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# REVIEW ESSAY

## Progressive Regression

Suzanna Sherry\*

PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT. By Robin West.† Durham: Duke University Press. 1994. 359 pp. \$39.95.

*Robin West's Progressive Constitutionalism collects a number of West's law review articles in which she proposes a "progressive" or "abolitionist" interpretation of the Fourteenth Amendment. West argues that this approach to the Fourteenth Amendment not only remains true to both the Amendment's history and plain meaning, but also offers a constitutional solution to many of today's important disputes between the far left and the far right. In this review essay, Professor Sherry praises West's ability to dissect and describe jurisprudential debates, but she questions the originality of and historical support for West's proposals to abandon the state action doctrine and to require that government protect positive rights. Criticizing West's doctrinal analysis of the Reconstruction Amendments, Professor Sherry argues that West's approach is marred by her inability to separate her constitutional scholarship from her progressive politics. Hence, Professor Sherry argues, little of Progressive Constitutionalism will be persuasive to readers who do not share those politics.*

The disparagement of "liberalism" is not a passing fashion of the late twentieth century. It is a recurring feature of Western political culture at least since the French Revolution.<sup>1</sup>

Robin West has written a book that every constitutional scholar would like to like. In *Progressive Constitutionalism*, she promises us a new and historically accurate interpretation of the Fourteenth Amendment that will deliver us from the quagmire of fruitless debate between the far left and the far right, and provide a constitutional solution to some of today's most important disputes. She also explains why this interpretation is inherently difficult for the judicial

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1. STEPHEN HOLMES, *THE ANATOMY OF ANTI-LIBERALISM* xi (1993).

branch to recognize, and thus recommends that progressives turn to Congress instead.

West's past contributions to constitutional jurisprudence have been impressive, creating in her readers high expectations for *Progressive Constitutionalism*. West's great strength as a scholar lies in her ability to cut to the heart of jurisprudential disputes and to shed new light on their character. She displayed this talent in writing the seminal article on disagreements within the feminist legal community.<sup>2</sup> She demonstrates this talent again in several chapters from Part III of the book, in which she insightfully dissects various intersections among conservatives, liberals, natural lawyers, positivists, individualists, and communitarians.<sup>3</sup> Undoubtedly, West's taxonomies have contributed significantly to constitutional jurisprudence.

Unfortunately, West's ability to propose, justify, and apply constitutional doctrine does not match her keen ability to redescribe scholarly debates. Because West devotes much of the book to doctrinal matters, *Progressive Constitutionalism* ultimately is profoundly disappointing.

West's doctrinal approach is quite simple to describe. First, she recommends that Congress, rather than the courts, interpret both the Equal Protection and Due Process Clauses of the Fourteenth Amendment, because the legislative process offers the best hope for what she calls a "progressive" interpretation of the Constitution.<sup>4</sup> Next, she suggests abandoning the state action component of both clauses and requiring the government to enforce positive rights. In her view, the government has a constitutional obligation to eliminate all inequality or inability to live life to the fullest, whether the cause is the government itself, other individuals, the free market, nature, or one's own shortcomings.<sup>5</sup> She

2. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988). The article is not republished in *Progressive Constitutionalism*, presumably because it is not especially relevant to the 14th Amendment.

3. I refer particularly to Chapters Seven, Eight, and Nine, all of which have previously been published as law review articles. See Robin L. West, *Constitutional Skepticism*, 72 B.U. L. REV. 765 (1992) (reprinted as Chapter Seven); Robin L. West, *The Authoritarian Impulse in Constitutional Law*, 42 U. MIAMI L. REV. 531 (1988) (reprinted as Chapter Eight); Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641 (1990) (reprinted as Chapter Nine). Indeed, every chapter in *Progressive Constitutionalism* has previously been published as a law review article.

4. West proposes the progressive interpretation of the Constitution as an alternative to an interpretation that she sometimes labels "liberal" and sometimes labels "conservative." P. 1. Her ideal constitutional state under a progressive interpretation of the 14th Amendment has three overriding characteristics. First, the state protects all citizens equally against not only criminality, but also against the dangers of the natural world. Second, the state guarantees the "'positive liberties' of civic participation, meaningful work, and unthreatened intimacy." Finally, government ensures to each citizen protection against "those natural, social, or private conditions that threaten to enslave her." Pp. 2-3.

5. Pp. 109-14; see also p. 5 (claiming that the 14th Amendment protects "the right to be free from the specter of hunger or homelessness" and "the right to be free from the fear of hateful verbal assaults"); p. 25 (stating that 14th Amendment prevents "private violation of trust" and "economic isolation"); p. 31 (arguing that the Equal Protection Clause "requires the state to affirmatively protect each person's exercise of his or her natural or human rights" and guarantees "the legal means of sustaining a livelihood in a market economy"); p. 35 (explaining that abolitionist theory, the historical basis for West's 14th Amendment interpretation, "provides at least some support for the claim that the equal protection clause guarantees minimal welfare rights, not only to shelter, food, and clothing, but also to a liveable minimum income or job"); p. 36 (asserting that the Equal Protection Clause prevents "state of servitude" of women "who perform huge and disproportionate amounts of unpaid domestic labor, from

argues that this "abolitionist" view is in fact the most historically accurate interpretation of the Fourteenth Amendment, because the alternative interpretations would allow some people to live in virtual slavery.<sup>6</sup>

West's book is divided into three sections, the first two of which she devotes to her doctrinal analysis of equal protection and due process. After opening with a brief presentation of her "abolitionist" or "progressive" theory and a discussion of its general implications, West explores three doctrinal applications. She claims that, under her progressive interpretation of the Fourteenth Amendment, marital rape exemptions are unconstitutional, while affirmative action and hate speech regulations are constitutional and perhaps even constitutionally mandated.<sup>7</sup> In all three instances, she argues that, under the abolitionist interpretation, the government has a constitutional obligation to intervene in order to protect individuals from private wrongs that diminish their capacity to participate fully in the society.

In the final section, entitled *Institutional Responsibilities*, West returns to theoretical matters. Chapters Seven, Eight, and Nine in this section are various taxonomies of constitutional jurisprudence, and are by far the strongest chapters in the book. West concludes with a chapter of advice for progressive constitutionalists.

Very little of *Progressive Constitutionalism* will be persuasive to readers who do not already share West's politics. Indeed, it is not clear why anyone who does not fit West's definition of a "progressive" constitutionalist would even want to read a book which suggests that Justices Brennan and Scalia differ "only marginally,"<sup>8</sup> and which begins the last chapter by asking whether a particular rule of constitutional interpretation would "help or hinder progressive causes."<sup>9</sup> This question makes explicit West's implicit, pervasive assumption: that the purpose of constitutional interpretation is to achieve results congruent with her definition of progressive. She does not attempt to defend progressive

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child care to housekeeping, often preventing their acquisition or development of labor skills compensable in the 'real' or paid labor market"); p. 117 (discussing the "threat" to constitutional freedom of women posed by "the unequal distribution and unequal recognition of and compensation for domestic labor"); p. 125 (explaining that the Reconstruction Amendments were "fundamentally" about "securing the positive liberties of citizenship").

