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THE OCTOBER 2021 TERM AND THE CHALLENGE TO PROGRESSIVE CONSTITUTIONAL THEORY

J. JOEL ALICEA*

This Essay examines the ways in which the Supreme Court's October 2021 Term challenges core theoretical commitments of progressive constitutional theory. Progressive constitutional theory originated in the progressive political theory of the late nineteenth and early twentieth centuries. Accordingly, progressive constitutional theory shares progressive political theory's commitments to two propositions: rationalism and individualism. These commitments lead to an understanding of history as moving in a particular direction—one that is generally in line with progressive ideology. The originalist and traditionalist approaches of the Court's October 2021 decisions call into question the progressive confidence in the direction of history while simultaneously rejecting the rationalistic and individualistic premises of progressivism. This helps explain why many progressive constitutional theorists have found the Court's decisions so disorienting and confounding. The October 2021 Term challenged—even though it did not definitively refute—the progressive narrative of constitutional redemption through history. The implications of the Court's decisions will reverberate through American constitutional theory for decades to come.

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INTRODUCTION

When we think about "controlling the Supreme Court"—the topic of this Symposium—we often think about tools like the confirmation process and elections, tools that the electorate and elected officials can

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use to influence the direction of the Court's jurisprudence.[1] I want to focus instead on a concept of control that emerges from progressive political theory and that has strongly influenced progressive constitutional theory: the concept that the Supreme Court is under the control of progressivism because the Court—like history more generally—will, in the long run, move in an ideologically progressive direction.

This concept of control involves impersonal, historical forces, rather than the intentional acts of persons or institutions. It relies not on constitutional mechanisms or contingent phenomena, but on a particular understanding of human nature and the relationship between the individual and society, as manifested through history. It is a concept of control that rose to prominence during the Progressive Era and is a hallmark of progressive political theory.[2] You hear it every time someone asserts that some position is on the wrong side of history: the notion that human affairs have an orientation, a disposition toward progressivism that will be reflected in history over time.[3] This notion of human progress is reflected in many of the major progressive constitutional theories that have been proposed since the rise of modern constitutional theory in the 1970s.[4]

The notion has been challenged by the October 2021 Term, in which the Supreme Court not only showed that it would generally decide future constitutional cases based on a history-and-tradition-focused approach (antithetical to progressive political and constitutional theory), but also that it was willing to overrule longstanding, landmark progressive victories,[5] most notably *Roe v. Wade*.[6] Part I will discuss some of the theoretical foundations of progressive political theory and its notion of human progress. Part II will show how progressive political theory has influenced progressive constitutional theory with respect to the idea of human progress. Part III will close by arguing that this past term poses a significant challenge to the politico-theoretical foundations undergirding progressive constitutional theory. My hope is to not only help us better understand why the end of this past Term has been so disorienting for

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1. *See, e.g.*, JACK M. BALKIN, LIVING ORIGINALISM 89–93, 287–96 (2011); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 293–95 (1957).
2. *See infra* Part II.
3. *See* H. BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY 88, 113–14 (1931).
4. *See infra* Part II.
5. *See infra* Part III.
6. 410 U.S. 113 (1973), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

progressive constitutional theorists, but also why this past term has significant relevance for constitutional theorists moving forward.

I. THE NOTION OF HUMAN PROGRESS IN PROGRESSIVE POLITICAL THEORY

As I have argued elsewhere, American constitutional theory can be understood as a debate about two core propositions in liberal political theory: (1) rationalism and (2) individualism.[7] It is not surprising, therefore, that progressive constitutional theory generally has a view on both propositions.

By "liberal political theory," I do not mean "liberal" as that term is understood in modern American political discourse, a term often associated with the views of the Democratic Party. I mean "liberal" as that term is used in political philosophy, as describing a politico-theoretical tradition that begins in the Renaissance[8] and includes such figures as John Locke[9] and Thomas Paine.[10] Some have argued that the liberal tradition includes the Anglo-American conservative philosophical tradition represented by Edmund Burke,[11] while others see conservatism as standing outside the liberal tradition and serving as a critique of it.[12] I take no position on that debate here; I only note this disagreement because it points to how difficult it is to pin down exactly what we mean by the term "liberal." As Alan Ryan has noted, there is a plausible argument that liberalism is an "essentially contested term[]"—its "meaning and reference are perennially open to debate."[13]

Fortunately, we need not define "liberalism" in any precise way to know that rationalism and individualism are associated with the liberal tradition. And because it is even clearer that these two propositions are

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7. *See generally* J. Joel Alicea, *Liberalism and Disagreement in American Constitutional Theory*, 107 VA. L. REV. 1711 (2021). The reader can find a more detailed treatment of the issues analyzed in Parts I and II below in *Liberalism and Disagreement*. Here, I am proceeding in summary fashion.

