized versions of the sole-sovereignty principle might be used effectively in popular debate. Certainly political arguments that marriage or poverty is like slavery can be and are made. But the power, if any, of such claims resides in highly specific comparisons, not in abstract and unrealistic assertions about the exclusive sovereignty of the state over the will of all citizens. The constitutional principle urged in this book would at best lead a legal scholar to the kinds of contextualized, and often inflammatory, arguments already in common use.

The sole-sovereignty principle is an important part of West's effort to define "progress," but it amounts to a traditional legal argument and thus might not necessarily be expected to contribute to political discourse in a fully robust way. She makes other, more directly moral claims. Indeed, she makes an extensive effort to understand and convey the progressive impulse. She contends that the definitive insight of modern progressive political theory is that "conservative deference to communal authority . . . directly implies a parallel deference to the clusters of social power that invariably underlie it" (p. 246).

Progressivism consists in large measure of "opposition to this conservative deference toward social power" (p. 246). In place of this deference, "progressives argue [that] state actors should rely on the experiences, ideals, and aspirations of the relatively disempowered" (p. 247). As stated, this conception of progressive politics is morally empty. Convicted murderers are relatively disempowered, as are American fascists. I am quite certain that West does not think that the experiences, ideals, and aspirations of either of these groups point the way to a better world.

Even if relative powerlessness were an index of moral worth, West's description of progressivism would not provide any basis for political choices. *All* groups are powerless relative to some other

group. Women, for instance, may generally be less powerful than men, but they are more powerful than imprisoned felons. Moreover, a group can be either more or less powerful than another group depending on the forum. I would suppose that in some state legislatures religious conservatives are more powerful than liberated, progressive women but not, I think, before the United States Supreme Court. On the other hand, those religious conservatives might be more powerful than progressive women even in front of the Court if the question involved religious expression in public schools rather than the legality of traditional sexual stereotypes. This suggests the obvious point that relative power also shifts according to the issue. Finally, the relative power of groups can change as a consequence of the progressives' own influence. A common example occurs when gay-rights groups are successful in obtaining the protection of a speech code within a university; the effect of this success can be to marginalize heterosexual conservatives.¹¹ When progressives win — an event that West believes occurs more than many academics admit — the very experiences, ideals, and aspirations that formed the moral content of the progressive agenda would immediately become, by definition, the power structure against which progressives must fight. In short, while sympathy for the underdog is a venerable and understandable theme in American politics, it does not provide a serious basis for moral decisionmaking.

While she states her basic definition of progressive politics without embarrassment, West recognizes that it is incomplete. She supplements that definition by importing substantive moral claims into her description of the subdivisions of progressive theory. These include idealistic progressivism, existential progressivism, and antisubordination progressivism.

The idealist values “memories, glimpses, or dreams” of true freedom or equality that arise, not from objective traditions, but from “the ‘interstices’ (as it were) of a daily life” (p. 247). Now, “true freedom and equality” does sound like an unassailable description of the good. But how does the progressive idealist know which dreams and glimpses represent “true” freedom and equality? West’s analysis suggests that idealists believe that visions can be counted on to identify the good if they “are not culled from the lessons of objective tradition” (p. 247). That is, they are good if opposed to the conservative moral impulse. This is surely wrong, unless all the conditions and experiences that form the bases of tradition are inevitably bad, a position that West herself wisely rejects elsewhere in her book. Some ideological stalwarts on both the left

11. See Robert F. Nagel, *Progressive Free Speech and the Uneasy Case for Campus Hate Codes*, 64 U. COLO. L. REV. 1055 (1993).

and right can be counted on to jump to moral conclusions by identifying their opponents' positions and then proposing the opposite; however, I doubt that the general public would find much persuasive in an unvarnished claim that whatever exists is bad and whatever can be imagined is good.

The problem with the idealist's morality goes beyond the fact that some objective traditions are good. As West's use of the word "interstices" itself suggests, the very notion that dreams and visions can ever stand entirely in opposition to established patterns is highly unrealistic. Even Martin Luther King's beautiful speech about his dream of racial equality,¹² a speech that West uses to illustrate progressive idealism (p. 249), is in fact rooted in some of the most traditional American political and religious beliefs, and these, in turn, are rooted in life as it has been lived — in the model of family life, political participation, and social integration that has been imperfectly present in American society from the beginning.¹³ There are, needless to say, many powerfully experienced visions that are evil and that are rightly distrusted or rejected by most political participants. King's vision, in contrast, has been potent precisely because it is so recognizably a part of our moral traditions. If King's dream were actually as visionary as West claims, it would have had far less gravity and attractiveness.