6. Pp. 126-27.

7. The chapter on hate speech seems misplaced in a book about the 14th Amendment, especially since West rejects the idea that the First Amendment "must be read through the prism of the Fourteenth Amendment's . . . promise of equality." P. 147. In fact, she calls for a reinterpretation of the purposes of the 1st Amendment itself, without reference to the 14th Amendment. See pp. 148-50. The unexplained inclusion of this 1st Amendment discussion suggests that the book is more about progressive politics than about the 14th Amendment. In contrast, Akhil Amar has crafted a theory that makes the 13th and 14th Amendments relevant to the question of hate speech regulations. Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124 (1992). It is surprising that West chooses not to cite Amar's article, since it so effectively supports her thesis.

8. P. 134. Most people would conclude from the two justices' diametrically opposed views on such issues as abortion, see *Webster v. Reproductive Health Serv.*, 492 U.S. 490 (1989), affirmative action, see *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990), property rights, see *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and state sovereign immunity, see *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989); *Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 825 (1987), that their differences are more than "marginal."

9. P. 290.

goals, but instead assumes that her readers share them. Those who do not unequivocally endorse her progressive results, or who simply believe that constitutional interpretation should not be so rigidly overdetermined, will find much of the book unsatisfying.

My substantive critique of *Progressive Constitutionalism* begins with a brief exploration of weaknesses in West's discussion of the Equal Protection Clause, a discussion which typifies her doctrinal analysis. I then turn to an observation West makes in Chapter Seven that contradicts her very purpose in writing the book: "Regardless of political viewpoint, constitutional scholars are peculiarly reluctant to see . . . the Constitution . . . as being at odds with our political or moral ideals, goals, or commitments."<sup>10</sup> In other words, she suggests that we tend to interpret the Constitution in accordance with our particular political desires, rather than to see it as being in tension with those desires and, therefore, as potentially flawed. Ironically, most of *Progressive Constitutionalism* exemplifies exactly this tendency. West's own failure to avoid what she herself identifies as a defect of constitutional scholarship raises several interesting questions, which I explore in Part II.

## I.

Neither of West's substantive modifications of Fourteenth Amendment jurisprudence—enforcing positive rights and abandoning the state action doctrine<sup>11</sup>—is particularly novel. Criticism of the state action doctrine has persisted for decades,<sup>12</sup> and many scholars have also called for protection of positive as well as negative constitutional rights.<sup>13</sup> Indeed, Frank Michelman

10. P. 159.

11. Although West claims that the existing doctrine of negative rights and the state action requirement are "logically independent of each other," p. 113, in reality any enforcement of positive rights necessarily eviscerates the state action requirement. If, as West suggests, Americans ought to have a constitutionally protected "positive liberty to food, shelter, a job or an income or to a fulfilled, prosperous, meaningful, and self-governed life" provided by the state, p. 110, then whether it is state action that deprives individuals of such necessities is irrelevant.

12. See, e.g., Charles L. Black Jr., *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967); Harold W. Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. REV. 53, 57-61. This random sampling illustrates the length and breadth of traditional criticism of the state action doctrine. The following footnote similarly documents a random sampling of the critiques of the negative rights doctrine.

13. See, e.g., Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990) (demanding affirmative duties of government to eradicate harms left unchecked under a negative Constitution); Archibald Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966) (identifying a change in the Warren Court's philosophy whereby the equal protection clause imposes affirmative obligations on states); Michael J. Gerhardt, *The Ripple Effects of Slaughterhouse: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 413 (1990) (rejecting a negative rights theory in favor of a constitutional interpretation emphasizing "the historical, structural, and linguistic contexts of particular constitutional guarantees."); Arthur Selwyn Miller, *Toward a Concept of Constitutional Duty*, 1968 SUP. CT. REV. 199 (discussing the development of a judicial concept of constitutional duty based on decisions rendered in the past three decades); Aviam Soifer, *Moral Ambition, Formalism, and the "Free World" of DeShaney*, 57 GEO. WASH. L. REV. 1513, 1521-26 (1989) (criticizing the "troubling lack of 'moral

called for an interpretation of the Fourteenth Amendment almost identical to West's over twenty-five years ago. He argued that the Fourteenth Amendment imposes upon the state a "duty to protect against certain hazards which are endemic in an unequal society, rather than . . . a duty to avoid complicity in unequal treatment."<sup>14</sup> Moreover, West presents a surprisingly weak historical analysis of her claim that the Framers' original intent in drafting the Fourteenth Amendment was to secure positive liberty and equality against private as well as public deprivation. A recent law review article makes a detailed—if controversial—historical case for an interpretation almost identical to West's,<sup>15</sup> and a wealth of recent books similarly supplements our understanding of the Fourteenth Amendment's history.<sup>16</sup> Nevertheless, West fails to mention any of these sources in her historical defense, either to refute them or to support her thesis. Instead, she relies almost exclusively on a single book that is several decades old.<sup>17</sup> Similarly, West's call for progressives to abandon litigation in favor of appeals to the legislature simply echoes Gerald Rosenberg's recent, more detailed, book.<sup>18</sup>

But neither novelty nor history are crucial to West's argument. She uses history only as "a [possible] source of moral insight and a vision of the just society that is superior to [our current vision],"<sup>19</sup> and not because it is necessarily authoritative. Thus if her vision is indeed inspiring and persuasively portrayed, it matters little whether she derived this vision from nineteenth century abolitionists or twentieth century scholars.

Unfortunately, West's unsupported historical assertions and unoriginal proposals are not the only problems with *Progressive Constitutionalism*. A brief survey of her equal protection analysis illustrates the serious weaknesses of the book's doctrinal portions.

ambition' " and "machismo conceptualism" of the majority's opinion in the *Deshaney* case); Strauss, *supra* note 12; see also David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

14. Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9 (1969) (emphasis omitted). Michelman modestly acknowledged that in making this suggestion even as early as 1969, he was "treading where others have trod before." *Id.*

15. Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991) (challenging the *Deshaney* decision and arguing for the establishment of a constitutional right to protection from private violence). Curiously, West chooses not to cite this article, although it strongly supports her thesis.

16. See, e.g., MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986); 6 CHARLES FAIRMAN, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-88* (Paul A. Freund ed., 1971); DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 253-319 (1990); ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877* (1988); ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* (1992).

17. JACOBUS TENBROEK, *EQUAL UNDER LAW* (1st Collier Books ed. 1965) (1951). While there is nothing wrong with her use of tenBroek, it is surprising that West chose not to cite any of the more recent histories of the 14th Amendment.

18. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

19. P. 18.

West begins by dividing existing equal protection jurisprudence into two camps, which she labels formalist and antisubordinationist.<sup>20</sup> The debate between the formalists and the antisubordinationists focuses on the meaning of equality. Formalists demand equal laws, while antisubordinationists demand equal results.<sup>21</sup> The conflict between the two camps over their interpretations of the Equal Protection Clause is sharpest in the context of affirmative action. Formalists—including an apparent majority of the current United States Supreme Court—believe that differential treatment based on race is unconstitutional. Conversely, antisubordinationists believe that the need to “reverse the utterly predictable effects of private, racial subordination” mandates differential treatment.<sup>22</sup>

West seeks a “new paradigm of meaning for the equal protection clause” because, in her words, the affirmative action debate “has come to a dead end.”<sup>23</sup> She proposes, therefore, “to start over, to go back to the beginning . . . in other words, to change the subject.”<sup>24</sup> *Progressive Constitutionalism*, she tells us, will “argue against both of these understandings of equal protection and . . . introduce a quite different interpretation.”<sup>25</sup> Her new paradigm focuses on the meaning of “equal protection” rather than on the meaning of “equality.” In this manner, she asserts that the plainest possible meaning of the Equal Protection Clause is that “no state may deny to any citizen the protection of its criminal and civil law against private violence and private violation.”<sup>26</sup> In other words, “[o]nly the state shall have access to the use of unchecked and uncheckable violence to effectuate its will.”<sup>27</sup> There is, as she notes, some historical evidence for this interpretation: The refusal of Southern states to protect newly freed slaves from rampant white violence may have been one impetus for the enactment of the Fourteenth Amendment.<sup>28</sup>

Ultimately, however, West is unable to “change the subject.” She breaks her promise to reject both of the existing approaches in favor of a new paradigm. Disappointingly, she comes down squarely on the side of the anti-subordinationists. Under her “new” progressive theory, West not only reaches all the same results as do the antisubordinationists,<sup>29</sup> but later in the book, she

20. P. 11.

21. See pp. 9-10.

22. P. 14.

23. P. 19.

24. P. 20.

25. P. 10.

26. P. 23.

27. P. 23.

28. West cites tenBroek for this contention. Pp. 24-25. In fact, the evidence is more ambiguous than West would lead us to believe. See, e.g., FONER, *supra* note 16, at 245 (claiming that the Civil Rights Bill, the basis for the 14th Amendment, “was primarily directed against public, not private, acts of injustice”). A stronger historical case for West’s interpretation may be found in Heyman, *supra* note 15, at 546-54 (arguing that Congress passed the Civil Rights Act and the 14th Amendment in response to the states’ inability to protect the rights of black citizens); see also FARBER & SHERRY, *supra* note 16, at 253-73 (discussing the ideological origins of the Reconstruction Amendments while focusing on the theories of natural law and the law of nations).

29. For example, compare the antisubordinationist view that affirmative action is constitutional and sometimes required, and that facially neutral statutes with a disparate impact violate equal protec-



explicitly concludes that progressives, like antisubordinationists, support a “‘substantive’ understanding of . . . equality.”<sup>30</sup> In the course of deriving these results from the uncontroversial doctrine that the state must protect all persons equally from “private violence and private violation of trust,”<sup>31</sup> she recreates, at the level of “equal protection,” the debate between the formalists and antisubordinationists over the meaning of “equality.”

Her initial formulation and defense of the principle of equal protection is not controversial. She explains that a state denies the equal protection of the laws when it refuses “to punish, check, or deter . . . violence” against one group or “to extend to [one group] the legal forms of contract and property that [are] essential to their participation in the community’s economic life.”<sup>32</sup> No formalist would find fault with this definition. But West adds a more substantive cast each time she restates the principle. She suggests that the state violates equal protection if it permits “economic isolation,”<sup>33</sup> “extreme material deprivation,”<sup>34</sup> or even “economic . . . dependence”;<sup>35</sup> if it fails to protect citizens from “subjection to the whims of others occasioned by extreme states of poverty”<sup>36</sup> or from “the mandatory mores of an unchecked, hostile, and hegemonic majority culture”;<sup>37</sup> if it fails to guarantee “freedom from want”;<sup>38</sup> or if it ignores the “felt needs and interests” of any community.<sup>39</sup> By the end of the first chapter, West has transmogrified her condemnation of the state’s failure to observe formal neutrality into an affirmative demand that the state remedy any substantive differentials. She suggests that “the equal protection clause requires the state to affirmatively protect each person’s exercise of his or her natural or human rights,”<sup>40</sup> without recognizing that she has leapt from a formal to a substantive interpretation of the Clause. Just as she accuses both formalists and antisubordinationists of forgetting that the clause is about equal *protection*,<sup>41</sup> she tends to forget that the language of the Clause focuses on *equal* protection, and not on baselines of liberty. Indeed, she states explicitly

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tion, pp. 13-14, with West’s identical conclusions. Pp. 37-38. *See also* pp. 64-65 (both the antisubordination model and West’s equal protection model make clear the inherent inequality of marital rape exemptions, while the formalist model does not); pp. 144-51 (both the West and the antisubordinationists support regulation of hate speech, albeit on different rationales).

30. P. 216; *see also* p. 49 (describing the “collective mandate” of the “antisubordinationist” and “protectionist” equal protection theories); p. 253 (“anti-subordination progressives” agree with all of the goals she put forth in chapter 2); p. 261 (“[E]quality,’ for the progressive constitutionalist, means substantive equality and the ‘equal protection clause’ constitutes a commitment to rid the culture of the stultifying, oppressive, and damaging consequences of the hierarchic domination of some social groups by others.”).

31. P. 25.

32. P. 25.

33. P. 25.

34. P. 36.

35. P. 35.

36. P. 35.

37. P. 40.

38. P. 32.

39. P. 34.

40. P. 31.

41. P. 29.

that "the protectionist reads [the Equal Protection Clause] as requiring liberty."<sup>42</sup>

It is surprising that West fails to recognize that she has simply reflected the conflict between formalists and antisubordinationists that she explicitly set out to renounce. Her failure to formulate a new interpretation that resolves that conflict, however, is both unsurprising and common. We are missing—and West does not supply—an understanding of the causes of substantive inequality. Such an understanding is necessary to justify persuasively either a formal or a substantive interpretation of the Equal Protection Clause. The substantive interpretation is most plausible only if the causes are largely social and correctable. In that instance, society might have a responsibility to remedy the inequalities it has created. If the causes are largely natural or individual, however, then a substantive interpretation is less plausible. It might be impossible to save people who cannot be saved, and it might be unjust to save people who will not save themselves. Regrettably, *Progressive Constitutionalism* fails to address this problem. In fact, West's argument rests on the unfounded assumption that the causes of inequality cannot possibly be natural, individual, or at all complex, but are instead the malign and sinister attempts of white men to perpetuate their own dominance.<sup>43</sup> Such a simplistic assumption renders the formalist approach hollow and hardly worth refuting. In fact, West does not bother to refute it. This cavalier approach will be appealing only to those who already embrace the antisubordinationist's assumptions.