8. ANTHONY ARBLASTER, THE RISE AND DECLINE OF WESTERN LIBERALISM 95 (1984).

9. JOHN LOCKE, *An Essay Concerning the True Original, Extent and End of Civil Government*, *in* THE SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 1 (Tom Crawford ed., Dover Publ'ns, Inc. 2002) (1946).

10. *See* THOMAS PAINE, *Rights of Man*, *in* COLLECTED WRITINGS 464–65 (Eric Foner ed., 1995).

11. *See, e.g.*, Yuval Levin, *After Progressivism*, FIRST THINGS (May 1, 2012), https://www.firstthings.com/article/2012/05/after-progressivism [https://perma.cc/U45J-Y2S7]; PIERRE MANENT, AN INTELLECTUAL HISTORY OF LIBERALISM 80 (Rebecca Balinski trans., 1994).

12. *See, e.g.*, ROGER SCRUTON, THE MEANING OF CONSERVATISM 186–87 (Palgrave 3d ed. 2001) (1980).

13. ALAN RYAN, THE MAKING OF MODERN LIBERALISM 23 (2012).

associated with the progressive branch of liberalism, our narrower focus can avoid a lot of disagreements about the contours of the liberal tradition.

Rationalism and individualism reflect a particular understanding of the human person and the relationship between the individual and society. Progressive liberalism has a view on both of those concepts, and John Stuart Mill—who is widely recognized as a founder of progressive liberalism[14]—helps us understand both.

We can start with rationalism. Perhaps the best articulation of rationalism was provided by Michael Oakeshott, who observed that a rationalist:

> [I]s the enemy of authority, of prejudice, of the merely traditional, customary or habitual. His mental attitude is at once sceptical and optimistic: sceptical, because there is no opinion, no habit, no belief, nothing so firmly rooted or so widely held that he hesitates to question it and to judge it by what he calls his 'reason'; optimistic, because the Rationalist never doubts the power of his 'reason' (when properly applied) to determine the worth of a thing, the truth of an opinion or the propriety of an action.[15]

Thus, rationalism places individual reason above all other sources of knowledge, like tradition or revelation.[16]

Rationalism is central to Mill's political thought. In his famous argument in favor of free speech, Mill argues that free speech is instrumentally valuable in discovering the truth, because "[w]rong opinions and practices gradually yield to fact and argument."[17] This assertion presupposes that human reason will see errors and correct them when ideas are subject to scrutiny. That presupposition may seem intuitive to some readers, but Mill's implicit assertion about individual reason is, in fact, controversial. Burke, for example, argues that the opposite is true: that our individual reason might fail to grasp the truth

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14. *See* PATRICK J. DENEEN, WHY LIBERALISM FAILED 45 (2018); JOHN GRAY, LIBERALISM 30 (2d ed. 1995).

15. MICHAEL OAKESHOTT, *Rationalism in Politics*, *in* RATIONALISM IN POLITICS AND OTHER ESSAYS 5, 6 (1991) (cleaned up).

16. *See* KENNETH MINOGUE, THE LIBERAL MIND 54-55 (Liberty Fund, Inc. 2000) (1963); 1 F.A. HAYEK, THE FATAL CONCEIT: THE ERRORS OF SOCIALISM 48-52 (W.W. Bartley III ed., paperback ed. 1991). A similar description of rationalism is found in then-Pope Benedict XVI's Regensburg Address. *See generally* POPE BENEDICT XVI, *Faith, Reason, and the University*, *in* A REASON OPEN TO GOD 7, 7-19 (J. Steven Brown ed., 2013).