Existential progressives, according to West, identify the good according to what promotes "open and identified choice[] and maintains a passion for free play, ambiguity, and change" (p. 250). This version of progressivism itself arises from the deeply American fascination with personal freedom and flux. If directed at a general audience, her discussion would perhaps resonate, but I doubt that it would edify. Here, for example, is her description of the existential progressive's morality:

The goal is a social world in which each individual and group is as free as possible to "find herself" through discovering her multiple selves; to disentrench herself from rigid roles imposed from without . . . to denaturalize her roots; and to discover her essence not in her essentiality, but in her potentiality. [p. 252]

12. See Martin Luther King, Jr., *I Have a Dream*, in *WORDS OF MARTIN LUTHER KING 95-97* (C.S. King ed., 1983).

13. Consider this account of King's famous speech:

King framed this vision entirely within hallowed symbols of Americanism: the Bible, the Declaration of Independence, the Constitution, the Emancipation Proclamation, and the "American Dream". The refrain of the patriotic song "My Country 'Tis of Thee" led to his peroration . . . King's performance enraptured the vast assemblage. Even southern whites, who could view the proceedings on television, grudgingly praised the dignity of the occasion.

ADAM FAIRCLOUGH, *MARTIN LUTHER KING, JR.* 91 (1995).

Yes, everyone from Roberto Unger to Newt Gingrich believes in discovering his potential,¹⁴ but the cold truth is that change is no guarantor of goodness. Although we can try to be many things, the question is what it is good to try to be. To write about progress-as-change does seem to have some unaccountable interest for parts of the academy, but as a contribution to wider political discourse it would appeal only to the most mindless reflexes of leftist politics and to the most banal beliefs that already make up much of our general culture.

For antisubordination progressives, the good is simply an absence of "constraint, invasion, and bondage" (p. 253). Here West writes vividly about "the daily numbing joylessness of a materially impoverished existence . . . the pain of being a target of hatred and abuse . . . shackles, chains, whips, bits, and gags" (p. 253). The main problem with this litany of bad things is its length. It is, after all, an old and transparent trick to start a list with what everyone agrees is terrible and then to end it — as if they were just obvious additions — with the kinds of doubtful claims that all the real debate was about in the first place. Thus, for West subordination includes "the restriction on livelihood, social contribution, career, and public work brought on even by wanted and celebrated mothering" (p. 253). If there can be any value for political debate in lumping together all the career and political costs paid by joyful mothers — or, I would add, fathers — with the state of extreme poverty or the experience of sexual bondage, I am unable to see what it might be.

West's enthusiastic discussion of the antisubordination principle actually demonstrates not how we might identify progress when that is uncertain, but how little guidance we will find in expansive analogies amounting to an insistence that certain groups are unjustly "constrained" unless they have everything they want. Everything is what many Americans already want, and useful writing begins from the mature knowledge that politics cannot enable anyone to escape all the costs that go with choice. West knows this, of course; her effort is to pinpoint the special kinds of costs that should be considered intolerable in our political system. I suspect, however, that associating motherhood with whips and gags would not seem to ordinary people a plausible way to describe this category.

III

Because, as I said at the outset, I am not a progressive, readers might well doubt my evaluation of Professor West's efforts to define

14. West associates Unger with existential progressivism. See p. 268. For an account of Gingrich's view on human malleability and the excitement of change, see Joan Didion, *The Teachings of Speaker Gingrich*, N.Y. REV. BOOKS, Aug. 10, 1995, at 7 (reviewing Newt Gingrich, *To Renew America* (1995)).

“progress.” My further claim — that constitutional scholars in general probably have little to offer the public on this question — seems even more likely to arouse skepticism. Whether or not *Progressive Constitutionalism* contains moral and political analysis that would be useful to the public, many legal scholars have written successfully for a wide audience. In recent years, people like Ronald Dworkin, Richard Posner, Lani Guinier, and Robert Bork have done so,¹⁵ and they are part of a long tradition that goes through Alexander Bickel to Zechariah Chafee all the way back to George Wythe.¹⁶ Obviously, therefore, I do not mean to argue that constitutional scholars are systematically unable to make important contributions to debate about the definition of “progress.” What I do mean to say is that it is difficult to make such contributions insofar as we write as constitutional scholars. The difficulty arises from the fact that the “constitutional” component of an argument about progress is inherently constraining.

