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Putting Progress Back into Progressive: Reclaiming a Philosophy of History for the Constitution

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PUTTING PROGRESS BACK INTO PROGRESSIVE: RECLAIMING A PHILOSOPHY OF HISTORY FOR THE CONSTITUTION

DAVID ARAM KAISER*

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INTRODUCTION

Chief Justice Earl Warren famously stated in *Trop v. Dulles* that the scope of the Eighth Amendment was “not static” and that it “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”¹ This statement characterized not just the Warren Court’s approach to the Eighth Amendment, but reflected a model of living constitutionalism based on the idea of progress. The progress

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1. 356 U.S. 86, 101 (1958).

associated with the Warren Court involved the expansion of the role of the federal government in a variety of areas—the regulatory state, civil rights, voter reapportionment, and criminal procedure—in such a way as to safeguard the individual citizen through collective action.² The Warren Court regarded the liberty protected by the Constitution as vindicated by an active government—what United States Supreme Court Justice Stephen Breyer has later called “active liberty.”³ But following its apogee in the Warren Court years, the idea of constitutional progress by means of the modern state has fallen on hard times, both specifically within constitutional jurisprudence (because of the increasing dominance of originalism), and within academic discourse generally (because of the ascendance of theories of postmodernism). Tellingly, in a recent dissent to an Eighth Amendment case, *Miller v. Alabama*, Justice Alito stated that “[b]oth the provenance and philosophical basis” of *Trop* were “problematic from the start.”⁴ His dissent questions: “Is it true that our society is inexorably evolving in the direction of greater and greater decency? Who says so, and how did this particular philosophy of history find its way into our fundamental law?”⁵ In his influential book on originalism, *A Matter of Interpretation*, Justice Scalia expressed a similar criticism of *Trop*, but in more colorful and provocative terms, stating that “[a] society that adopts a bill of rights is skeptical that ‘evolving standards of decency’ always ‘mark progress,’ and that societies always ‘mature,’ as opposed to rot.”⁶ Justice Scalia thus implies that constitutional change may not always be beneficial and indeed that a living constitution might rather be seen as a rotting constitution.

This Article examines how the idea of constitutional progress, *Trop*’s “particular philosophy of history,” is currently attacked by conservative proponents of constitutional originalism and neglected by contemporary proponents of living constitutionalism. Traditionally, proponents of living constitutionalism supported modern constitutional doctrine through this

2. ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970). For an astute contemporary analysis of the importance of the Warren Court decisions to modern constitutional doctrine, see AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 139–99 (2012) [hereinafter AMAR, *UNWRITTEN CONSTITUTION*].

3. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

4. *Miller v. Alabama*, 132 S. Ct. 2455, 2487 (2012) (Alito, J., dissenting). *Miller* holds that the mandatory sentencing of juveniles to life in prison without the possibility of parole violates the Eighth Amendment. *Id.* at 2460.

5. *Id.* at 2487.

6. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 40–41 (1997) [hereinafter SCALIA, *MATTER OF INTERPRETATION*].

philosophy of history—a narrative of progress in which constitutional principles are seen as developing towards a modern form of organized liberty and individual freedom. Progress in this sense is now practically a dirty word in postmodern academic circles. Originalism, which focuses on the meaning of the Constitution, or of a constitutional amendment, at the moment of its historical origin, is increasingly becoming the dominant historical model in constitutional interpretation.⁷ Numerous commentators have criticized originalism for relying on “law office history.” But, as this Article argues, the central problem posed by the increasing dominance of originalism is not that it turns constitutional interpretation towards history per se, but that originalism expresses a model of history divorced from the idea of progress. The advantage of an appropriate philosophy of history to a progressive interpretation of the Constitution is that it reunites historical change with an account of constitutional principles. One strength of the traditional account of the common law was that it expressed developing principles of reason.⁸ Contemporary accounts of common law constitutionalism have sought to divest themselves from such apparent metaphysical baggage.⁹ However, by divesting common law constitutionalism from any connection to a philosophy of history and reason, contemporary accounts of living constitutionalism are failing to meet originalism as a strong theory of constitutional interpretation.¹⁰ As I will argue, proponents of living constitutionalism need to reclaim some version of a philosophy of history in order to rebut Justice Scalia’s challenge that living constitutionalism represents “rot” rather than progress.

The Article is structured as follows. Part I provides an overview of the issue of progress and the Constitution. Parts II and III contrast the jurisprudence of the two current United States Supreme Court Justices who have written influential books on constitutional theory: Justice Scalia and Justice Breyer. Part II describes Justice Scalia’s account of originalism

7. The capstone originalist Supreme Court decision is *District of Columbia v. Heller*, 554 U.S. 570 (2008). See Reva B. Siegel, *Heller & Originalism’s Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1423 (2009) [hereinafter Siegel, *Originalism’s Dead Hand*]. For an analytical survey of theories of originalism, see Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009).

8. See *infra* Part IV.

9. See *infra* Part V.

10. Laurence Tribe has recently raised this important issue, suggesting that liberals should go beyond the embrace of incremental change that marks contemporary common law constitutionalism and, instead, define a narrative that connects the constitutional past to the present based on “principles by which we feel bound” and “which themselves evolve with our changing selves.” Laurence H. Tribe, *America’s Constitutional Narrative*, 141 DAEDALUS 18, 24 (2012).

in relation to a philosophy of history. Because Scalia posits original constitutional principles established at the founding and good for all time, he rejects any narrative of progress for the Constitution. Part III juxtaposes Scalia's originalism with Justice Breyer's account of "active liberty," which is based on Benjamin Constant's contrast between the liberty of the moderns and the liberty of the ancients. Parts IV, V, and VI discuss the idea of a narrative of progress in relation to some of the most influential contemporary theorists of living constitutionalism: Ronald Dworkin, Bruce Ackerman, Jack Balkin, David Strauss, and Reva Siegel. Part VII looks at a specific example of a constitutional right—the right of indigent criminal defendants to be provided counsel—in light of the narrative of progress developed in the previous sections. Part VIII presents concluding thoughts.

I. PROGRESS AND THE CONSTITUTION

The issue of progress and the Constitution raises the jurisprudential question of whether and how certain conceptions of liberty are embodied in the Constitution. The *Lochner* era Supreme Court regarded the individual's freedom to contract as a liberty embodied in the Constitution. That view was famously rejected by Justice Holmes in his dissent to *Lochner v. New York*, in which he wrote, "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."¹¹ But conservative critics of the New Deal and the Warren court can make an analogous argument, contending that neither does the Fourteenth Amendment enact the modern regulatory and welfare state. Liberals and conservatives therefore fundamentally disagree about the type of liberty protected by the Constitution.

As I will discuss below, in terms of the philosophical debate over concepts of liberty, the individual liberty associated with the *Lochner*-era court can be correlated to a "negative" conception of liberty in relation to the state, and the collectivist liberty associated with the New Deal and the modern welfare state can be correlated with a "positive" conception of liberty in relation to the state. The "negative" conception of liberty is the right to be left alone by the state, while the "positive" conception of liberty is the right to be affirmatively aided by the state.¹² The historian can trace a change in the dominant doctrine of liberty from the eighteenth century, with its emphasis on negative liberty and *laissez faire* conceptions of the

11. *Lochner v. New York*, 198 U.S. 45, 75 (1905).

12. *See infra* Part III.

state, to the twentieth century, with its emphasis on positive liberty and the role of the welfare state. The historian can trace the corresponding growth of the federal government and the regulatory state as embodying this model of positive liberty.

But what is the relationship between the story of the modern state and the story of the development of modern constitutional doctrine? Does the Constitution have its own autonomy as law, or is it merely a reflection of the dominant political culture of the time? These are no longer historical questions. These are questions of constitutional theory and are ones, this Article argues, that a theory of constitutional progress is uniquely able to address.

As Alexander Bickel has described, the Warren Court fused an idea of progress with modern constitutional doctrine.¹³ However, the theme of progress and the Constitution goes back much further in American history. Progress has been a key term in jurisprudence and political philosophy, and thinkers across the political spectrum have appealed to it in various forms. For example, the social Darwinism of Herbert Spencer, which influenced the *Lochner*-era Supreme Court, incorporated progress in the form of a “confidence that the progress of society inhered in the nature of things”¹⁴ Spencer’s social Darwinism, however, was combined with a “terrible pessimism about man’s capacity to move purposefully in the right direction”¹⁵ Progress in the liberal progressive tradition reflects the inverse view, namely that human beings can purposefully use the apparatus of the state to achieve progress. Bickel thus describes the idea of progress behind the Warren Court: “men . . . acquired confidence in their own capacity to change their environment and institutional arrangements for the better.”¹⁶ This idea of improving political institutions based on human reason ultimately reflects the tradition of the French Revolution. Edmund Burke inaugurated a central strand of modern conservative thought by questioning this animating goal of the French Revolution—the use of reason and the apparatus of the state to achieve progress.¹⁷

13. BICKEL, *supra* note 2.

14. *Id.* at 16.

15. *Id.* (internal citation omitted).

16. *Id.* at 19.

17. DAVID ARAM KAISER, ROMANTICISM, AESTHETICS, AND NATIONALISM 61–68 (1999) [hereinafter KAISER, NATIONALISM]; David Aram Kaiser, “*The Perfection of Reason*”: Coleridge and the Ancient Constitution, 32 *STUDS. IN ROMANTICISM* 29, 29–45 (1993) [hereinafter Kaiser, *Perfection of Reason*]. For a contemporary conservative intellectual account of the Burkean tradition, see YUVAL LEVIN, THE GREAT DEBATE: EDMUND BURKE, THOMAS PAINE, AND THE BIRTH OF RIGHT AND LEFT (2013).