17. JOHN STUART MILL, *On Liberty*, *in* ON LIBERTY AND OTHER WRITINGS 1, 23 (Stefan Collini ed., 1989).

embedded in longstanding traditions, which is why we should be hesitant to displace them.[18] It would generally be better, in Burke's view, to defer to the intergenerational sifting of ideas that tradition represents, rather than to presume that our individual reason has identified an error in the tradition.[19] Burke is not *anti-rational*, but he is *anti-rationalist*.[20] He agrees that human affairs should be governed by reason, but he disagrees with Mill that individual reason should be elevated above the form of reason embodied in tradition.[21] Mill's rationalism, therefore, reflects an optimistic appraisal of individual human reason and its ability to drive human progress.

Indeed, that is why Mill is so hostile to custom and tradition. In Mill's view: "The despotism of custom is everywhere the standing hindrance to human advancement, being in unceasing antagonism to that disposition to aim at something better than customary, which is called . . . the spirit of liberty, or that of progress or improvement."[22] If individual reason—unhindered by custom or tradition—is necessary to uncover errors and lead to human progress, then custom and tradition are opposed to progress: "[T]he contest between [custom and progress] constitutes the chief interest of the history of mankind."[23]

Mill's rationalism pairs well with his individualism, though it is conceivable that rationalism and individualism could travel separately.[24] Individualism is the view that the individual takes priority over society and, therefore, that any obligation to obey political authority must be grounded in the individual's *choice* to submit to authority.[25] Individualism again contrasts with Burkean conservatism, which embraces the notion of unchosen duties and obligations embodied in "a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born."[26]

We can see how rationalism might lead a person to be individualistic. To have authority is to be able to give "exclusionary

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18. *See* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 76 (J.G.A. Pocock ed., Hackett Publ'g Co. 1987) (1790).

19. *See id.*

20. J. Joel Alicea, *The Role of Emotion in Constitutional Theory*, 97 NOTRE DAME L. REV. 1145, 1172-73 (2022).

21. *See id.*

22. MILL, *supra* note 17, at 70.

23. *Id.*

24. For instance, David Strauss's constitutional theory is individualistic but purports to reject rationalism. *See* Alicea, *supra* note 7, at 1755-56, 1761.

25. *Id.* at 1138-39.

26. BURKE, *supra* note 18, at 85; *see also* YUVAL LEVIN, THE GREAT DEBATE: EDMUND BURKE, THOMAS PAINE, AND THE BIRTH OF RIGHT AND LEFT 101–09 (2014).

reasons" for doing or not doing something.[27] An exclusionary reason is "a reason for judging or acting in the absence of understood reasons, or for disregarding at least *some* reasons which are understood and relevant and would[,] in the absence of the exclusionary reason[,] have sufficed to justify proceeding in some other way."[28] For example, if a mother orders her ten-year-old son to wear a particular jacket (that the son regards as ugly) to a social outing, the mother's instruction is an exclusionary reason: it is a reason for acting irrespective of at least some reasons (like the ugliness of the jacket) that, in the absence of her instruction, would have been reasons for not acting.[29] The mother, therefore, has authority.[30] If obeying authority means acting in the absence of or in disregard of our own reasons, it necessarily entails deferring to someone else's reasons, and because a rationalist trusts her *own* reason and is resistant to deferring to the reasoning of others, she will be disinclined to obey authority that she has not *independently* determined is correct on the matter in question. This would seem to destroy the basis for *any* authority. To only obey a person where one already agrees with the person is the same thing as denying that the person can give exclusionary reasons, which is the same thing as denying that the person has authority.[31]

The rationalist need not go that far, however; she could conclude, based on her own reason, that it would be better to allow someone to have authority (*i.e.*, to be able to give exclusionary reasons) on at least some matters.[32] Note, however, that this conclusion is based on *her consent* to authority resulting from a rationalistic calculus. In this way, Mill's utilitarianism leads him to accept authority under very limited circumstances, as evidenced by the Harm Principle.[33] But Mill is clear that "[o]ver himself, over his own body and mind, the individual is

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27. *See* JOSEPH RAZ, *Legitimate Authority*, *in* THE AUTHORITY OF LAW 3, 17 (2d ed. 2009).

28. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 234 (2d ed. 2011). I am deviating from Raz's definition in a couple of ways. First, Raz only uses "exclusionary reasons" to refer to second-order reasons *not* to do something, whereas I (like Finnis) have extended it here to include reasons *to* do something. Second, Raz qualifies his definition in numerous ways that I (again, largely following Finnis) have omitted. *See id.*; RAZ, *supra* note 27.

29. J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1, 18 (2022) (citing RAZ, *supra* note 27, at 17–18).

30. *Id.*

31. *See* RAZ, *supra* note 27, at 26–27.

32. *Id.*

33. MILL, *supra* note 17, at 13 ("[T]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.").

sovereign."[34] The use of the word "sovereign" is telling, since a sovereign is an authority who governs a society.[35] To say that an individual is sovereign is like saying that the individual is a nation-unto-herself, a highly individualistic assertion. It is no surprise, then, that individualism is as hostile to claims of *authority* by past generations as rationalism is to claims of *knowledge* by past generations.

Mill's rationalism and individualism combine to give him a distinctive understanding of the human person, which he expressed in that key phrase in the first chapter of *On Liberty*: "man as a progressive being."[36] Mill believes that human beings liberated from the influence of custom and tradition will progress: "The progressive principle . . . is antagonistic to the sway of Custom, involving at least emancipation from that yoke."[37] As Ryan described Mill's view: "[T]he central discovery of the social sciences was that history progressed in a certain direction and did so under the impact of changes in ideas."[38] And if rationalism and individualism are the source of human progress, then tradition, custom, and intergenerational authority are enemies of human progress and, in a real sense, of history itself.[39]

This notion of history as having a certain orientation toward progress—that progress is a predictable part of the human experience under the conditions of the liberated self—gained significant force in America in the late nineteenth and early twentieth centuries under the influence of Darwinism, which gave this idea of future progress a scientific tinge.[40] We see this notion of progress most directly in the writings of John Dewey[41] and Woodrow Wilson,[42] who echoed Mill's understanding of man as a progressive being by explicitly relying on Darwin.

So progressive political theory, going back at least to Mill, has presupposed rationalism and individualism, and those two propositions lead to a view of history as moving in a particular direction. That is not to say that progressivism has always seen progress as *inevitable*, but it

34. *Id.*

35. JEAN BODIN, ON SOVEREIGNTY 1 (Julian H. Franklin ed. & trans., 1992).

36. MILL, *supra* note 17, at 14.

37. *Id.* at 70.

38. RYAN, *supra* note 13, at 267.

39. MINOGUE, *supra* note 16, at 54–57 (describing the union of rationalism—what he calls "libertarianism"—and a progressive view of history).

40. *See generally* BRADLEY C.S. WATSON, LIVING CONSTITUTION, DYING FAITH: PROGRESSIVISM AND THE NEW SCIENCE OF JURISPRUDENCE 55–109 (2009).

41. *See, e.g.*, JOHN DEWEY, *The Influence of Darwinism on Philosophy*, *in* THE INFLUENCE OF DARWIN ON PHILOSOPHY AND OTHER ESSAYS IN CONTEMPORARY THOUGHT 1, 9–19 (1910).

42. *See, e.g.*, WOODROW WILSON, *What Is Progress?*, *in* THE NEW FREEDOM: A CALL FOR THE EMANCIPATION OF THE GENEROUS ENERGIES OF A PEOPLE 33 (1913).

has had confidence in eventual human progress, as "progress" is understood in progressive ideology.

II. THE NOTION OF HUMAN PROGRESS IN PROGRESSIVE CONSTITUTIONAL THEORY

Progressive political theory, in turn, gave birth to progressive constitutional theory.[43] The notion of a living constitution rose to prominence during the Progressive Era. Wilson, for instance, famously advocated that "[l]iving political constitutions . . . be Darwinian in structure and in practice," allowing progress through "development" and "evolution."[44] We must "interpret the Constitution according to the Darwinian principle,"[45] and because "[n]o living thing can have its organs offset against each other, as checks, and live," Wilson argued that the separation of powers and checks-and-balances of our Constitution must be replaced with "the intimate, instinctive co-ordination" of the branches.[46] It is hardly surprising, in light of these views, that Wilson became one of the intellectual fathers of the modern administrative state,[47] which is often seen as an achievement of progressive constitutional theory.[48]

The ideological overlap between progressive political theory and progressive constitutional theory is evident. Both are antagonistic to the authority of past generations to bind the current generation (individualism),[49] and both have confidence that each generation will better understand what is true than its predecessors (rationalism).[50] Both invoke the judgment of history, confident that the future belongs to progressivism.[51] These assumptions are antithetical to originalism, which

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43. For an in-depth discussion, see generally WATSON, *supra* note 40.