West’s book serves as an especially good illustration of this point because it goes much further than most constitutional scholarship in recognizing the authoritarian character of constitutional law. Presumably to avoid what she criticizes, West’s own legal arguments are not designed to be conclusive; in fact, they are openly and radically incomplete. Her fundamental position, for example, rests on an asserted similarity between slavery and certain modern situations such as poverty and abusive marriages, yet she makes no effort to develop detailed comparisons. Nor does she attempt to analyze whether her abolitionist interpretation of the Equal Protection and Due Process Clauses can be successfully integrated with other provisions of the Constitution.¹⁷ West, for example, ignores federalism and separation of powers. In many respects, then, West’s arguments seem to take on the following structure: “Here is a historical view of the Fourteenth Amendment — and the beginnings of an argument about its modern application — that is not the whole story but is significant, morally important, and largely overlooked; I offer this constitutional interpretation not as an authoritative constraint on current decisionmaking but as an avenue for moral insight and growth.¹⁸ I know that this kind of contribution is not fully satisfying as a legal argument; however, given the expecta-

15. See RONALD DWORIN, *LAW’S EMPIRE* (1986); RICHARD A. POSNER, *OVERCOMING LAW* (1995); LANI GUINIER, *THE TYRANNY OF THE MAJORITY* (1994); ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990).

16. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); ZECHARIAH CHAFEE JR., *FREEDOM OF SPEECH* (1920); GEORGE WYTHE, *DECISIONS OF CASES IN VIRGINIA, BY THE HIGH COURT OF CHANCERY* (1795).

17. Cf. Philip Bobbitt, *Parlor Game*, 12 CONST. COMM. 151 (1995).

18. See, e.g., chapter 8 (“The Authoritarian Impulse in Constitutional Law”).

tions that judicialized discourse creates, a more complete legal argument would shut off thought and responsibility in a way that I wish to avoid.”

Perhaps this imagined reply to her legalistic critics accurately captures one side of West’s thought. It is consistent with her argument against authoritarian judicial decisionmaking and with her call for “pragmatic constitutive” arguments. Unfortunately — and curiously — it is not consistent with much of her prose. Recall that her “minimal” formulation of the abolitionist meaning of the Fourteenth Amendment insists that “we have an *absolute, incontrovertible* right not to be subject to *any* sovereignty other than the state” (p. 36; emphasis added). She also argues that the major premise in *DeShaney v. Winnebago County Department of Social Services*¹⁹ — that the Constitution does not create a right to police protection — “is squarely wrong” (p. 33). Similarly, West writes that marital rape exemptions “do not merely inflict extensive damage on innumerable women’s lives, but they also constitute a constitutional outrage” (p. 47). In her historical analysis, she moves from relatively careful, limited claims (“it is far more consistent with the abolitionist history of the Fourteenth Amendment to understand [its] liberty . . . in a positive rather than negative sense”) to broad, definitive conclusions (“the reconstruction amendments . . . were intended to ensure . . . the full positive liberty to which slavery is the absolute antithesis”) (pp. 125, 126-27). In a single paragraph, West shifts from suggesting that “an abolitionist understanding . . . provides at least some support for the claim that the equal protection clause guarantees minimal welfare rights” to asserting that “the state has an obligation to protect citizens from abject subjection to the whims of others occasioned by extreme states of poverty” (p. 35).

West’s use of the rhetoric of definitive constitutionalism is not inadvertent. In a section titled, “The Latent Possibility of a Progressive Constitutional Faith,” she imagines progressives making the claim “that the Constitution really means what the progressive insists . . . and consequently mandates a progressive conception of community” (p. 183). West seems to think that she can reconcile her claims about what the Constitution “really means” with her hostility to authoritarian interpretation, and her reliance on the jurisprudence of Stanley Fish suggests a start in that direction. She adopts Fish’s view that “some set of purposes, needs, or interests of the relevant interpreting community,” rather than text or authorial intent, establish constitutional meaning (p. 307). Given the emphasis that West places on abolitionist history, this seems at least super-

19. *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189 (1989).

ficially an odd position for her to adopt.²⁰ But Fish's ideas, as described by West, do serve her purposes. She notes that if the constraints within the interpretive community are sufficiently strong, "the text's meaning will be very determined indeed" (p. 307). Thus, it is possible for a legally incomplete argument to be entirely determinate within a nonlegal interpretive community. Fish's reader-response theory, in short, helps West move closer to two of her basic objectives: to give status to the legislative branch as an alternative interpretive community and to frame her legally incomplete arguments as constitutionally determinate.

To accomplish her objectives fully, however, West needs more than the abstract jurisprudence of Stanley Fish. First, she needs the conventions within the political world to be such that her moral analogies and historical arguments, while obviously limited, can be definitive before Congress.²¹ Moreover, even assuming that radically incomplete legal arguments can lead to determinate conclusions in her preferred forum, West's definitive claims about what the Fourteenth Amendment means still must be squared with her ideal of "an aspirational Constitution." If, as West argues, false authority in judicial decisionmaking blocks choice about the community's purposes and needs, it is no obvious improvement to move to a Congress where false authority also is permitted to block choice.