After the Warren Court, however, the idea of progress has largely disappeared from the jurisprudence of both the Left and the Right. The disappearance of the idea of progress from the jurisprudence of the Right is not surprising, since mainstream conservative thought, influenced by Burke, has always been skeptical about appeals to progress through the state. What is surprising, however, is how the idea of progress has been rejected by its former home, the cultural Left. Postmodernist thought criticized the “grand narratives” of history, including the liberal narrative of progress through the development of the state reflected in the Warren Court.¹⁸ Many critics on the Left inspired by postmodernism have decried the idea of progress in history, finding it, at best, hopelessly naïve, or, at worst, irredeemably complicit with Western Imperialism.¹⁹ Meanwhile, in conservative jurisprudence, originalism has dominated, and has been regarded as initiating the turn (or return) to history in contemporary constitutional theory.

II. ORIGINALISM: PRINCIPLES WITHOUT CHANGE, HISTORY WITHOUT PROGRESS

A centrant tenet of Justice Scalia’s theory of originalism, as he states it in *Originalism: The Lesser Evil*, is that the very purpose of having a written Constitution is to prevent change: “The purpose of constitutional guarantees—and in particular those constitutional guarantees of individual rights that are at the center of this controversy—is precisely to prevent the law from reflecting certain *changes* in original values that the society adopting the Constitution thinks fundamentally undesirable.”²⁰ He repeats and amplifies this point in *A Matter of Interpretation* in the context of rejecting a common law approach to constitutional interpretation.²¹ Scalia defines a common law approach to adjudication as one that is not

18. See JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (Geoff Bennington & Brian Massumi trans., 1979). Richard Rorty is perhaps unique on the Left in combining a post-philosophical critique of the grand narratives of progress with a vigorous defense of the traditional goals of the modern liberal state. See RICHARD RORTY, *TRUTH AND PROGRESS: PHILOSOPHICAL PAPERS* (1998); RICHARD RORTY, *ACHIEVING OUR COUNTRY: LEFTIST THOUGHT IN TWENTIETH-CENTURY AMERICA* (1998) [hereinafter RORTY, *ACHIEVING OUR COUNTRY*].

19. For example, Eric Foner’s review of 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998), states, “[a]mong the most charming features of Ackerman’s approach is that he really believes in that quaint idea, Progress.” Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 *YALE L.J.* 2003, 2009 (1999). For a discussion of the American progressive tradition and imperialism, see JACKSON LEARS, *REBIRTH OF A NATION: THE MAKING OF MODERN AMERICA* 276–326 (2009).

20. Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. CIN. L. REV.* 849, 862 (1989).

21. ANTONIN SCALIA, *MATTER OF INTERPRETATION*, *supra* note 6, at 3–14.

constrained by the text of a constitution or a statute. This is an accurate enough description of the English common law, which traditionally was contrasted with written legal codes.²² But Scalia goes further and describes common law judging as if it were unconstrained by any sense of legal *principles*. This, as I discuss below, is not an accurate account of the common law tradition.²³ Scalia does acknowledge that the common law tradition understood itself to be *discovering* existing law rather than *creating* new law, but he argues that the work of legal realist scholarship in the twentieth century has shown that common law judges were in fact creating new law.²⁴ Scalia's embrace of a stark legal realist view of the common law as unconstrained by principles is ironic because such a legal realist view would also reject Scalia's originalist claim that constitutional interpretation can be based on principles embodied in the constitutional text.²⁵

Scalia thus defines common law judging as an infinitely malleable practice. As he describes the common law tradition, no rule of decision previously announced could be erased, but a common law judge could create new law by distinguishing the facts of the current case and enunciating a new principle of law based on those new facts.²⁶ Because the facts of cases are seldom exactly similar, common law judging, Scalia contends, provides no practical restraint on the ability of the judge to create new law through distinguishing prior cases.²⁷ Scalia argues that, whatever virtue common law judging might have in some areas of the law, it is inappropriate and pernicious to apply this approach to constitutional interpretation because this approach allows the judge to ignore and override the principles expressed in the Constitution. It is therefore within this context of his opposition to common law constitutional interpretation that Scalia defines the essential value of a written Constitution as preserving original principles against change: “[i]t certainly cannot be said that a constitution naturally suggests changeability; to the contrary, its whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away.”²⁸

22. See Kaiser, *Perfection of Reason*, *supra* note 17, at 37–40.

23. See *infra* Part IV.

24. SCALIA, MATTER OF INTERPRETATION, *supra* note 6, at 10.

25. Indeed, as discussed below in Section Five, David Strauss's account of common law constitutionalism, which is the theoretical opposite of Scalia's view, expresses the same stark legal realism.

26. SCALIA, MATTER OF INTERPRETATION, *supra* note 6, at 8–9.

27. See *id.* at 7–11.

28. *Id.* at 40.

Justice Scalia focuses his argument against constitutional changeability by turning to the Eighth Amendment prohibition on cruel and unusual punishment. The Eighth Amendment has often been considered the exemplary constitutional provision for living constitutionalism since Chief Justice Earl Warren famously stated in *Trop v. Dulles* that this amendment's meaning has changed to reflect "the evolving standards of decency that mark the progress of a maturing society."²⁹ Scalia rejects the whole model of progress presupposed by this. Rather, he states, "[a] society that adopts a bill of rights is skeptical that 'evolving standards of decency' always 'mark progress,' and that societies always 'mature,' as opposed to rot."³⁰ Scalia argues that if one released the phrase "cruel and unusual" from its historical meaning, then the Eighth Amendment "would be no protection against the moral perceptions of a future, more brutal, generation."³¹ The principle of the Eighth Amendment, he argues, is "rooted in the moral perceptions of the time."³² As Scalia concludes:

"[M]oral principles" . . . are permanent. The Americans of 1791 surely thought that what was cruel was cruel, regardless of what a more brutal future generation might think about it. They were embedding in the Bill of Rights *their* moral values, for otherwise all its general and abstract guarantees could be brought to nought.³³

Scalia's argument is that the original meaning of the Eighth Amendment serves to prevent a possible increase in barbarism. An increase in barbarism, however, has never been the expectation of a liberal philosophy of history. A liberal philosophy of history expects that moral progress will increase. To the defender of living constitutionalism, therefore, the central problem with Scalia's originalism is not his appeal to history as such, but rather his rejection of the narrative of progress in history. Scalia's originalism removes constitutional principles from the movement of history. For Scalia, the whole point of a written Constitution is to prevent change. For Scalia, constitutional principles are understood as being fully expressed at their founding and are thereafter timeless.

Liberal and progressive critics of Scalia's originalism fail to focus on his antipathy towards progress and a progressive movement of history,

29. 356 U.S. 86, 101 (1958). On the importance of the Eighth Amendment to living constitutionalism, see William C. Heffernan, *Constitutional Historicism: An Examination of the Eighth Amendment Evolving Standards Of Decency Test*, 54 AM. U. L. REV. 1355 (2005).

30. SCALIA, MATTER OF INTERPRETATION, *supra* note 6, at 40–41.

31. *Id.* at 145.

32. *Id.*

33. *Id.* at 146.

because, I believe, they themselves have an ambivalent relationship with the concept of progress. But the unwillingness of liberal and progressive constitutional theorists to defend progress as the traditional core of living constitutionalism cedes too much theoretical ground to originalism. Once one abandons the defense of the narrative of progress, constitutional change is subject to being recharacterized as the story of a falling away from original principles. In the conservative narrative, this represents a story of constitutional decline, or, as Scalia phrases it, “rot.”³⁴

Inevitably, of course, new phenomena and new circumstances emerge in history as problems with which constitutional interpretation must contend. Critics of originalism often argue as if the inevitable emergence of new circumstances is, in itself, sufficient to refute originalism as a theory of constitutional interpretation. After all, the critic may ask, the Founders never foresaw the Internet when they were drafting the Constitution, so how can originalism guide constitutional questions relating to this new historical phenomenon? Scalia, however, readily acknowledges that the history of the United States since the founding has presented circumstances and phenomena unknown and unforeseen by the founders, to which the court must apply constitutional principles. He maintains that the principles, *as principles*, do not change, even as they are applied to new factual circumstances unforeseen by the Founders. New technology, as such, is not troubling to originalism as long as the new circumstances can be subsumed under concepts and principles available at the founding.³⁵ For example, Scalia has no trouble dealing with infrared searches as a Fourth Amendment issue.³⁶ This search technology was unknown to the Founders, but the concept of a government search was known to them, and therefore this new *type* of search poses no fundamental problem to originalist interpretation.³⁷

In this Article, however, I want to engage in broader theoretical terms how historical change is a problem for originalism. My argument is that the important conflict between originalism and living constitutionalism

34. *Id.* at 41.

35. This idea is reflected in his corresponding account of textualism: “In their full context, words mean what they conveyed to reasonable people at the time they were written—with the understanding that general terms may embrace later technological innovations.” ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 16 (2012).

36. *See* *Kyllo v. United States*, 533 U.S. 27 (2001).