44. WILSON, *supra* note 42, at 48.

45. *Id.*

46. *Id.* at 47–48; *see also id.* at 45–48.

47. *See, e.g.*, Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197 (1887) (exemplifying Wilson's theoretical justifications for the administrative state).

48. *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION 16–18 (2010) (arguing that originalism cannot be reconciled with the modern administrative state).

49. *Compare* MILL, *supra* note 17, at 70, *with* LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE 16-17 (2012), *and* David A. Strauss, Essay, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1718-22 (2003).

50. *Compare* MILL, *supra* note 17, at 23, 70, *with* Justice William J. Brennan, Jr., *Speech to the Text and Teaching Symposium*, *in* ORIGINALISM: A QUARTER-CENTURY OF DEBATE 55, 60–70 (Steven G. Calabresi ed., 2007), *and* WILSON, *supra* note 42, at 45-48.

51. *Compare* BUTTERFIELD, *supra* note 3, at 88-89, 113–14, *with* Brennan, *supra* note 50, at 55 (expressing "faith in progress"); *see also Trop v. Dulles*, 356 U.S.

generally presupposes the authority of the past to bind those living today (anti-individualism)[52] and that future generations might decay rather than progress (anti-rationalism),[53] thus necessitating limitations on future action.[54]

We see these progressive political ideas reflected—to different degrees and in different ways—in some of the most prominent modern progressive constitutional theories. Consider the theories of Ronald Dworkin, Jack Balkin, and David Strauss.

Dworkin's law as integrity is highly rationalistic.[55] It not only expects that the law could, in principle, be made coherent, but also imposes on the judge the Herculean task of synthesizing the entire corpus of legal materials.[56] While Dworkin acknowledges that this is an impossible task,[57] it is emblematic of his exaltation of human reason over other sources of knowledge,[58] such as tradition or custom, which are to be discarded insofar as they do not, in the eyes of the judge, depict the corpus of law in its best light.

Or consider Balkin's living originalism, which, as James Fleming has compellingly argued, bears great similarity to Dworkin's theory.[59] Central to Balkin's theory of constitutional legitimacy is the notion that the Constitution must reflect the views of those living today, which "necessarily requires delegation to the future" and "a steadfast belief that the evils of the present can and will be recognized and remedied, if not in our day then in the days to come."[60] Here we see both a rejection of intergenerational authority[61] *and* confidence in reason to drive human

86, 101 (1958) (plurality opinion) (invoking "the evolving standards of decency that mark the progress of a maturing society").

52. *See* Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1130–31, 1134 (1998); *see also* Joel Alicea, *Originalism and the Rule of the Dead*, 23 NAT'L AFFS. 149, 149, 152–54 (2015), https://www.nationalaffairs.com/publications/detail/originalism-and-the-rule-of-the-dead [https://perma.cc/9F5A-M77L].

53. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 40–41 (Amy Gutmann ed., 1997).

54. *See id.* at 40–42.

55. Alicea, *supra* note 7, at 1759–61.

56. RONALD DWORKIN, LAW'S EMPIRE 245 (1986).

57. *Id.*

58. *See* Cass R. Sunstein, *Second-Order Perfectionism*, 75 FORDHAM L. REV. 2867, 2879–81 (2007); Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 394–96 (2006); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 690–91, 691 n.356 (1994).