This type of superficial analysis and an assumption that her audience will be uncritically appreciative permeate the book. West asserts, for example, that the Fourteenth Amendment was never aimed exclusively at state action, but rather at any conditions that lead to subjugation. At the same time, she never confronts the fact that the language of the Fourteenth Amendment, unlike that of the Thirteenth, refers explicitly to states. Suggesting that there is little or no

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42. P. 38. Similarly, she seems to confuse the 13th and 14th Amendments, suggesting that the latter "explicitly prohibits" slavery, p. 27, and confers a "positive right to be free from bondage." P. 39. This confusion, coupled with the failure to distinguish between equality and liberty, assists her in reaching her ultimate conclusions that the Equal Protection Clause contains positive rights and no state action requirement.

43. See, e.g., pp. 115-16 (asserting that women marry to avoid sexual violence and cannot participate in civic life because they "feel responsible" for disproportionate amounts of domestic and childcare labor); pp. 163-64 ("African-Americans and other ethnic minorities are hindered in their search for meaningful freedom and full civic equality . . . by the continuing and escalating presence of a virulent white racism in virtually all spheres of private, social, and economic life."); p. 261 (arguing that the Equal Protection Clause should be "a tool for dismantling society's racist, misogynist, homophobic, patriarchic, and economic hierarchies" in order to achieve "substantive social equality").

West's blithe assumption that women are little more than victims of male domination is particularly ironic if one compares her criticism of motherhood, p. 248, with the dedication page. West notes that: the widespread participation of women in practices of heterosexuality, family, and motherhood is best explained as a product not of nature or biology, nor of benign culture, and certainly not of individual choice, but rather as a product of patterns of coercion, gendered hierarchy, sexual violence, and male control of women's sexual and reproductive labor.

P. 248. Nevertheless, in a genuine demonstration of presumably uncoerced maternal love, West dedicates the book to her two young sons. P. v.

difference between the two amendments implicates a complicated and controversial historical argument that West never addresses.<sup>44</sup>

Similarly, it is hard to understand why an intellectually serious scholar would describe the status of women as West does, save as a rhetorical flourish aimed at readers who need no further substantive arguments to convince them. Trivializing the horrors of slavery, West describes as living in an unconstitutional "state of servitude," the "vast numbers of women who perform huge and disproportionate amounts of unpaid domestic labor [and] are, like slaves, rendered subject to the whim of a separate sovereign, the check-bearing spouse on whom they depend for material survival."<sup>45</sup> She also suggests that "the private regime of sexual violence against women," especially marital rape exemptions, is analogous to the "private regime[ ] of segregation."<sup>46</sup> Accordingly, she concludes that the regime's abolition would essentially end discrimination against women. Indeed, her general view that the current constitutional regime "has not served women well"<sup>47</sup> does not mirror any version of reality. Compare the status of women in, say, 1954 (the year both she and I were born) and 1994, and it is uncontroversially obvious that the status of women has improved, in large part due to "liberal" constitutional decisions.<sup>48</sup> Despite this progress, West asserts that the current constitutional doctrine protects patriarchy to such an extent that it would "raise constitutional problems" for "the state . . . to take affirmative actions to address sexual violence and the violence that women suffer within intimate relations."<sup>49</sup> West's insistence that current constitutional jurisprudence hurts women reflects her failure to consider that the state action requirement, which she so roundly criticizes, may be "a necessary prerequisite to the very idea of rights," including a woman's right to obtain an abortion.<sup>50</sup> Her essentialist view of women as universally "infantilize[d]" by the "fear of sexual violence"<sup>51</sup> appears to drive her idiosyncratic perception of women.

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44. See Heyman, *supra* note 15, at 550-66 (arguing that the Civil Rights Act of 1866 and the 14th Amendment similarly demand an affirmative right to protection by the government).

45. P. 36. Anne Coughlin suggests that arguments such as West's, which depict women as lacking the ordinary powers of rational choice and exit from an intolerable situation, demean women and perpetuate stereotypes of women as inferior and irrational. Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1 (1994).

46. P. 71.

47. P. 114.

48. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804, 2826-29 (1992) (joint plurality opinion) (reaffirming women's fundamental right to abortion and striking provision requiring woman to notify her husband); *Stanton v. Stanton*, 421 U.S. 7, 13-17 (1975) (requiring fathers to support daughters and sons to same age of majority); *Taylor v. Louisiana*, 419 U.S. 522, 526-33 (1975) (invalidating jury-service discrimination on the basis of gender); *Frontiero v. Richardson*, 411 U.S. 677, 688-91 (1973) (invalidating financial discrimination against working women); *Roe v. Wade*, 410 U.S. 113, 152-58 (1973) (protecting women's fundamental right to abortion); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (invalidating arbitrary preference for males); *Griswold v. Connecticut*, 381 U.S. 479, 481-86 (1965) (plurality opinion) (invalidating restrictions on contraceptive availability).

49. P. 120.

50. Louis Michael Seidman, *The State Action Paradox*, 10 CONST. COMMENTARY 379, 380, 392-94 (1993); see also HOLMES, *supra* note 1, at 209 ("[T]he liberal distinction between public and private . . . may be a necessary precondition for the democratization of public life.").

51. P. 116.

Finally, the book is riddled with obvious errors. The chapter on freedom of speech, for example, incorrectly assumes that the primary basis for defending a right to free speech in a democracy is a "commitment to individual liberty."<sup>52</sup> Moreover, her discussion of the debate over constraints on constitutional interpretation reverses the common legal usage of the terms "interpretivism" and "non-interpretivism." By her account, interpretivists reject plain meaning and original intent.<sup>53</sup> In addition, the book simplistically lumps all postmodern and pragmatist scholars together.<sup>54</sup> Her taxonomy of progressive constitutionalists is hopelessly internally inconsistent.<sup>55</sup> Lastly, her progressive view of conservative constitutionalists, especially those on the Supreme Court, is overwrought. She cites Richard Epstein as the typical conservative, therefore predicting that the current Supreme Court is likely to invalidate "[m]ost of the significant items on any progressive political agenda" under a "*Lochner*-like understanding of the due process clause."<sup>56</sup>

At base, *Progressive Constitutionalism* is simply one more attack on the Supreme Court's holdings in *City of Richmond v. J.A. Croson Co.*<sup>57</sup> and *R.A.V. v. City of St. Paul.*<sup>58</sup> But numerous critiques of both cases already exist, and

52. P. 105. For classic alternative justifications ignored by *Progressive Constitutionalism*, see ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) (arguing that freedom of speech is necessary to self-government); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (asserting that freedom of speech ensures that truth will prevail in the marketplace of ideas).