37. *See* *United States v. Jones*, 132 S. Ct. 945, 950 n.3 (2012). “Whatever new methods of investigation may be devised, our task, *at a minimum*, is to decide whether the action in question would have constituted a ‘search’ within the original meaning of the Fourth Amendment.” *Id.* (emphasis added).

occurs at a more fundamental level than the particular problems of applying the Constitution to new technologies. The conflict between originalism and living constitutionalism is rooted in issues relating to the very development of the modern state itself, a development that both entails a new role for government and a new concept of liberty for the citizen in relation to that government. As I will discuss below, the story of the development of the modern state is reflected in constitutional theory in the debate over “positive” and “negative” accounts of liberty, that is, between the view that the essence of individual freedom consists in being left alone by the state and the view that the state is central to creating the conditions under which the individual can achieve freedom. As I will discuss next, Justice Breyer’s account of “active liberty” (in his book by the same name) emerges from the debate concerning these two opposing accounts of liberty. An analysis of Breyer’s work will therefore show how the liberal narrative of progress remains important to contemporary constitutional theory.

III. STEPHEN BREYER’S “ACTIVE LIBERTY” AND THE MODERN STATE

Justice Stephen Breyer’s book-length essay, *Active Liberty*, has been seen as the liberal-wing’s answer to Scalia’s *A Matter of Interpretation*.³⁸ Commentators have mainly focused on Breyer’s direct criticisms of originalism.³⁹ However, as I will argue below, what is more important for a progressive response to originalism is an analysis of the implications of the philosophy of history under which Breyer advances his concept of active liberty.

Breyer uses a framework that contrasts the liberty of the ancients and the liberty of the moderns, a contrast famously made by the French-Swiss political philosopher Benjamin Constant in 1819. As Breyer explains, Constant’s liberty of the moderns is “the individual’s freedom to pursue his own interests and desires free of improper government interference.”⁴⁰ In contrast, “the liberty of the ancients” is “an active liberty,” which “[f]rom the citizen’s perspective” means “an active and constant participation in collective powers”⁴¹

38. BREYER, *supra* note 3. For review essays on this theme, see Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387 (2006); James E. Ryan, *Does It Take a Theory? Originalism, Active Liberty, and Minimalism*, 58 STAN. L. REV. 1623 (2006).

39. See McConnell, *supra* note 38, at 2414; Ryan, *supra* note 38, at 1635.

40. BREYER, *supra* note 3, at 5 (internal citations omitted).

41. *Id.* at 4.

Further fleshing out his conceptual framework, Breyer states that active liberty “bears some similarities to . . . Isaiah Berlin’s concept of ‘positive liberty.’”⁴² The English political philosopher Isaiah Berlin distinguished between two concepts of liberty, negative and positive.⁴³ Berlin’s essay follows a long tradition in liberal thought, which contemporary political philosopher Alan Wolfe has summarized as follows: negative liberty is the view that “freedom consists in the fact that no one can tell me what to do,” whereas positive liberty is the view that “it is not sufficient for me merely to be left alone, I must also have the capacity to realize the goals that I choose for myself.”⁴⁴ Scalia’s *A Matter of Interpretation* reflects a conception of rights as “negative” liberties, that is, as restraints against the state’s encroachment on the freedom of the individual. An emphasis on negative liberties characterizes “classical” liberalism, laissez-faire economics, and a limited role for the state.⁴⁵ “Modern” liberalism on the other hand recognizes a “positive” conception of liberty, and conceives a state that intervenes in the economy to provide opportunities for individual development.⁴⁶

Breyer’s account of active liberty is consistent with the role that modern liberalism has envisioned for the modern welfare state. Indeed, many of the Supreme Court cases that Breyer lists as embodying “active liberty” are classics of New Deal jurisprudence.⁴⁷ But even though Breyer connects active liberty with the *modern* welfare and regulatory state, Breyer, in an apparently unintentional irony, bases his theoretical

42. *Id.* at 137 n.6.

43. ISAAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* (1969).

44. ALAN WOLFE, *THE FUTURE OF LIBERALISM* 13 (2009). The Hegelian philosopher of liberalism, Guido de Ruggiero, presents a similar account in GUIDO DE RUGGIERO, *THE HISTORY OF EUROPEAN LIBERALISM* 350–57 (R. G. Collingwood trans., Beacon Press 1964) (1925).

45. WOLFE, *supra* note 44, at 13. De Ruggiero similarly states:

History presents us with two conceptions, one inspiring the political systems of the eighteenth century, the other those of the nineteenth and twentieth. According to the first, freedom is the ability to do what one likes, a liberty of choice implying the individual’s right not to be hampered by others in the development of his own activity.

DE RUGGIERO, *supra* note 44, at 350.

46. “[M]odern liberals are prepared to accept state intervention into the economy in order to give large numbers of people the sense of mastery that free market capitalism gives only to the few.” WOLFE, *supra* note 44, at 13.

47. Breyer lists *Wickard v. Filburn*, 317 U.S. 111, 125 (1942); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); and *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). BREYER, *supra* note 3, at 138 n.10. He also lists three central voter reapportionment cases from the 1960s: *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962); and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). BREYER, *supra* note 3, at 138 n.10. For a discussion of the key transformational cases of the New Deal, including *Wickard*, see 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 368–75 (1998).

justification of active liberty on Constant's liberty of the *ancients*. To fully appreciate the significance of this unintentional irony for contemporary living constitutionalism, we need to turn to the philosophy of history that Constant presents in distinguishing between the liberty of the ancients and the liberty of the moderns.

Constant, writing in 1819, identifies the development of modern commerce as creating a distinctly modern liberty, which he distinguishes from the liberty of the ancients. Constant associates the liberty of the ancients with the collective communities of the Greeks and Romans. He sees the development of international commerce as inaugurating a great historical shift between the ancient and modern world. Constant argues that the increased flow of commerce in modern times gives rise to the quintessentially modern liberty of individuals freely pursuing their private interests within the modern free market.⁴⁸ This new economic model called for the protection of universal individual rights of contract and property against the arbitrary restraints of traditional feudal privileges associated with the *ancient regime*.⁴⁹ While Constant does acknowledge some sort of collective role for government, he regards the historical developments of modernity as destroying the tightly knit communities within which the liberty of the ancients existed.⁵⁰ His emphasis therefore is on the development of the modern private individual, whose corresponding modern liberty is freedom from restraint by the state.⁵¹

We can contrast Constant's conception with Hegel's account of the modern state in the *Philosophy of Right* (1821).⁵² Hegel points to a distinctive development of the modern world, the differentiation between the *civil society* and the *state*. Civil society is the mass of individuals involved in economic activity, each seeking his or her good.⁵³ Civil society embodies the so-called "free market" famously described by Adam Smith in 1776 in *The Wealth of Nations*.⁵⁴ According to this conception of

48. "[C]ommerce inspires in men a vivid love of individual independence. Commerce supplies their needs, satisfies their desires, without the intervention of the authorities." *Id.* at 315.

49. WOLFE, *supra* note 44, at 14.

50. "[W]e can no longer enjoy the liberty of the ancients, which consisted in an active and constant participation in collective power. Our freedom must consist of peaceful enjoyment and private independence." BENJAMIN CONSTANT, *The Liberty of the Ancients Compared with That of the Moderns*, in POLITICAL WRITINGS 316 (Biancamaria Fontana ed. & trans., 1988).

51. This is how Berlin viewed the work of Constant. For example, Berlin characterizes Constant as "demand[ing] a maximum degree of non-interference compatible with the minimum demands of social life." ISALIAH BERLIN, *Political Ideas in the Twentieth Century*, in FOUR ESSAYS ON LIBERTY 26 (1969).

52. G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* (T.M. Knox trans., Oxford Univ. Press 1952) (1821).

53. SHLOMO AVINERI, *HEGEL'S THEORY OF THE MODERN STATE* 142 (1972).

54. *Id.*

the free market described by the then new science of political economy, the rights of individuals to pursue economic self-interest is paramount. In the *Philosophy of Right*, Hegel, like Constant, acknowledges the modernity of the free market system, which is at the heart of what he calls civil society. But Hegel does not see civil society as the end point of the development of modern government. He envisions a role of the state beyond merely protecting the functioning of the free market. The modern state, in Hegel's view, must also look to the collective good. But, as he argued, the collectivity of modern times should not and indeed could not simply be based on returning to the model of collective good found in the ancient world, such as the Greek *polis*. As much as Hegel admired the collective civic virtue of the ancient Greeks (what he calls "beautiful freedom"), he was convinced that the collective communities of the ancients could not be recreated in the modern world.⁵⁵ Rather, the modern democratic state had to be based on the conditions of the modern world, which entailed a system of representational democracy, rather than the direct democracy of the ancient Greeks. Hegel proposed a model of the modern state that preserved modern civil society, with its free play of individual economic pursuits, but also regulated it in light of the needs of the society as a whole. As the Hegelian scholar and political philosopher Shlomo Avineri summarizes it, "[c]ivil society thus becomes integrated into Hegel's system as a necessary moment in man's progress towards his realization of the consciousness of freedom. But it is subordinated to the higher universality of the state. Adam Smith is thus *aufgehoben*—both preserved and transcended—into the Hegelian system."⁵⁶

Hegel's dialectical resolution of opposites has been frequently and thoroughly critiqued by his contemporaries, by Marx, and by much of postmodernist thought—while at the same time strongly influencing all of these critics. It is beyond the scope of this Article to address those critiques here. My purpose in returning to Hegel is to show that this body of thought is still crucial to the problem with which contemporary living constitutionalism continues to grapple. Living constitutionalism needs to present a narrative of progress in which the earlier moments of constitutional rights (the negative liberties of classical liberalism) connect up to the later moments of constitutional rights (the positive liberties of

55. As Avineri describes, for Hegel, "[t]he Greek world is the realm of beautiful freedom, which discerns the ethical and the beautiful in the multiplicity of forms and nuances." *Id.* at 225. However, "[t]he polis is a given, not a willed entity. Ethical behaviour is imbued in the individual naturally and is not an outcome of a conscious moral choice." *Id.* at 225–26 (internal citations omitted).