59. JAMES E. FLEMING, FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS 129–34 (2015).

60. BALKIN, *supra* note 1, at 62–63.

61. Alicea, *supra* note 7, at 1753–55.

progress,[62] leading, in Balkin's highly significant phrasing, to the "redemption" of the Constitution from past errors.[63]

Finally, consider Strauss's common-law constitutionalism. Strauss sees the dead-hand objection as a central dilemma in constitutional theory, and he believes it is sufficient to reject originalism.[64] His theory is therefore built on strongly individualistic foundations, rejecting the notion of intergenerational authority.[65] And while he purports to ground his theory in Burkean traditionalism,[66] his notion of "rational traditionalism" is quite alien to Burke's,[67] since he sees tradition as having no "independent value" and as being dispensable if we are "quite confident that a practice is wrong."[68]

I hope this brief overview shows that the rationalistic and individualistic premises of progressive political theory undergird progressive constitutional theory. These premises give progressive constitutional theorists, in Balkin's words, "faith in [the Constitution's] redemption through history,"[69] such that "the system of constitutional government can and will become still better over time."[70] Better, that is, from the progressive perspective.

III. THE OCTOBER 2021 TERM'S CHALLENGE TO PROGRESSIVE CONSTITUTIONAL THEORY

That progressive faith has been seriously challenged by the October 2021 Term. Last Term, the Court adopted a more originalist and tradition-focused understanding of constitutional law,[71] with premises

62. *Id.* at 1759.

63. BALKIN, *supra* note 1, at 74–93.

64. STRAUSS, *supra* note 48, at 99–100.

65. Alicea, *supra* note 7, at 1755–56.

66. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 891–97 (1996).

67. Alicea, *supra* note 7, at 1765–67, 1767 n.338.

68. Strauss, *supra* note 66, at 895–97.

69. BALKIN, *supra* note 1, at 74.

70. *Id.* at 78. It is important to note, however, that Balkin concedes that constitutional redemption is not guaranteed. *Id.* at 76; *see also* Jack M. Balkin, *Constitutional Rot*, *in* CAN IT HAPPEN HERE?: AUTHORITARIANISM IN AMERICA 19, 19–35 (Cass R. Sunstein ed., 2018) (asserting that republics are susceptible to constitutional rot and patterns of success are not guaranteed to continue).

71. Although my discussion above contrasts progressive constitutional theory with originalism, below I discuss originalism and traditionalism interchangeably, since both are opposed to progressive constitutional theory's rationalist and individualist premises. But originalism and traditionalism should not be conflated. *See* Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653, 1672–85 (2020). It is, however, conceivable that traditionalism could be an adjunct to originalism. *See* McConnell, *supra* note 52, at 1136–38.

and outcomes antithetical to those held by progressive constitutional theorists.

There were numerous cases reflecting this antithesis.[72] The most important, of course, was *Dobbs v. Jackson Women's Health Organization.*[73] *Dobbs* did at least two things opposed to progressive constitutional theory. First, and most obviously, it overruled *Roe.*[74] This was significant both because the need to justify *Roe* served as a catalyst for much of modern progressive constitutional theory[75] and because overturning *Roe* showed that the Court could not only *halt* what many progressive constitutional theorists saw as progress but actually *reverse it* in a major way. If the Court was willing to overrule *Roe*, it might be willing to overrule other landmark decisions that progressives regard as "mark[ing] the progress of a maturing society."[76]

Second, *Dobbs* reaffirmed that the tradition-focused test of *Washington v. Glucksberg*[77] governed substantive due process cases, a proposition that had been thrown into doubt by *Obergefell v. Hodges.*[78] *Obergefell* had embraced a pre-*Glucksberg* approach that ultimately rested on the "reasoned judgment" of five justices about which "interests of the person [are] so fundamental that the State must accord them its respect."[79] *Obergefell*'s assumptions were highly rationalistic, leading a bare majority of the Court to recognize a right that had not existed in any human society before the year 2000.[80] As Michael McConnell has explained, the *Glucksberg* test embodies the opposite assumptions about individual reason:

> The voice of tradition is thus the voice of humility: the assumption that when many people, over a period of many years, have come to a particular conclusion, this is more reliable than the attempt of any one person (even oneself) or

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72. *See* Marc O. DeGirolami, *Traditionalism Rising*, J. CONTEMP. LEGAL ISSUES (forthcoming) (manuscript at 2–13), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4205351 [https://perma.cc/2MBL-HSVR].

73. 142 S. Ct. 2228 (2022).

74. *Id.* at 2242.

75. *See* JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS 42, 99–101 (2005); *see also* Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 665.

76. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

77. 521 U.S. 702, 720–21 (1997).