53. P. 75. For common meanings of the two terms, see JOHN HART ELY, *DEMOCRACY AND TRUST: A THEORY OF JUDICIAL REVIEW* 88 n.\* (1980); Michael J. Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 263-84 (1981); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

54. P. 77. For a carefully nuanced description of some of the differences among pragmatists and postmodernists, see William N. Eskridge Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994).

55. For example, West labels me a "progressive positivist," which is equivalent to an "existentialist." Thirteen pages later, she describes me as an "idealist" with occasional existentialist leaning, a taxonomic classification which, according to West, is altogether different. Pp. 269.

56. P. 286. Unlike Epstein, most modern constitutional conservatives—on and off the bench—generally eschew activism, refraining from invalidating either liberal or conservative legislation. See, e.g., Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986) (criticizing *Lochner*-like activism); *General Motors Corp. v. Romein*, 112 S.Ct. 1105, 1112 (1992) (unanimously upholding a retroactive increase of an employer's liability under worker's compensation benefits); *United States v. Carlton*, 114 S. Ct. 2018, 2024 (1994) (upholding retroactive elimination of the estate tax deduction).

57. 488 U.S. 469 (1989) (holding Richmond's minority set-aside programs unconstitutional).

58. 112 S. Ct. 2538 (1992) (striking down a city bias-motivated disorderly conduct ordinance as a violation of the 1st Amendment). The one chapter that does not fit with this purpose is Chapter Two, on marital rape. It is unclear why West devotes the first substantive doctrinal chapter to the constitutionality of marital rape exemptions. Only one state (Louisiana) still has a marital rape exemption. Thirty-two states and the District of Columbia have abolished the exemption entirely, and 18 states distinguish marital rape from other types of rape in various ways. Four states apply the exemption only to spouses living together. Three states require that the marital rape be reported within a shorter period of time. The legislative trend is clearly against exemptions. Moreover, such exemptions are probably unconstitutional under virtually any theory of the 14th Amendment; West's "abolitionist" theory does not advance the argument. Thus the focus on domestic sexual violence in a book on the 14th Amendment is difficult to understand except as a reflection of West's personal interest in the topic. See Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 98-99 (1987) (describing West's personal experience with violence).

most of them present stronger arguments than West's.<sup>59</sup> In fact, the amount of paper devoted to these two issues seems disproportionate to their importance. Perusing the law reviews leaves the impression that scholars believe engaging in affirmative action and prohibiting hate speech would, more than any other possible course of action, dramatically improve the condition of people of color in this country. It might be time to explore other possibilities.

Ultimately, West's critique of the "liberal" interpretation of the Constitution that resulted in decisions like *Croson* and *R.A.V.*, as well as in the failure to protect the poor, is simply a restatement of traditional antiliberal beliefs. She distrusts judicial application of neutral principles of law, expansive protection for freedom of speech, and the workings of the free market; because all three work against her progressive goals. Her jurisprudence thus unintentionally echoes the philosophical writings of classic antiliberals. Stephen Holmes summarizes the work of one such antiliberal, Carl Schmitt, who argued that "[l]iberals place too much confidence . . . in three impersonal mechanisms: the rule of law, the free market, and the inevitable triumph of truth in open discussion."<sup>60</sup> A careful discussion of the actual roles these three mechanisms ought to play in a liberal society could, of course, form the core of an excellent book. Unfortunately, West does not engage in such a discussion. Instead she summarily relegates the mechanisms, and liberalism itself, to the realm of evil antiprogressivism.

In summary, the "abolitionist" interpretation West ultimately describes is neither novel nor historically supported. Moreover, her doctrinal argument relies on rhetorical tropes rather than substantive analysis, and as a result, is ultimately unpersuasive. Her interpretation and application of the Fourteenth Amendment is simply not well articulated. Given this shortcoming, what purpose do the doctrinal chapters serve? An examination of the more metaconstitutional chapters is useful in exploring that question.

## II.

In the final four chapters of the book, West turns from the Fourteenth Amendment to more general questions of constitutional jurisprudence. These chapters are considerably better than the earlier ones. Chapter Seven, *Constitutional Skepticism*, addresses the absence of scholarly skepticism toward the Constitution, describing the failure of progressives and conservatives alike to question the wisdom or morality of the Constitution itself. Chapter Eight, *The Authoritarian Impulse in Constitutional Law*, insightfully analyzes the distinction between liberal and civic republican constitutional thought; West concludes that the important difference is not between liberals, who emphasize individuals, and republicans, who emphasize communities; but between agnostics, who defer to the authority of either individuals or communities, and

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59. See, e.g., Amar, *supra* note 7; Lawrence Friedman, *Regulating Hate Speech at Public Universities After R.A.V. v. City of St. Paul*, 37 How. L.J. 1 (1993); Kathleen Sullivan, *City of Richmond v. J.A. Croson Co.: The Backlash Against Affirmative Action*, 64 TUL. L. REV. 1609 (1990).

60. HOLMES, *supra* note 1, at 46.

pragmatists or skeptics, whose individualism or communitarianism stems instead from beliefs about what is most "conducive to a more interesting, moral, and productive world."<sup>61</sup> Chapter Nine, *Progressive and Conservative Constitutionalism*, dissects the different visions of various strands within the progressive and conservative movements, arguing that differences in constitutional outlook are better explained by divergent attitudes toward social power than by jurisprudential categories such as positivism, pragmatism, or natural law. Chapter Ten, *The Aspirational Constitution*, addresses questions raised by a minimalist approach to judicial review<sup>62</sup> and suggests that the legislature is the superior branch in which to advance West's progressive interpretation of the Constitution.

These chapters raise interesting questions about the state of constitutional scholarship that may contribute to our ongoing debate about the Constitution's purposes. In particular, West asks in *Constitutional Skepticism* why there is no "normative constitutional debate":<sup>63</sup> scholars rarely ask "whether our Constitution is desirable,"<sup>64</sup> tending instead to "see the Constitution as more or less in line with moral and political virtue."<sup>65</sup> Thus constitutional scholars tend to interpret the Constitution so that it is morally perfect instead of recognizing and criticizing its imperfection. West's recognition and description of this tendency is well written and accurate, but the insight is neither new nor exclusively progressive. Henry Monaghan, who is by no means a progressive, identified and criticized the same tendency among left-leaning scholars over a decade ago, when he suggested that the Constitution is decidedly imperfect.<sup>66</sup> West nicely adds both a progressive attack on the Constitution as morally flawed<sup>67</sup> and a progressive defense of the properly interpreted Constitution.<sup>68</sup> Less successfully, she attributes to the ongoing "indeterminacy" dispute, the tendency to avoid debate about the morality of the Constitution.<sup>69</sup>

Interestingly, West's discussion of the tendency to "blur constitutionality with morality"<sup>70</sup> follows two sections in which West succumbs to that tendency. The doctrinal portion of the book attempts to show that a proper interpretation of the Fourteenth Amendment ineluctably yields the results West personally favors. Given her discomfort with the lack of normative discussion about the Constitution itself, why did she follow the traditional path of interpretation, rather than confrontation? In other words, why did West choose to write

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61. P. 204.