56. *Id.* at 147.

modern liberalism and the welfare state) as a continuous rational story of development.⁵⁷

Comparing Constant with Hegel, we can see that Constant's account of the liberty of the moderns and ancients likewise recounts a philosophy of history. However, in Constant's philosophy of history, the narrative of modernity essentially ends with the emergence of the negative individual liberty connected with the free market of eighteenth-century economics. Constant presents no modern conception of the role of the state. In contrast, Hegel's philosophy of history describes a third moment, the emergence of the modern state, which seeks to integrate the type of individual economic liberty that Constant describes with the collective society strived for by ancient societies.⁵⁸

Defining the exact contours of the relationship between individual liberty and the role of the modern state remains, of course, a vexed and much-contested problem.⁵⁹ But my argument here is that this relationship should at least be on the table for contemporary living constitutionalism. This is why I regard Breyer's use of Constant's liberty of the ancients and moderns to ground contemporary living constitutionalism as problematic. Breyer stresses the active liberty of the ancients as a vital and continuing political tradition and thus flips Constant's distinction on its head. But crucial to Constant's distinction of the two types of liberty is the premise that the active liberty of the ancients is no longer possible within the conditions of modern society and modern governments. Indeed, Constant's motivation in distinguishing between ancient and modern liberty was to oppose what he saw as the dangers of the oppressive collectivism of the ancients returning in the guise of the French Revolution and Rousseau's totalizing account of the state.⁶⁰ Constant's binary

57. For a discussion of the liberal Hegelian tradition, see JÜRGEN HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY: TWELVE LECTURES 51–74* (Frederick Lawrence, trans., 1987) [hereinafter HABERMAS, *TWELVE LECTURES*]. Francis Fukuyama presents a neoconservative account of Hegel in *THE END OF HISTORY AND THE LAST MAN* (1992). Fukuyama does not discuss the relationship of the Hegelian narrative of the state to the American Constitution.

58. Along these lines, Guido de Ruggiero, the Hegelian-inspired theorist of the modern liberal state presents a dialectical critique and reversal of Constant's liberty of the moderns and ancients. De Ruggiero argues that the modern liberal state is actually a logical development of Constant's liberty of the moderns. Once one grants "the necessity of political liberty to guarantee the rights of individuals," de Ruggiero argues, "this implies their participation in the government . . ." DE RUGGIERO, *supra* note 44, at 168. Indeed, the commitment to bringing individuals into the political process requires a liberal state structured to fully realize the development of political activities. *Id.*

59. See *infra* Parts VII, VIII.

60. De Ruggiero situates Constant's account of the two liberties in relation to Constant's reaction against the increased power of the state associated with Rousseau's "general will" and the French Revolution. DE RUGGIERO, *supra* note 44, at 168. De Ruggiero argues that Constant opposed what he

opposition between ancient and modern liberty however leaves open the central question—how can one redefine the collectivist liberty of the ancients in modern terms? As I will discuss in the following sections, Hegel’s narrative of progress, which describes the development of the modern state as a vehicle for reconciling individual and collective freedom, provides a framework for answering this question.

Justice Breyer, it should be noted, is not alone among contemporary living constitutionalists in failing to highlight a narrative of progress and the rise of the modern state. In contemporary accounts of living constitutionalism, the narrative of the modern state has generally been ignored or occluded. This treatment has gone hand in hand with the attempt to locate a collectivist principle in some version of the *past*, rather than the present or future. In modern American constitutional theory, this looking backward is reflected in what has variously been called “civic republicanism,” “classical republicanism,” or “neorepublicanism,” and looks to the features of classical Greek and Roman republics with their emphasis on civic virtue.⁶¹ Breyer’s identification of the collectivist principles of modern constitutional doctrine with Constant’s “liberty of the ancients” reflects this trend.

Tracing collectivist principles from the past is valuable for living constitutionalism. Jack Balkin, a prominent living constitutionalist, argues that the principles of the New Deal regulatory state are consistent with the original meaning of the Commerce Clause, and supports this by discussing the broad meaning of the word “commerce” in eighteenth-century usage.⁶² As I discussed above, the Hegelian dialectical account of history describes how the structure of civil society is transcended yet preserved in the structure of the state. Thus, one side of the Hegelian narrative of progress, the preservation side, focuses on the continuity of political principles as they develop over time.⁶³ But the other side of the dialectic describes the

saw as a dangerous resurgence of the liberty of the ancients in the form of the subjection of the individual to the collective interests of the state. *Id.*

61. As legal historian G. Edward White describes, proponents of civic republicanism “found a historical model for such a perspective in the republican-inspired political and social theories of the founders’ generation, which a cadre of historians, writing in the late 1960s and 1970s, had unearthed for them.” G. Edward White, *The Arrival of History in Constitutional Scholarship*, 88 VA. L. REV. 485, 598 (2002). See also LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 143–63 (1996).

62. Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 15–23 (2010); JACK M. BALKIN, *LIVING ORIGINALISM* 138–82 (2011) [hereinafter BALKIN, *ORIGINALISM*].

63. Balkin elaborates his approach to constitutional interpretation (what he calls constitutional “construction”) in terms of text and principles in his important recent book, *LIVING ORIGINALISM*, *supra* note 62. I agree with much of his project of defining a living constitutionalism that responds to originalism. However, what Balkin means by the word “principle” is not what I (following the

process of transcending, which focuses on change and the distinctive features of modernity. I am concerned that contemporary accounts of living constitutionalism based on the past—such as Breyer’s emphasis on the liberty of the ancients, and Balkin’s emphasis on eighteenth-century conceptions of commerce—are too focused on the preservation side. These accounts of living constitutionalism attempt to compete with originalism in terms of preserving original constitutional principles.⁶⁴ I fear that such attempts are bound to lose because living constitutionalism can never beat originalism at its game of freezing constitutional principles at their point of origins. In trying to do so, past-oriented accounts of living constitutionalism end up ignoring or deemphasizing the idea of change for the better, which is the traditional strength and core of the liberal narrative of progress. Liberalism used to openly acknowledge the distinctive modernity of the welfare state as a mark of progress. Failure to maintain and defend this core liberal narrative of progress therefore runs the serious risk that constitutional developments associated with the modern state will be devalued as erosions from the original principles of the Constitution, rather than defended as the culminations of those principles.⁶⁵ Scalia’s “rot” argument in *A Matter of Interpretation* proceeds precisely from this premise.⁶⁶

The danger of ignoring the narrative of progress is brought into clearer relief for contemporary constitutional theory by Bruce Ackerman’s work. Ackerman focuses on the modernity of the regulatory/welfare state

Hegelian philosophical tradition) and Ronald Dworkin (discussed in Section 4 below) mean by that word. I view Balkin’s constitutional “principles” as more akin to open-ended themes (such as “equal protection of the laws”) that each generation of Americans is free to, indeed is obligated to, “flesh out,” in their own time. See BALKIN, ORIGINALISM, *supra* note 62, at 3. Balkin’s constitutional principles are, in his terms, “delegated,” *id.* at 63, 104, 107, by the Founders. See *id.* at 44–45, 308–09, 350–52. In contrast, my account of constitutional principles is that such principles have a determinate content, both at the founding and in their later versions in modern constitutional doctrine, and that there is a rational connection between the determinate content of a constitutional principle in its different moments in constitutional history.

64. For a discussion of how liberal constitutional theorists have felt compelled to adopt historical arguments in reaction to originalism, see Paul Horwitz, *The Past, Tense: The History of Crisis—and the Crisis of History—in Constitutional Theory*, 61 ALB. L. REV. 459, 488–89 (1997).

65. A further consequence is that contemporary living constitutionalists often seek to defend modern constitutional decisions by appealing to strong theories of stare decisis, rather than directly defending such decisions as being legitimate developments of constitutional principles. As Balkin keenly notes:

The irony is that many of the decisions that living constitutionalists fear are inconsistent with original meaning are actually consistent with it. By conceding that decisions they admire have no basis in the Constitution’s text and principles, living constitutionalists face an unnecessary difficulty in justifying the legitimacy of these decisions.

BALKIN, ORIGINALISM, *supra* note 62, at 123.

66. See SCALIA, MATTER OF INTERPRETATION, *supra* note 6, at 41.

ushered in by the New Deal. He criticizes the legal profession for giving legal significance to only two Constitutional moments: The Founding (the Constitution and Bill of Rights of 1789), and the Reconstruction (with the post-Civil War amendments, most notably the 14th Amendment). The accepted legal narrative, according to Ackerman, therefore tells only a “two-part story” of Constitutional development. Ackerman contends that there is a third great constitutional moment, the New Deal, which results in “the constitutional triumph of the activist welfare state.”⁶⁷ He therefore tells a three-part story, which “defines the legal meaning of modernity.”⁶⁸ As Ackerman summarizes it, “[a]ll of us live in the modern era that begins with the Supreme Court’s ‘switch in time’ in 1937, in which an activist, regulatory state is finally accepted as an unchallengeable constitutional reality.”⁶⁹

The crucial question for contemporary living constitutionalism is highlighted by Ackerman’s acknowledgment of the distinctive modernity of the American welfare state and the attendant “positive” account of liberty involving state intervention in economic and social conditions. How does one present a constitutional narrative that explains the development of the new conception of liberty initiated by the modern welfare state? Either one can present a narrative that somehow connects modern collectivist liberty to traditional individualist (“negative”) liberty, or one must concede that collectivist liberty represent a wholly novel modern phenomenon. And such a concession runs the risk of delegitimizing collectivist liberty as a *rupture* in the constitutional narrative.