Although West's answer to these problems is not entirely clear, she does say that a constitutional claim, historical or otherwise, will seem authoritative if that interpretation converges with the desires and interests of a particular polity (p. 310). Thus her argument may be (1) that Congress's actual interpretive conventions permit determinative constitutional claims; and (2) that these claims do not block choice because they are treated as determinative only when they match the moral aspirations of the community. Although one can imagine such a set of conventions, West provides no evidence that they are in fact the conventions that guide congressional interpretation. Surely members of Congress at least understand and tolerate constitutional arguments that are acknowledged to be partial and inconclusive. Even if West believes that such carefully phrased arguments will nevertheless *seem* conclusive if they match political desires and interests, this would provide no excuse for framing the arguments in an exaggerated or inaccurate way. Presumably, it is the polity's moral objectives, not bullying modifiers, that should do the work of persuasion. Moreover, precisely because in West's view

20. It also may represent a misunderstanding of Fish, whose later writings emphasize authorial intent. See Stanley Fish, *Play of Surfaces: Theory and Law*, in *LEGAL HERMENEUTICS* 297, 299-310 (Gregory Leyh ed., 1992).

21. If West is arguing that Fish's position means that interpretive communities can choose their conventions, she seems far removed from what Fish thinks. See *id.* at 299.

the underlying issue for political interpretation is how a community's desires and interests should be understood, it would seem crucial that falsely conclusive legal claims should not cut off choice on these matters. At one point, West herself says that Congress should not look to the Constitution for "authoritative guidance from . . . any aspect of our shared past" (p. 312). This points to the general conclusion that, just as false authority constricts in judicial decisionmaking, it is also authoritarian in political settings.

West could have confined herself to making precisely qualified claims about historical and textual meaning. She could have buttressed these claims with direct moral appeals about how the desires and interests of the political community should be understood. Why, then, did she not drop the vestiges of legal authoritarianism? The blunt answer, I think, is that West does not want Congress to engage in full debate about what progress might be. Instead, she thinks the "congressional Constitution" should be an "avowedly utopian assessment of where we might go" (p. 312). That is, definitive claims about history and morality will have a place in congressional debate if they are definitive *progressive* claims. West is proposing that the legal academy attempt to convince Congress that the Constitution "mandates" a progressive definition of community (pp. 183, 305).

She cannot expect to do this, as I have tried to show in the preceding section, by relying on those thin understandings of moral choice that she calls "progressive." So at the end of her book, West attempts to construct an artificial set of interpretive conventions for Congress. She declares that the central mission of Congress, unlike the courts, is the "alteration, the deviation, and the transformation — not the conservation — of the past" (p. 313). In short, an "interpretive community freed of the judicial purpose" would be progressive by definition. It "very likely — even naturally" would interpret the Constitution "as requiring, not simply permitting . . . far more progressive . . . interpretations . . . than those reached by the Court" (p. 315). Of course it would; if Congress's job is to institute "progressive" change, then Congress will have to conclude that the Constitution requires "progressive" change.

The trouble with this definition, obviously, is that neither change nor "progressive" change is necessarily the function of the legislative branch. Every time a bill is defeated or limited, the legislature makes a determination about what not to change. Every time a possible bill fails to materialize, the legislature makes a determination that the present seems acceptable or even desirable. While these determinations are not always formal acts of legisla-

tion, they are important aspects of the legislative process.²² They certainly demonstrate that part of the function of the Congress is to decide what not to change. Moreover, it goes without saying that even when Congress does act, it remains entirely free to move in a direction that does not seem utopian to those who call themselves progressives.

In the end then, "progressive constitutionalism" is authoritarian. West's aspirational constitution, like the ideological label used in the title of the book, represents an attempt to shut off full debate on what we should do about our future. It privileges a particular direction not only as "progressive" but as "constitutional." It pretends that one vision of the future is mandated. If enough law professors insist in one way or another that the interpretive canons of Congress require it to pursue the progressives' agenda, perhaps some politicians will even fall for it.

Robin West's book demonstrates how — like moths to the flame — even impressively insightful constitutional scholars cannot resist the bright hope of false authority. The nature of constitutional argument in our system is authoritarian because for us a constitution *is* a privileged set of positions. Therefore, constitutional argument used to direct change is inherently stifling. The only ways to avoid this sad end are to give up on the word "constitutional" as it has come to be used or to give up on participation in public debate about what progress means. Of course, these alternatives would allow for the scholarly study of the Constitution but not for policy prescriptions in its name. This would require constitutional scholars to come down to the same ground that the rest of the political community occupies. In discussions about the future, our strong beliefs and hopes would have no rhetorical advantage. They would have to be understandable and convincing on their own terms. Now, *that* would be a difficult book to write.

22. For a more general discussion on the significance of inaction, see NAGEL, *supra* note 1, at 151-54.