78. 576 U.S. 644, 664, 671 (2015) (distinguishing *Glucksberg* and adopting the approach of pre-*Glucksberg* substantive due process cases).

79. *Id.* at 664 (using the same phrase—"reasoned judgment"—that the Court used in *Planned Parenthood v. Casey*, 505 U.S. 833, 849 (1992)).

80. *See United States v. Windsor*, 570 U.S. 744, 808 (2013) (Alito, J., dissenting).

> small group of persons (such as the Court) to chart a new course on the basis of abstract first principles.[81]

Indeed, insofar as the *Glucksberg* test is understood as an intergenerational form of decision-making in which prior generations have some authority over our actions today,[82] the test is also anti-individualist.

Similarly, in *New York State Rifle & Pistol Ass'n v. Bruen*,[83] the Court firmly rejected the tiers-of-scrutiny analysis employed by all the lower federal courts and instead adopted a text-and-history approach to Second Amendment cases.[84] Because the tiers of scrutiny ask judges to determine what interests *the judges* think are compelling or important enough to justify intrusion on a constitutional right,[85] and because they require judges in Second Amendment cases to "make difficult empirical judgments about the costs and benefits of firearms restrictions,"[86] they are a paradigmatically rationalistic and individualistic form of analysis. They assume that a handful of individual judges living today, based on contestable social-scientific studies about complex phenomena, can declare their conclusions as settled fact and, based on those conclusions, strike a different—and better—balance among competing interests than had previous generations.[87] Instead, the Court held that the balance of interests "struck by the traditions of the American people" would govern.[88] The dead would have the authority to bind the living, and their judgments would be no less trustworthy than ours.

Finally, in *Kennedy v. Bremerton School District*,[89] the Court overruled *Lemon v. Kurtzman*[90] and adopted a test based on "original meaning and history."[91] *Lemon*'s three-part test instructed judges to determine whether a law's "principal or primary effect" was to "advance[]" or "inhibit[] religion" and whether it "foster[ed] 'an excessive entanglement with religion.'"[92] By replacing this test with one

81. McConnell, *supra* note 75, at 684.

82. *See id.* at 682.

83. 142 S. Ct. 2111 (2022).

84. *Id.* at 2125–34.

85. *See id.* at 2130.

86. *Id.* (cleaned up).

87. *See United States v. Windsor*, 570 U.S. 744, 815 n.7 (2013) (Alito, J., dissenting); *see also* Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, 41 NAT'L AFFS. 72, 79–81 (2019); OAKESHOTT, *supra* note 15, at 27–28.

88. *Bruen*, 142 S. Ct. at 2131.

89. 142 S. Ct. 2407 (2022).

90. 403 U.S. 602 (1971).

91. *Kennedy*, 142 S. Ct. at 2428.

92. *Lemon*, 403 U.S. at 612–13 (quoting *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 674 (1970)).

that "faithfully reflects the understanding of the Founding Fathers,"[93] the Court once again deferred to the judgment of prior generations in answering complex and contestable questions, such as which government actions involve "excessive entanglement with religion."[94]

Thus, in all three cases (and in others as well),[95] the Court rejected methods of constitutional analysis that favored the judgments of those living today over previous generations.[96] The Court asserted the authority of the past to bind the present, and it appealed to "the latent wisdom which prevails in" custom and tradition.[97] In short, the Court adopted constitutional theories (originalism and traditionalism) premised on anti-rationalist, anti-individualist propositions directly opposed to progressive political and constitutional theory, and it overruled precedents that helped forge the progressive faith in the long-run victory of their principles. The challenge to progressive constitutional theory, then, is not just in confounding their expectations about the future of constitutional law; it is in rejecting the politico-theoretical premises at the heart of progressivism in both its political and constitutional manifestations.

This explains why progressive constitutional scholars have found the October 2021 Term so disorienting. It is not just that they disagree with the Court's decisions; it is that the Court's decisions potentially call into question their long-held assumptions about the direction of history, about

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93. *Kennedy*, 142 S. Ct. at 2428 (alteration omitted) (quoting *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)).

94. *Lemon*, 403 U.S. at 612–13 (quoting *Walz*, 397 U.S. at 674).

95. *See* DeGirolami, *supra* note 71, at 1658–60.