Ackerman’s solution is to say that the Constitution was, in effect, amended through the legislation created during the New Deal. This, as he acknowledges, is a controversial solution since it allows the amendment of the Constitution outside the provisions of Article Five. It is beyond the scope of this Article to address the controversy over Ackerman’s account of constitutional rule-making outside Article Five.⁷⁰

This Article proposes another approach to legitimizing modern constitutional doctrine. Like Ackerman, I want to acknowledge the distinctive modernity of modern constitutional doctrine. However, I think the development of modern constitutional doctrine can be explained through a narrative of progress that describes the movement from the old

67. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 40 (1991).

68. *Id.*

69. *Id.*

70. For a discussion, see KALMAN, *supra* note 61, at 212–29.

liberalism of individual rights to the new liberalism of the modern welfare/regulatory state as a self-unified development of constitutional principles. Ronald Dworkin's account of the internal coherence of legal principles is crucially important to explaining this. I therefore turn next to consider Dworkin's work in relation to a new narrative of constitutional progress.

IV. RONALD DWORKIN'S INTEGRITY AND INTENTION IN LEGAL PRINCIPLES

A narrative of constitutional progress provides an explanation of how constitutional doctrine appears to change over time and yet nonetheless expresses a coherent structure of intentions and purposes. Originalism, whatever its other theoretical shortcomings, has no problem in describing the Constitution as an intentional legal structure. According to various accounts of originalism, the Constitution either expresses the actual intent of the Founders, or the Founders' apparent intent, as expressed in the language of the text and as its audience at the time of its drafting would have interpreted that language.⁷¹ Living constitutionalism rejects originalism's attempt to limit the scope of constitutional intention to these two accounts of Founder intention, both of which freeze intention at a point of origin. In rejecting an originalist account of constitutional intention, I am not, however, rejecting all accounts of intention. To the contrary, I believe that intention is integral to any account of constitutional meaning. The theoretical movements associated with the Left, Deconstruction, and Critical Legal Studies, however, generally proclaimed the indeterminacy of the text and rejected the very idea that intention can determine meaning.⁷² While deconstructionist critiques of intention served a valuable purpose in spurring a reconsideration of ossified legal dogma, such critiques now offer no help in shoring up the progressive constitutional tradition against originalism's claims to be the exclusive interpretive method faithful to constitutional principles. Where then can the progressive tradition turn for a non-originalist account of intention? Ronald Dworkin's work is distinctive in progressive legal theory because

71. Walter Benn Michaels, *A Defense of Old Originalism*, 31 W. NEW ENG. L. REV. 21 (2009).

72. Much of the application of deconstructionist literary theory to legal theory was in the service of some version of the argument that the inherent indeterminacy of language reveals that all purported legal interpretation is only disguised political policy-making. See RONALD DWORKIN, *LAW'S EMPIRE*, 271-75 (1986). For a review of the textual indeterminacy argument in deconstruction and legal theory, see David Aram Kaiser, *Entering onto the Path of Inference: Textualism and Contextualism in the Bruton Trilogy*, 44 U.S.F. L. REV. 95 (2009) [hereinafter Kaiser, *Path of Inference*].

he sought to use interpretive theory to support the possibility of normative legal interpretation rather than to undermine that possibility. I therefore turn to a consideration of Dworkin's work in relation to a constitutional narrative of progress.

In *Law's Empire*, Dworkin offers an account of judicial decision-making as "integrity in law," which treats the continuity of legal principles as central to modern jurisprudence.⁷³ As Dworkin explains, "[t]he adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, *on the assumption that they were all created by a single author*—the community personified—expressing a coherent conception of justice and fairness."⁷⁴ Dworkin articulates what he means by "community personified" by using the now-famous analogy of the "chain novel."⁷⁵ The judge who crafts an opinion is like the latest writer in a group of novelists, working one after another in time, to compose a chain novel. Dworkin's analogy describes the process of legal decision-making as preserving the intentional structure of the principles of law, "each novelist in the chain interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on."⁷⁶ Dworkin rejects the legal realist view that reduces legal judgments to a series of discrete decisions whose relationship bears no more than a bare chronological connection to each other. He states that integrity in law "insists that the law . . . contains not only the narrow explicit content of these [past] decisions, but also, more broadly, the scheme of principles necessary to justify them."⁷⁷

By stressing the coherence of legal principles through the model of a single (albeit multi-generational) author, Dworkin acknowledges the centrality of intention for any account of interpretation. As he states, "even if we reject the thesis that creative interpretation aims to discover some actual historical intention, the concept of intention nevertheless provides the *formal* structure for all interpretive claims."⁷⁸ As Dworkin explains further, "an interpretation is by nature a report of a purpose; it proposes a way of seeing what is interpreted—a social practice or tradition as much as a text or painting—as if this were the product of a decision to pursue one set of themes or visions or purposes or 'point,' rather than another."⁷⁹

73. DWORKIN, *supra* note 72, at 225–75.

74. *Id.* at 225 (emphasis added).

75. *Id.* at 228–32.

76. *Id.* at 229.

77. *Id.* at 227.

78. *Id.* at 58.

79. *Id.* at 58–59.

But *whose* purpose has Dworkin's judge/interpreter found in coming to a coherent view of the law? One line of criticism of Dworkin is that his account of legal interpretation creates an artificial author, to which one can ascribe all the meanings in the law that one wishes while pretending to be engaging in interpretation.⁸⁰ The creation of such an artificial author might appear to be a bad faith effort to justify wholesale re-writing under the guise of interpretation.⁸¹ But in the Hegelian tradition, Dworkin's multi-generational communal author of the law is not an arbitrarily constructed person, but is, rather, reason itself. The Hegelian narrative of progress sees reason itself as the author of the coherent whole of the law.

To call reason the author of the law may sound odd to the modern ear, but the concept of law as the embodiment of reason has been an orthodox belief for much of the history of the law. Blackstone famously states this tradition in relation to the common law: "the law is the perfection of reason, . . . it always intends to conform thereto, and what is not reason is not law."⁸² Historically, the concept of law as an embodiment of reason has often been connected to an implied or explicit theological worldview.⁸³ According to this theological worldview, God is the author of all creation, including the principles of law. Not surprisingly, contemporary advocates of common law constitutionalism, such as David Strauss (whom I discuss below), are eager to excise any trace of theology or metaphysics from the common law tradition.⁸⁴ Certainly, a contemporary secular account of the law cannot be based on an explicitly theological worldview. But, as I will argue below, a robust theory of living constitutionalism needs to affirm some notion of the development of reason in history.

Dworkin, however, does not focus on the common law's traditional emphasis on reason. Although Dworkin's own analogy of the chain novel suggests the traditional common law narrative of the development of reason across history, Dworkin is suspicious about giving history a central role in legal interpretation because he believes that doing so would support originalism's premise that a law's meaning "is fixed in some initial act of

80. Steven D. Smith, *Idolatry in Constitutional Interpretation*, in PAUL F. CAMPOS, PIERRE SCHLAG, & STEPHEN D. SMITH, *AGAINST THE LAW* 168 (1996).

81. STEVEN D. SMITH, *LAW'S QUANDARY* 146–50 (2004) [hereinafter SMITH, *LAW'S QUANDARY*].

82. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 70 (Legal Classics Library, 1983) (1765) (facsimile of first edition). For further discussion, see Kaiser, *Perfection of Reason*, *supra* note 17, at 29–55.

83. SMITH, *LAW'S QUANDARY*, *supra* note 81, at 45–48, 151–53.

84. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 894 (1996) [hereinafter Strauss, *Constitutional Interpretation*].

creation.”⁸⁵ For this reason, Dworkin’s account lacks a strong historical narrative linking up the various prior judicial opinions out of which Dworkin’s judge creates a coherent account of the law. As Dworkin states, his model of integrity “does not require consistency in principle over all historical stages of a community’s law; it does not require that judges try to understand the law they enforce as continuous in principle with the abandoned law of a previous century or even a previous generation.”⁸⁶ Dworkin’s model of integrity “commands a horizontal rather than vertical consistency of principle across the range of legal standards the community now enforces.”⁸⁷ By “horizontal consistency” Dworkin means that the judge who interprets law “with integrity” will view the law as a coherent system of legal principles. From this standpoint, the judge will view the law as containing, not just the narrow explicit content of prior legal opinions, but “also, more broadly, the scheme of principles necessary to justify them.”⁸⁸ Regardless of the historical intent of the legal decisions of the past, Dworkin’s judge will strive to make the law “the best it can be,” that is, construe it within a system of legal principles defensible from the perspective of the judge at the present moment.⁸⁹ In contrast, a narrative of constitutional progress based on reason takes on the additional task of reconciling and integrating the historical intentions of legal decisions, “vertically,” that is, across the historical stages of the law’s development.