62. West assesses the consequences for modern progressive politics if the Supreme Court were to act according to James Thayer's famous "rule of administration," thereby invalidating legislation only when it is unconstitutional "beyond a reasonable doubt." James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 151 (1893).

63. P. 159.

64. P. 156.

65. P. 160.

66. See Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981). A similar assumption underlies SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988).

67. Pp. 162-69.

68. Pp. 183-88.

69. Pp. 171-80.

70. P. 159-60.

this book instead of a book echoing William Lloyd Garrison's charge that the Constitution is a "Covenant with Death and an Agreement with Hell"?<sup>71</sup>

Garrison himself may serve as a cautionary example for those who would condemn the Constitution as immoral. His views were not widely accepted, even within the antislavery movement. When he burned a Constitution, declaring, "So perish all compromises with tyranny!" many in his antislavery audience hissed.<sup>72</sup> Although West rejects the possibility that the reluctance to criticize the Constitution is primarily strategic,<sup>73</sup> the history of the abolitionist movement suggests that radical anticonstitutionalism is an ineffective strategy.

Because West disparages the strategic explanation, it cannot explain her own decision to reject the Garrisonian model. A partial explanation might lie in the differences between her views and Garrison's.<sup>74</sup> By 1854, when Garrison delivered his dramatic condemnation of the Constitution, there was sufficient antislavery sentiment to ensure that the slavery debate would not soon fade away. Diversity within the antislavery movement was possible, and the potentially alienating tactics of a small subgroup would not substantially diminish support for the movement as a whole. Moreover, the moral rightness of the antislavery position was increasingly difficult to deny.

West's views, by contrast, command the allegiance of only a small group of academics, and are certainly rejected by a vast majority of the population.<sup>75</sup> Condemning motherhood and favoring such goals as broad mandatory affirmative action and massive economic redistribution are unpopular enough without adding a general condemnation of the Constitution. Moreover, the deprecation of capitalism and formal equality implicit in her progressive demands fights *against* a worldwide trend. Ultimately, West desperately needs the moral high ground provided by the Constitution; Garrison did not.

Our reluctance to criticize the Constitution itself, and our corresponding tendency to criticize constitutional interpretation instead, may have cultural or historical roots. Americans of all political persuasions have always held a deep

71. See MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* 98 (1986).

72. *Id.* at 98; PHILLIP S. PALUDAN, *A COVENANT WITH DEATH: THE CONSTITUTION, LAW, AND EQUALITY IN THE CIVIL WAR ERA* 3 (1975). For discussions of the general rejection of Garrison's radical views, see FARBER & SHERRY, *supra* note 16, at 258; ROBERT W. FOGEL, *WITHOUT CONSENT OR CONTRACT: THE RISE AND FALL OF AMERICAN SLAVERY* 271-80 (1989); Kammen, *supra* note 71, at 98-100.

73. See pp. 170-71. West also rejects the possibility that scholars are "still afflicted with an irrational and deeply emotional affection for a foundational legal document." P. 160.

74. Part of the explanation for the general reluctance to engage in normative criticism of the Constitution may also lie in the scholarly profession's continuing uncertainty about the purposes of our scholarship. See, e.g., *A Symposium on Legal Scholarship*, 63 U. COLO. L. REV. 521 (1992); Symposium, *Legal Scholarship: Its Nature and Purposes*, 90 YALE L.J. 955 (1981). West does not discuss this possibility.

75. West herself seems to recognize this when she notes that we do not currently have either a progressive Congress or a progressive citizenry. P. 289. The results of the 1994 midterm elections resoundingly confirm the gap between West's views and those of a large majority of the American people. See, e.g., NEWT GINGRICH, DICK ARMEY & THE HOUSE REPUBLICANS, *CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY AND THE HOUSE REPUBLICANS TO CHANGE THE NATION* (Ed Gillespie & Bob Schellhas eds., 1994) (illustrating the government role that many Americans view as appropriate).

and abiding belief in a higher law. Courts and commentators have measured popularly enacted legislation against natural justice since before the Constitution itself. From James Wilson to John Bingham, from Joseph Story to Clarence Thomas, "we the people" believe we are constructing a political order that depends in part on natural justice for its justification.<sup>76</sup> Nevertheless, there is a deep conflict between the belief in higher law and our equally strong belief in popular sovereignty.<sup>77</sup> How can we reconcile these two conflicting items of constitutional faith?

Two complementary tactics may bridge the gap. The first is to incorporate the higher law into the Constitution itself. John Marshall's attempt to incorporate natural law ideas into the Contract Clause,<sup>78</sup> and the modern Court's reliance on substantive due process—to say nothing of the explicit language of the Ninth Amendment and the Fourteenth Amendment's Privileges and Immunities Clause—are examples of this tendency to believe that the popularly enacted Constitution reflects higher law, thus dissolving the conflict between popular sovereignty and higher law. It is inconsistent with this approach to disparage the Constitution, not only because this denigrates the paradigmatic written embodiment of our popular sovereignty, but also because it undermines the unstated cultural premise behind every constitutional provision, its inherent congruence with higher law.

The second tactic to reconcile natural law and popular sovereignty begins with the recognition that context frames natural law, and that natural law has always been situated rather than abstract. When considering the intersection between natural law and popular sovereignty, Americans have traditionally refused to believe that our popular Constitution simply embodies natural law. Rejecting, for example, the universal and deity-derived natural law of Thomism, Americans have tended to focus on natural law as derived from local traditions. Thus, by definition, natural law, like "custom," incorporates the people's will indirectly through long acquiescence.<sup>79</sup>

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76. See, e.g., CHESTER JAMES ANTIEAU, *THE HIGHER LAWS: ORIGINS OF MODERN CONSTITUTIONAL LAW* (1994) (exploring the origins and development of divine and natural law); FARBER & SHERRY, *supra* note 16, at 258-71 (tracing natural law ideology in the origins of the Reconstruction Amendments); Thomas C. Grey, *The Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 *STAN. L. REV.* 843 (1978) (exploring the role of unwritten fundamental law in the Framers' constitutional scheme); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 *U. CHI. L. REV.* 1127 (1987) (arguing that textualism ignores the Framers' intent not to displace natural law) [hereinafter Sherry, *Unwritten Constitution*]; Suzanna Sherry, *Natural Law in the States*, 61 *U. CIN. L. REV.* 171 (1992) (arguing that the Framers viewed the Constitution as one of several sources of fundamental law); John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 *EMORY L.J.* 967, 994-99 (1993) (arguing that a declaratory approach to the 9th Amendment supports natural rights beyond the text).