96. In her remarks at the Symposium, Professor Maggie Blackhawk seemed to suggest that the Court's decision in *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022), was a potential counterexample to my argument, since she argued that the Court "ignored history, text, originalism . . . to just decide a certain outcome." Maggie Blackhawk, Professor of L., N.Y. Univ., Panelist Speech at Wisconsin Law Review Symposium: Controlling the Supreme Court: Now and "far into the future" (Oct. 28, 2022). Professor Blackhawk is an expert in American Indian law, which is an enormously complex area of law, and I am not. I express no view as to whether *Castro-Huerta* was rightly decided. But as to whether *Castro-Huerta* is a counterexample to my argument, I would point out that both the majority and the dissent agreed that the foundational question in the case—"whether Indian country is part of a State or instead is separate and independent from a State"—was primarily a question resolved by the Court's precedents. *Id.* at 2502. The majority and dissent simply disagreed about what those precedents required. *Compare id.* at 2493–94 (majority opinion), *with id.* at 2511–12, 2519–21 (Gorsuch, J., dissenting). It was not, in other words, a case in which one side was arguing in favor of originalism and the other side was not; it was a case in which originalism did not play a necessary role in *either side's* argument. In any event, my claim would remain sound even if *Castro-Huerta* is an example of the Court choosing non-originalism over originalism, since my argument does not depend on the Court applying originalism in *all* areas of law. All I need show is that the Court has *generally* adopted a more originalist or traditionalist approach to constitutional law that is antithetical to progressive constitutional theory, and it seems to me that the Court has done so.

97. BURKE, *supra* note 18, at 76.

the notion that the Court is under the control of a progressive future. Indeed, progressive constitutional scholars have said as much, with one stating that *Dobbs* had made her conclude that "[t]he image of the court as a majestic guardian of liberty was . . . 'a complete lie.'"[98] Another progressive scholar has said: "I have always perceived of the law as a tool for justice . . . and my faith that the law is being used toward that end has definitely been shaken by this Supreme Court."[99] As Mark Joseph Stern observed:

> But since the 1950s, the legal academy has told a particular story about American law, one with clear heroes and villains. The Supreme Court was the hero, vindicating the Constitution's grand guarantees of liberty and equality for all, abolishing segregation while guarding against authoritarianism. It was the great bastion of freedom, the protector of democracy, the champion of civil liberties, the pure and high-minded manifestation of our nation's noblest values.[100]

This view of history—in which the Court is a key actor in the march of human progress—has, in the eyes of another progressive scholar, "abruptly com[e] to an end in rapid succession," causing "a difficult, emotional, psychological transformation."[101] "[M]any professors had their own personal grieving period,"[102] with one even experiencing "a migraine for the first time in a decade" after *Dobbs* came down.[103]

CONCLUSION

Again, it is important not to overstate the point.[104] Progressive constitutional theorists acknowledge the possibility that "[t]he Constitution-in-practice will not always respect our most cherished values. It will not always protect our rights. We will often live in dark

98. Mark Joseph Stern, *The Supreme Court Is Blowing Up Law School, Too*, SLATE (Oct. 2, 2022, 7:00 PM), https://slate.com/news-and-politics/2022/10/supreme-court-scotus-decisions-law-school-professors.html [https://perma.cc/RHQ8-Y3MQ].

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* (cleaned up).

103. *Id.*

104. My argument, for example, is less applicable to progressive constitutional scholars who, for various reasons, have long had a more skeptical view of the Court. *See, e.g.*, *id.* ("Not all progressive constitutional law professors are in the same boat. Eric Segall, a professor at Georgia State College of Law, told [Mark Joseph Stern] that he 'lost faith in the Supreme Court long ago.'").

times."[105] But these theorists move on to affirm that we must "have faith that over time [the Constitution] will come to respect our rights and our values. The Constitution is ours if we can trust in its future and in what future generations will do to realize its promises. The Constitution is ours if we can believe in its redemption."[106] The October 2021 Term challenged—even though it did not definitively refute—that progressive faith and its narrative of redemption through history. The implications of the Court's decisions will reverberate through American constitutional theory for decades to come.

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105. BALKIN, *supra* note 1, at 99.
106. *Id.*

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