Dworkin thus describes the coherence of the law in terms of the individual judge, who, through an individual act of creative interpretation, arranges an area of the law into a coherent whole as part of the act of rendering a decision. Commentators have criticized Dworkin’s account on the basis that “[w]e demand integrity of our law as a whole and of the judiciary *collectively*, yet on Dworkin’s account of interpretation, integrity’s commission is executed by judges *individually*.”⁹⁰ This criticism points to Dworkin’s failure to integrate interpretation “across time.”⁹¹ My discussion suggests a reconsideration of the narrative of

85. DWORKIN, *supra* note 72, at 347.

86. *Id.*

87. *Id.*

88. *Id.*

89. *See id.* at 53. What Dworkin describes as “creative interpretation,” “strives to make an object the best it can be, as an instance of some assumed enterprise” *Id.*

90. 11 GERALD J. POSTEMA, A TREATISE OF LEGAL PHILOSOPHY AND GENERAL JURISPRUDENCE: LEGAL PHILOSOPHY IN THE TWENTIETH CENTURY: THE COMMON LAW WORLD 455 (2011) (internal citations omitted).

91. *Id.* Balkin characterizes Dworkin’s integrity in legal interpretation as trying to “make sense of the whole of past judicial decisions, justified by the best theory of political morality available.” BALKIN, ORIGINALISM, *supra* note 62, 308. I think Balkin attributes more historical integration to

progress as a way of applying Dworkin's account of integrity in law across time.

Dworkin's theory of integrity in law therefore stresses the coherence of legal principles from within the interpretive standpoint of the individual judge, but Dworkin fails to account for law as a collectively changing practice in history. The theory I turn to next, the contemporary common law constitutionalism of David Strauss, does the reverse. He stresses historical change in legal decisions, but fails to provide an account of the coherence of constitutional principles.

V. DAVID STRAUSS' LIVING CONSTITUTIONALISM: COMMON LAW CHANGE WITHOUT PROGRESS

The work of David Strauss presents an extensively elaborated contemporary account of living constitutionalism based on common law judging.⁹² Strauss does not shy away from describing constitutional interpretation as a process of change. But he does avoid describing that change as part of a narrative of progress or a philosophy of history. Indeed, Strauss strives to jettison what he calls the "mystical component" of the common law, which he regards as the source of conservatism in the common law tradition.⁹³ In so doing, however, he also jettisons the strong narrative of progress to which the progressive tradition has traditionally appealed and which contemporary living constitutionalism needs to reclaim in the face of originalism.

Central to Strauss' theory of common law constitutionalism is his rejection of originalism's focus on the text of the Constitution. Strauss writes, "[t]he common law tradition rejects the notion that law must be derived from some authoritative source and finds it instead in understandings that evolve over time."⁹⁴ By using the word "evolve" Strauss implies change for the better, or at least change consonant with the needs of the contemporary moment. However, Strauss does not refer to a

Dworkin's project than Dworkin wants to provide. However, it is precisely because Dworkin has such a philosophically substantial account of legal principles that the question of whether and how these principles are integrated across history arises in considering his work.

92. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010); Strauss, *Constitutional Interpretation*, *supra* note 84, at 877; David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 *YALE L.J.* 1717 (2003); David A. Strauss, *Originalism, Precedent, and Candor*, 22 *CONST. COMMENT.* 299 (2005); David A. Strauss, *The Common Law Genius of the Warren Court*, 49 *WM. & MARY L. REV.* 845 (2008) [hereinafter Strauss, *Common Law Genius*]; David A. Strauss, *Why Conservatives Shouldn't Be Originalists*, 31 *HARV. J. L. & PUB. POL'Y* 969 (2008).

93. Strauss, *Constitutional Interpretation*, *supra* note 84, at 893–94.

94. *Id.* at 879.

Hegelian narrative of progress. Rather, Strauss appeals to Edmund Burke's idea of traditionalism, the idea that practices change and accrue over time by a process of social acceptance, and that social acceptance over time itself provides legitimization to practices.⁹⁵ Strauss sees Burke's traditionalism as a culmination of the common law tradition.⁹⁶

There is a certain historical irony to the fact that a contemporary proponent of progressive living constitutionalism like Strauss should focus on the thought of Edmund Burke.⁹⁷ While Burke undoubtedly stands as one of the most influential figures in the Anglo-American political tradition, Burke's orientation is fundamentally opposed to modern liberal progressivism. Burke expressed his thought in the context of criticizing both the French Revolution and the entire concept of political change based on principles. The embracing of Burke by contemporary defenders of living constitutionalism has resulted in an ironic reversal of progressive and conservative positions. Formerly, progressives like Thomas Paine appealed to principles as the basis of political reform, and pragmatic conservatives like Edmund Burke resisted the call in the name of tradition.⁹⁸ Today, it is the conservative originalists, led by Justice Scalia, who appeal to principles, while the liberal defenders of living constitutionalism appeal to Burkean notions of tradition and incrementalism.⁹⁹

Strauss does acknowledge that much of the common law tradition in general, and Burke in particular, are hostile to progressive thought: “[h]istorically the common law tradition has been burdened with a degree of mysticism and also, at times, with excessive conservatism.”¹⁰⁰ Strauss regards the common law tradition's conservatism as wrapped up with its mysticism and he seeks to purge his theory of both elements: “[t]he common law ideology often had, in addition, a mystical component, with its appeal to ‘time out of mind’ and the ineffable spirit of the English people. But traditionalism need not have . . . any such mystical aspect. It can be placed on an entirely rational footing.”¹⁰¹ In order to place

95. *Id.* at 893–94.

96. *Id.*

97. See Andrew C. Spiropoulos, *Just Not Who We Are: A Critique of Common Law Constitutionalism*, 54 VILL. L. REV. 181, 181 (2009) (“All of a sudden Edmund Burke is ‘in’”).

98. Kaiser, *Perfection of Reason*, *supra* note 17, 29–45.

99. “[W]hen one considers the Court's liberty decisions in their totality, an unmistakable characteristic that emerges is their incremental quality.” GOODWIN LIU, PAMELA S. KARLAN & CHRISTOPHER H. SCHROEDER, *KEEPING FAITH WITH THE CONSTITUTION* 150 (2010).

100. Strauss, *Constitutional Interpretation*, *supra* note 84, at 888 (citation omitted).

101. *Id.* at 894 (citations omitted).

traditionalism on such a rational footing, Strauss rejects the common law's strong metaphysical connection between the present and the past, which he characterizes as "establishing a quasi-religious bond with the past or as maintaining a national identity."¹⁰²

But does a "rational" account of the common law demand a rejection of all strong metaphysical narratives, including the Hegelian narrative of progress? The Hegelian narrative of progress has important similarities to the traditional role of reason in the common law as described by Blackstone. As discussed above, under Blackstone's view, the common law was a rational whole and each new part of the law was revealed through a new court decision. According to this concept, the common law judge, in announcing new law, is *discovering* the law that already existed within a rational whole system of the law, and not creating new law. As we have seen, Scalia rejects this traditional common law justification, and argues that this is just an ideological cover for a judge's desire to create new law.¹⁰³ For Scalia, common law judging is unrestrained by any set of core principles. He therefore sharply distinguishes common law judging from the interpretation of the Constitution, which, Scalia argues, is precisely designed to embody a set of core principles and embed them as rights so that future generations cannot readily take them away.¹⁰⁴ Ironically, Strauss, the great contemporary proponent of common law constitutionalism, ends up embracing the same view of common law judging held by Scalia, the great contemporary opponent of common law constitutionalism. Both men regard the practice of common law judging as essentially changeable and not bound by any set of core principles.

Strauss regards the lack of restraining core principles in common law judging as a positive quality because he believes this allows living constitutionalism to adapt the Constitution to the needs of the present. My argument here however is that, by adopting this position, Strauss throws out the proverbial baby with the bathwater. In his desire to free up constitutional interpretation from the constraints of the past, Strauss also jettisons the most compelling justification for living constitutionalism, the Hegelian narrative of progress, which is based on the idea that principles are not static and can be seen as, in some sense, entailing their own development. This Hegelian conception is congruent with the traditional common law view that the decisions of judges express particular instances of the rational whole of the law.

102. *Id.* at 895.

103. SCALIA, MATTER OF INTERPRETATION, *supra* note 6, at 10.

104. *Id.* at 40.

The idea of constitutional principles somehow determining their own development may sound metaphysical to some. But this is no more metaphysical than the sense an interpreter feels towards discovering the apparent intention of a text.¹⁰⁵ The unfolding self-determination of the law is another way of describing Dworkin's integrity in the interpretation of the law as the recognition of a multi-generational structure of intentions. Thus the chain novelist in Dworkin's analogy both interprets the existing intention of the existing novel and, in continuing it, recasts the set of intentions. So too the judge recasts the intentions of the law through the constraints of the felt intentions of the principles. The Hegelian narrative of progress can be seen as describing the continuity of the principles through changes that appear contingent in relation to history but also appear to involve the unfolding of the rational structure of the principle itself.

However, what of the concerns raised by Strauss's comments that a narrative of progress presupposes a nationalistic and religious narrative unacceptable to a contemporary secular society? It should be emphasized that the Hegelian narrative of progress differs from the traditional English common law view of reason because the Hegelian narrative stresses a dynamic and future-oriented account of the unfolding of reason in history. In contrast, the English common law tradition tended to place the rational whole of the law in some past moment of origin, such as an unwritten "ancient constitution."¹⁰⁶ In this way, the Hegelian narrative of progress avoids Strauss's criticism of the nationalistic conservatism of the common law tradition's use of reason.