77. Others have also noted the potential contradiction between popular sovereignty and higher law. See, e.g., Paul W. Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 *YALE L.J.* 449 (1989).

78. See G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE 1815-35*, at 595-673 (1988).

79. See FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985); GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1969); Sherry, *Unwritten Constitution*, *supra* note 76, at 1128-30. For a more general discussion of this vision of natural law, see ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981).



Under this second approach, it is not enough to envision natural law as reflecting the American situation, rather than as being purely universal and abstract. One must also explain how the people ensure that popular sovereigns are faithful to that higher law. Frank Michelman, who shares West's progressive goals, recently pointed out that our simultaneous commitment to popular sovereignty and higher law necessarily precludes radically transformative constitutional change.<sup>80</sup> Change can occur only if the sovereign people's cultural norms before the change resemble their norms after the change. Otherwise, we cannot be certain that "we the people" have adhered to our own higher law, rather than to unprincipled self-interest, in governing ourselves.<sup>81</sup> Based on this view, our commitment to both higher law and popular sovereignty makes sense only in a regime of incremental, as opposed to radical, change. The much-noted "Burkean strain in American political thought"<sup>82</sup> is therefore a necessary feature of American constitutionalism.

To fully reconcile our peculiar allegiance to both higher law and popular sovereignty, both approaches are necessary. Because the Constitution embodies a higher law based on our tradition and because incremental change is required to ensure our faithfulness to that higher law, no radical interpretation of the Constitution is likely to survive. Its acceptance would bring into uncomfortably sharp relief, the conflict between popular sovereignty and higher law. Any radical interpretation would eventually become domesticated or extinct. Thus the peculiarly American loyalty to conflicting ideals necessitates the peculiarly American philosophy of pragmatism: Change, while necessary and welcome, should be incremental rather than suddenly transformative.

For the purposes of this essay, the two most salient characteristics of pragmatism are its antifoundationalism and its tendency toward incremental rather than radical change. Instead of abstract, unitary, foundational principles, legal pragmatists rely on a web of "coherence with existing beliefs as the basis for decisions [and] those beliefs limit the possibility of radical improvement."<sup>83</sup> Legal pragmatism of this form is currently enjoying a revival among American academics.<sup>84</sup> Indeed, West indirectly claims to be a pragmatist.<sup>85</sup>

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80. Frank Michelman, *Layers of Law*, 1994 John Dewey Lecture in the Philosophy of Law, University of Minnesota Law School (Nov. 14, 1994).

81. *Id.* While the manifestation of that change can be sudden, traditions must die slowly. The quintessential gradual change in traditions is the transition from *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding Louisiana laws requiring racially-segregated railway cars), to *Brown v. Board of Education*, 347 U.S. 483 (1954) (holding segregation in public schools unconstitutional). Other, apparently more sudden changes also exhibit the same tendency. The sea change on the Court in 1937 was preceded by decades of the gradual erosion of earlier beliefs; the radical revolution worked by the Reconstruction Amendments took years of political and military struggle to come to fruition.

82. Robert W. Bennett, *Of Gnarled Pegs and Round Holes: Sunstein's Civic Republicanism and the American Constitution*, 11 CONST. COMMENTARY 395, 407 (1994) (book review).

83. Daniel Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. REV. (forthcoming) (manuscript at 10) (on file with the *Stanford Law Review*).

84. For illustrations of pragmatist scholarship, see, e.g., PRAGMATISM IN LAW AND SOCIETY (Michael Brint & William Weaver eds. 1991); Farber, *supra* note 83.

85. See, e.g., pp. 162, 208, 210. It is possible, of course, that she is simply a political progressive without any particular jurisprudential or epistemological bent. In that case, however, her intended audi-

Yet despite West's claims, her proposals do not fare well under pragmatism. She is neither an antifoundationalist nor an incrementalist. She uses her abolitionist theory of the Fourteenth Amendment to scrutinize everything from hate speech to marital rape to welfare, rivaling the foundationalism of John Ely,<sup>86</sup> Michael Perry,<sup>87</sup> or Robert Bork.<sup>88</sup> She is, relatedly, an essentialist: Just as the foundationalist believes one size fits all in constitutional theory, the essentialist believes one size fits all in human nature.<sup>89</sup> West's essentialism is apparent, for example, in her view of women. She suggests that to be a woman is to be terrorized and infantilized by the potentiality of sexual violence and thus to be coerced into heterosexuality, marriage, and motherhood for protection.<sup>90</sup> West apparently has not contemplated that a woman might genuinely and freely choose to marry and have children, or that for many women mothering is, in Jean Bethke Elshtain's words, a "complicated, rich, ambivalent, vexing, joyous activity."<sup>91</sup>

Neither is West an incrementalist. This is apparent both in her general proposals to abolish the state action doctrine and enforce affirmative rights, and in her specific proposals with regard to hate speech and affirmative action. Most fundamentally, West's categorical and unwavering denunciation of all but a sliver of the vast spectrum of existing constitutional analysis belies her purported pragmatism. A pragmatist values existing tradition as one component of the web of coherent beliefs and activities that comprise our culture, and seeks a balance between "the 'funded knowledge' of past experience [and] the open possibilities offered by future experience."<sup>92</sup> Thus, unlike the more radical social constructivist, who "tears up the old manual and starts writing anew," the pragmatist "tries to create new and better stories that fit safely within the system of prior narratives."<sup>93</sup> West, however, rejects as "deeply conservative" any understanding of the Constitution that derives from any "set of past historical traditions," even the set of traditions established by the Warren Court.<sup>94</sup> A more pragmatist approach to constitutional interpretation would build on tradi-

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ence should be legislatures or the general public; it is hard to see what she has to say specifically to legal academics, courts, or lawyers, to whom the book is obviously directed.

86. See generally ELY, *supra* note 53.

87. See generally MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY* (1982).

88. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF LAW* (1990).