I acknowledge that, as a cultural form, the narrative of progress did originate in theological accounts of providential history.¹⁰⁷ But the narrative of progress has undergone and continues to undergo a process of secularization. Hegel's philosophy of history redefined providential history in philosophical terms. For Hegel, reason's movement through history does not indicate the providential control of an external God but

105. The interpreter's discovery of apparent authorial intention is felt as a kind of constraint. As Stanley Fish has stated, "[i]nterpretation cannot be a rational activity in the absence of such a constraint." Stanley Fish, *Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law*, 29 CARDOZO L. REV. 1109, 1114 (2008). For a further discussion, see David Aram Kaiser, *Path of Inference*, *supra* note 72, at 109–12.

106. The nineteenth century poet, literary critic, and philosopher Samuel Taylor Coleridge described the ancient English constitution as the evolving embodiment of reason in his political treatise, 10 THE COLLECTED WORKS OF SAMUEL TAYLOR COLERIDGE: ON THE CONSTITUTION OF CHURCH AND STATE (John Colmer, ed. Princeton Univ. Press 1976) (1830). See KAISER, NATIONALISM, *supra* note 17, at 59–73; Kaiser, *Perfection of Reason*, *supra* note 17, at 29–55.

107. ROBERT NISBET, HISTORY OF THE IDEA OF PROGRESS 284 (1980).

rather describes the development of rationality in and through human history.¹⁰⁸ To the extent that Hegel's philosophy preserved a theological worldview, the thinkers influenced by him further secularized his account, and reinterpreted it into the most modern and rationalistic terms available to them. One line of descent leads to Marx's materialist dialectic, another line of descent to Max Weber and modern sociology.¹⁰⁹ The core of Hegel's philosophy of history, which remains crucial for living constitutionalism, is that human history is an unfolding of a process of reason that human authors collectively create and by which these human authors are also determined.¹¹⁰

VI. SOCIAL MOVEMENTS AND THE NARRATIVE OF PROGRESS

Progressive social movements, such as the abolitionist, feminist, and civil rights movements, have traditionally appealed to a narrative of progress by arguing that what appears to be a change in constitutional doctrine is rather the development of the full implications of existing constitutional rights.¹¹¹ Thus antebellum abolitionists argued that the Due Process Clause alone already provided authority for Congress to abolish slavery because the principle of liberty contained therein was antithetical to slavery.¹¹²

108. Richard Rorty's pragmatist account of Hegel reflects this view:

For Hegel told a story about history as the growth of freedom, the gradual dawning of the idea that human beings are on their own, because there is nothing more to God than his march through the world—nothing more to the divine than the history of the human adventure.

RORTY, *ACHIEVING OUR COUNTRY*, *supra* note 18, at 21.

109. See HABERMAS, *TWELVE LECTURES*, *supra* note 57, at 51–52.

110. I expand on this in the conclusion below.

111. For a discussion of this in the suffragist movement, see Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 334–37 (2001) [hereinafter Siegel, *Text in Contest*]. So too advocates of gay rights have argued that the Founders “wrote a binding set of laws that were meant to surprise them. . . . They believed in the progress of liberty, which they based on their conception of human beings as rational creatures.” MICHAEL NAVA & ROBERT DAWIDOFF, *CREATED EQUAL: WHY GAY RIGHTS MATTER TO AMERICA* 28 (1994).

112. In discussing the argument of abolitionist Alvan Stewart, a prominent historian of the Fourteenth Amendment notes:

The whole system of power relations between the states and the federal government was to be rearranged and redistributed by a simple declaratory statement of what always had been true, as if no change were being made. An institution, deep-rooted in the economic, social, and political fabric of a large segment of the nation . . . was to be uprooted, struck out of constitutional existence, “not as a new principle, but as an old one”

JACOBUS TENBROEK, *EQUAL UNDER LAW: THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 69 (1965).

Reva Siegel, a prominent contemporary expositor of living constitutionalism, has compellingly described how social movements have influenced the development of constitutional doctrine.¹¹³ As I discuss below, Siegel has criticized Strauss' common law constitutionalism for limiting itself to a legal realist view of the Constitution as simply being the coercive power of the current set of judicial decisions. In contrast, Siegel has described how social movements have appealed to constitutional principles as existing independently of judicial decisions and how the appeal to constitutional principles has justified the emergence of new constitutional understandings. Her account thus highlights how important a narrative of progress based on evolving constitutional principles has been for progressive social movements. However, as I will discuss below, Siegel describes the movement of constitutional principles in history in terms of a source of rhetorical power for social movements. Like other contemporary living constitutionalists, she avoids directly endorsing a narrative of progress.

As discussed earlier, Strauss rejects the burden of connecting modern constitutional doctrine with the text of the Constitution. Modern constitutional doctrine need not connect with the text of the Constitution because, for Strauss, what legitimizes modern constitutional doctrine is not the text of the Constitution but rather the fact that the doctrine has been accepted over time. Because Strauss wants to jettison the whole problem of connecting modern doctrine with the text of the Constitution, he ends up expressing an extreme form of legal realism: the law is what judges say it is; the Constitution means what judges say it means. Thus, Siegel characterizes Strauss' position as "a sophisticated and frank kind of legal realism."¹¹⁴

Strauss' form of frank legal realism may appear to solve the problem of reconciling contemporary constitutional doctrine with the text of the Constitution, but such legal realism ultimately comes at the price of delegitimizing the Constitution. To see this, we need to turn to the useful contrast that the legal philosopher Jürgen Habermas has drawn between "facticity" and "validity" models of the law.¹¹⁵ Under the facticity model, people submit to the law as a coercive external force. Thus, Siegel

113. See Reva B. Siegel, *Text in Contest*, *supra* note 111; Jack M. Balkin & Reva B. Siegel, *Principles, Practices, & Social Movements*, 154 U. PA. L. REV. 927, 946–50 (2006).

114. Siegel, *Text in Contest*, *supra* note 111, at 328.

115. On this distinction between facticity and validity in the law, "legal norms as both enforceable laws and laws of freedom," see JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 28–31 (William Rehg trans., 1996) [hereinafter HABERMAS, FACTS AND NORMS].

describes Strauss' view as a "classically instrumentalist view of constitutional lawmaking" based on the assumption "that the purpose of law is to enforce society's norms by regulating the conduct of those who would resist them."¹¹⁶ In contrast, under a validity model of the law, people submit to the law because they are convinced of its validity; that is, they see law as a principle of freedom that they themselves endorse, rather than as an external prohibition. Under a facticity model of the law, like that of Strauss, it makes no sense to distinguish between what the Constitution really means and what a judge says it means. Strauss has no account of constitutional meaning that is independent and separate from a judge's pronouncement of it. Under a validity model of the law, however, people construe the meaning of the Constitution independently of what judges say that meaning is. Siegel expresses this validity model of the Constitution in criticizing Strauss, and in describing the importance of social movements to the development of progressive constitutional doctrine.

Siegel begins her critique of Strauss by rejecting a deconstructionist view that progressive constitutional arguments are based on the indeterminacy of the text of the Constitution: "it is not by proclaiming the semantic indeterminacy of the Constitution that citizens make claims—to courts or each other—about the Constitution's meaning"¹¹⁷ Rather, Siegel argues, progressive movements have engaged in "something like the contrary": "[c]itizens invoke the text of the Constitution, properly interpreted or amended in light of our constitutional traditions, as a foundation, having meaning that can be ascertained apart from the pronouncements of those authorized to interpret it or the preferences of those who live under it."¹¹⁸ Thus Siegel describes how progressive social movements have appealed to a meaning of the constitutional text independent of what judges have said it means or the meaning that people might want it to have in order to support their interests. By rejecting Strauss' legal realist view of common law constitutionalism and stressing how progressive social movements have appealed to independent constitutional principles, Siegel's account shows some similarities to Scalia's account of the Constitution as a distinctive set of principles that are outside and beyond the process of common law judging. Furthermore,

116. Siegel, *Text in Contest*, *supra* note 111, at 333.

117. *Id.* at 323.

118. *Id.* See also BALKIN, ORIGINALISM, *supra* note 62, 83–84.

like Scalia, she emphasizes the importance of a written constitution.¹¹⁹ Siegel, however, expressly rejects any conservative project of freezing constitutional principles at their point of origin, and argues instead for the “ongoing public authorship” of the Constitution.¹²⁰

What however is the relationship of history to Siegel’s account of the democratic authorship of the Constitution? On the one hand, history seems crucial. Siegel states, “[h]istory matters in our constitutional culture, not merely because it is a source of constraint, but because it is a source of understanding that guides our judgments and gives them meaning.”¹²¹ But Siegel’s discussion, like much of contemporary living constitutionalism, displays ambivalence towards how constitutional meaning is revealed in history. Is the appeal to history merely a pragmatic use of rhetoric? Or is there actually a way in which the constitutional principles of the past are connected to the principles urged by progressive movements? Siegel urges both views: “We look to the past as we make pragmatic judgments about how to vindicate constitutional values in the present. And we look to the past as we struggle to define ourselves as a nation acting in history, united imaginatively and ethically across generations as well as communities.”¹²² But without a robust philosophy of history and a narrative of progress, how does one unite oneself imaginatively and ethically across generations? This question defines the problem faced by contemporary living constitutionalists.¹²³

As Siegel argues, appeals to history have rhetorical force in constitutional arguments: “[c]ollective memory . . . supplies a language for its members to argue with one another about the community’s grounds and aims, enabling it to evolve in history.”¹²⁴ But, because of her criticism of originalism, Siegel is wary of granting history a role beyond being a common language of constitutional argument or a sociological factor explaining the motivations of political actors. Thus, in *Text in Context*, she sets forth a sociological account of “legal culture” as “those

119. “Setting forth the terms of the constitutional compact in a writing signifies a commitment to transparency in government. The terms of government are to be open, accessible, contestable, and revisable.” Siegel, *Text in Context*, *supra* note 111, at 314.