89. For critiques of essentialism, see, for example, ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

90. See, e.g., pp. 115-16, 248.

91. JEAN BETHKE ELSHTAIN, *PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT* 243 (1981).

92. Farber, *supra* note 83 (manuscript at 11).

93. Eskridge, *supra* note 54, at 643.

94. P. 132. It is partly this fundamental rejection of any reliance on the past that leads her to conclude that Justices Brennan and Scalia differ "only marginally." P. 135.

tion—criticizing its inconsistencies and inadequacies but also recognizing its presumptive authority, rather than rejecting it wholesale.<sup>95</sup>

The pragmatist allegiance to incremental change, while it allows us to envision many futures, also allows us to rule out others. In 1969, proposals to abolish state action and to make affirmative rights constitutionally enforceable might have been seen as incremental changes. In the context of cases such as *Reitman v. Mulkey*<sup>96</sup> and *Shapiro v. Thompson*,<sup>97</sup> and of the new safety nets created by the Great Society, which were generally popular, proposing that the state take responsibility for righting all wrongs did not diverge from the existing cultural norms. Indeed, a spate of law review articles around that time suggested that it was but a short doctrinal step from the existing caselaw to proposals similar to many of those West now makes.<sup>98</sup>

Today it is clear, however, that “we the people” have chosen quite a different path. We moved away from that once possible future by incremental steps, eventually making it unimaginable without a radical transformation. Richard Nixon, condemned as a conservative in his own time, would be considered a liberal compared to Ronald Reagan.<sup>99</sup> The election of a majority Republican House of Representatives for the first time in forty years, and the support of a Democratic president for welfare reform, are evidence of just how far we have come since a right to welfare seemed consistent with our cultural mores.

There is some evidence that the radical right is coming to accept abortion as a battle waged and lost, and is moving on to new issues.<sup>100</sup> Yet many on the radical left—West among them—refuse to accept that their battle for a paternalistic state has also been waged and lost. Instead of turning to new issues or attempting incremental change in their preferred direction, they are advocating a new radical transformation, a future that a large majority of the American people can no longer even envision. From being on the vanguard of change, the far left wing of the legal academy has retreated to the position occupied in

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95. For recent examples of a pragmatist approach to constitutional doctrine, see Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 *MINN. L. REV.* 1331 (1988); Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 *U. CHI. L. REV.* 131 (1995) (finding in pragmatism a theory of individual responsibility).

96. 387 U.S. 369 (1967) (holding unconstitutional California law affirming an individual’s “right” to discriminate in sale, lease, or rental of real property).

97. 394 U.S. 618 (1969) (holding unconstitutional state laws denying welfare benefits to residents of less than one year).

98. See, e.g., Cox, *supra* note 13, at 93 (observing growth of a governmental duty to provide substantive equality); Kenneth L. Karst & Harold W. Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 *SUP. CT. REV.* 39, 76 (predicting an enhanced role for the judiciary in an “era of positive government”); Michelman, *supra* note 14, at 9 (theorizing a right to “minimum welfare”).

99. See generally THOMAS LANGSTON, *IDEOLOGUES AND PRESIDENTS: FROM THE NEW DEAL TO THE REAGAN REVOLUTION* (1992); DAVID MCKAY, *DOMESTIC POLICY AND IDEOLOGY: PRESIDENTS AND THE AMERICAN STATE, 1964-1987* (1989).

100. See, e.g., Valerie Richardson, *Abortion Tabled by GOP*, *WASH. TIMES*, Mar. 1, 1993, at A3 (reporting that delegates to the GOP biennial convention decided to ignore abortion and squabble over homosexual rights instead); David Shribman, *Divisions on the Right: The Crusaders Might Tone it Down*, *MONTREAL GAZETTE*, Aug. 7, 1993, at B5 (reporting that some in the Christian Coalition are moving away from the abortion issue).

the early 1940s by the Four Horsemen: bemoaning the foolishness of the path we have already irrevocably taken.

Having lost the battle for a welfare state, West disturbingly turns to traditionally conservative tactics to advance her doctrinal proposals. Conservatives have always availed themselves of several strategies to achieve their goal of preventing changes in the status quo ante. Suppression of free speech is often a useful tool for achieving their goal of preventing change.<sup>101</sup> Allocation of benefits according to status rather than merit assures continued power for the favored groups.<sup>102</sup> When the courts frustrate legislative attempts to retain the status quo, conservatives urge that constitutional interpretation belongs to the people and their representatives, and not to the courts.<sup>103</sup> Finally, of course, appeal to historical intent as the touchstone of constitutional interpretation almost guarantees a long-term bias against change.

It is distressing to see how progressives, having lost the political and judicial battle for the hearts of Americans, have adopted these erstwhile conservative strategies. I have suggested elsewhere that Bruce Ackerman has turned to originalism as a last-gasp defense of liberal principles.<sup>104</sup> Now comes Robin West (and she is not alone), calling for the removal of constitutional interpretation from the hands of the courts, and supporting both restrictions on unpopular speech and allocation of benefits on the basis of race rather than merit. Urging a return to older, rejected principles, West mimics earlier generations of conservatives in both her overall approach and her specific doctrinal proposals.

But there is more at stake here than simply that past and present losers in the political arena adopt common strategies despite their disparate goals. Many of the new progressive strategies—especially the suppression of free speech and the insistence that a radical vision is superior to that which the populace has developed over the year—are based on a profoundly antidemocratic mis-

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101. Many groups in our history have used the suppression of critical speech to stifle dissent and silence calls for change. The Federalists used it to stifle Republican dissent, see JAMES MORTON SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* 176-187 (1956); the Southern slaveholding states used it to silence abolitionist voices, see FARBER & SHERRY, *supra* note 16, at 269-70; the antiabortion Reagan administration used it to limit speech about abortion, see *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (upholding abortion "gag-rule" for federally funded clinics); and a variety of governmental officials have used it throughout this century to diminish criticism of various military adventures. See, e.g., *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994) (striking down a municipal ban on residential signs opposing Persian Gulf War); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969) (striking down school district's attempt to ban black armbands worn in protest of the Vietnam War); *Abrams v. United States*, 250 U.S. 616 (1919) (upholding prison terms imposed for distributing leaflets opposing United States policy in World War I).

102. For example, in the first half of this century most American universities used quotas to limit the numbers of Jewish students and faculty. NATHAN C. BELTH, *A PROMISE TO KEEP: A NARRATIVE OF THE AMERICAN ENCOUNTER WITH ANTI-SEMITISM* 96-110, 194-95 (1979); LEONARD DINNERSTEIN, *A HISTORY OF AMERICAN ANTISEMITISM* 84-86 (1994).

103. See, e.g., Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455 (1986) (arguing on behalf of the Reagan administration for a "jurisprudence of original intent"); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (arguing that Court's power to define the spheres of freedom under the First Amendment must be derived from "neutral" constitutional principles).

104. See Suzanna Sherry, *The Ghost of Liberalism Past*, 105 HARV. L. REV. 918, 933-34 (1992) (reviewing 1 BRUCE A. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991)).

trust of the people's choices. And while this kind of authoritarian elitism is understandable in political conservatives, it is inconsistent with everything progressives have always stood for. Thus in the end, West is neither a pragmatist nor a progressive. She is ultimately an authoritarian in the deepest sense of the word, adopting traditional conservative tools to impose her outdated personal views on a public that has already soundly rejected them.