120. *Id.* at 315.

121. *Id.* at 304.

122. *Id.* at 343 (citation omitted).

123. Jeb Rubinfeld’s engaging account of constitutional interpretation is based on a people’s commitment across time to a written constitution. *See generally* JEB RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* (2001); JEB RUBENFELD, *REVOLUTION BY JUDICIARY* (2005). Rubinfeld’s work, however, does not directly engage the issues of progress and the philosophy of history.

124. Siegel, *Originalism’s Dead Hand*, *supra* note 7, at 1423.

understandings and practices that give shape to a society's legal system, including but not limited to the formal procedures it designates as lawmaking."¹²⁵ But she defers the question of "whether this account of legal culture is part of an 'internal' or 'external' understanding of the legal system."¹²⁶ To be internal to the legal system would mean that, like Dworkin's integrity in legal interpretation, one believes the constitutional principles of the past actually have some form of conceptual connection to the purportedly changed or evolved constitutional principles of the present. But to take an external view, one merely has to ascribe this belief as the motivation of others, and thus bracket or defer the question of the actual conceptual connection between constitutional principles of the past and the present.

Taking an external view makes it easier to criticize originalism, but comes at the cost of undermining the progressive tradition's own narrative of progress. For example, in criticizing *Heller*, Siegel describes how the arguments proffered by gun rights advocates resonate with contemporary concerns. She observes that "[c]laims about the past express contemporary identities, relationships, and concerns, and express deep normative convictions."¹²⁷ She contends that the originalist's appeal to the original meaning of the Second Amendment is, in effect, a rhetorical cover for what is actually a form of living constitutionalism practiced by the Right. The arguments of the gun rights advocates, she concludes, fail to live up to the "positivist lawmaking model" that originalism proclaims as the justification of originalism over living constitutionalism as a method of constitutional interpretation.¹²⁸ While Siegel thus masterfully turns the tables on originalist Second Amendment advocates, she does not provide a normative account of what a "good faith" appeal to history would be.

In summary, Siegel criticizes Strauss' form of legal realism and argues for the value of the idea of a shared constitutional past. But she does not present a philosophy of history that would support her appeal to a shared constitutional past and provide continuity between original constitutional principles and what she sees as their "evolved" forms today. Siegel's reluctance to acknowledge a robust role for a philosophy of history for constitutional principles is similar to Strauss' reluctance to provide a robust account of textual interpretation. The puzzle raised by Strauss' account of common law constitutionalism is: why should we act as if legal

125. Siegel, *Text in Contest*, *supra* note 111, at 318 (footnote omitted).

126. *Id.* at 318–19 n.56.

127. Siegel, *Originalism's Dead Hand*, *supra* note 7, at 1420.

128. *Id.*

texts determine the law if we have no actual conviction that legal texts have a determinate meaning? Similarly, the puzzle raised by Siegel's account of social movements and constitutional change is: why should we appeal to history as meaningful to constitutional argument unless we have some basis for believing that there is an actual continuity between original constitutional principles and modern constitutional doctrine? As this Article argues, advocates of living constitutionalism need to reclaim a version of Hegel's narrative of progress to validate their appeals to the constitutional past.

VII. "A DUTY RESTING SOMEWHERE": THE APPOINTMENT OF COUNSEL AND THE WELFARE STATE

Strauss uses the right of an indigent criminal defendant to have counsel appointed as an example of a modern constitutional right that, he argues, is not based on the text of the Constitution, but rather is the result of a common law constitutional development.¹²⁹ The Sixth Amendment gives a criminal defendant the right "to have the assistance of counsel for his defense."¹³⁰ Strauss contends that "[t]here is little doubt that the original understanding of this provision was that the government may not forbid a defendant from having the assistance of retained counsel."¹³¹ As he notes, according to modern Sixth Amendment constitutional doctrine, associated most famously with *Gideon v. Wainwright*, the government must provide counsel for defendants who cannot afford it when charged with serious crimes.¹³² Strauss notes that the modern rule "fits comfortably with the language" of the Sixth Amendment, and the language has been used to support it.¹³³ But, Strauss objects that "in fact it is just a coincidence—almost a matter of homonymy—that the modern right to counsel is supported by the language of the Sixth Amendment."¹³⁴ He nonetheless believes it is legitimate to use this coincidence of language to justify the modern rule because society has agreed to treat the language of the Constitution as a common ground. An interpretation of the Constitution is legitimate, Strauss argues, as long as it "can be reconciled with some plausible ordinary meaning of the text," even though, as Strauss appears to

129. Strauss, *Constitutional Interpretation*, *supra* note 84, at 877, 919–20; Strauss, *Common Law Genius*, *supra* note 92, at 868–71.

130. U.S. CONST. amend. VI.

131. Strauss, *Constitutional Interpretation*, *supra* note 84, at 919–20.

132. *Id.* at 920.

133. *Id.*

134. *Id.*

concede here, the modern meaning has no connection with the Framers' original intention for the Sixth Amendment.¹³⁵

Strauss' example of an indigent defendant's right to appointed counsel is an important instance of the development of a modern constitutional right, and is precisely what a theory of living constitutionalism should defend as legitimate. I think, however, that Strauss unnecessarily concedes the interpretative game to the originalists by abandoning any claim to a historical connection between the ostensible original meaning of the Sixth Amendment and the modern meaning as expressed in *Gideon*. I will instead offer an account of this right that stresses the conceptual connection between its original and modern meanings through a narrative of progress of the modern state. As I will discuss below, an indigent defendant's right to appointed counsel is conceptually implicit in the right to be represented by counsel. This conceptual connection was already perceived at the time of the Sixth Amendment, but was not universally acknowledged as giving rise to a duty by the state. Judicial recognition of the necessity of this conceptual connection emerged alongside the emergence of the duties of the modern state.

Strauss' account of common law constitutionalism puts great emphasis on the incremental nature of changes in constitutional doctrine. The United States Supreme Court, he argues, does not simply announce a radical new principle in a case. Rather, what appears to be a new principle is preceded by a series of cases that presage the movement towards it. Strauss' account of the cases leading to *Gideon* presents this narrative of gradual common law change.¹³⁶ Strauss describes the prior cases as showing the Court's "experimentation" with the old rule, and, as a result of this experimentation, preparing the ground for the new principle. The old rule from *Betts v. Brady* held that whether counsel must be appointed in a state prosecution was to be decided case by case, under the Due Process Clause, by determining whether, under the totality of the circumstances, the failure to appoint counsel denied fundamental fairness.¹³⁷ Strauss describes how "[i]n each case, the Court identified some occasion during the proceedings when the defendant might have benefited from counsel"¹³⁸ In other words, the Court kept finding prejudice when analyzing the issue of whether the failure to appoint counsel had denied the defendant

135. *Id.*

136. David A. Strauss, *Common Law Genius*, *supra* note 92, at 868–70.

137. *Id.* at 868 (citing *Betts v. Brady*, 316 U.S. 455, 462, 473 (1942)).

138. *Id.* at 870.

“fundamental fairness.”¹³⁹ As Strauss describes it, the Court eventually discovered through this process of experimentation that there was actually no instance in which the denial of counsel would not lead to a denial of fundamental fairness, which discovery led the Court to the black-letter rule in *Gideon* that any indigent in a state prosecution was entitled to counsel.

Strauss’ account emphasizes that the Court eventually found the rule in *Betts v. Brady* so unworkable that it, in good common law style, fashioned a new rule that was. From a legal realist perspective, this is a useful description of the movement towards *Gideon*. But *Gideon* itself characterized the decision, rather, as a return to “old precedents,” and emphasized the grounding in original constitutional principles: “From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.”¹⁴⁰ A narrative of progress regards this language as more than rhetorical window-dressing. A narrative of progress sees the case law leading to *Gideon* as the Court’s growing acknowledgment of the implicit ramifications of a constitutional principle—the right to a fair trial—in the context of an emerging sense of the obligations and duties of the modern state.

The story of *Gideon* is part of the larger story of the incorporation of the Bill of Rights against the States through the Due Process Clause of the Fourteenth Amendment.¹⁴¹ By the time of *Gideon*, the interpretation of the Sixth Amendment right to counsel had already changed in the federal courts from being simply a negative right barring the government from prohibiting a defendant from obtaining representation to including the positive duty that the government provide counsel for indigent defendants. *Gideon* incorporated the Sixth Amendment against the States according to this modern understanding of the Sixth Amendment as containing a

139. The Congressional Research Service writes:

Generally, the Court developed three categories of prejudicial factors . . . which required the furnishing of assistance of counsel. There were (1) the personal characteristics of the defendant which made it unlikely he could obtain an adequate defense of his own, (2) the technical complexity of the charges or of possible defenses to the charges, and (3) events occurring at trial that raised problems of prejudice.

CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION 1637–38 (Centennial ed. 2013) (citing cases).

140. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

141. For background, see DANIEL JOHN MEADOR, PRELUDES TO GIDEON: NOTES ON APPELLATE ADVOCACY, HABEAS CORPUS, AND CONSTITUTIONAL LITIGATION (1967). For a contemporary analytical account of the Warren Court and the incorporation of the Bill of Rights, see AMAR, UNWRITTEN CONSTITUTION, *supra* note 2, 151–67.

positive duty. The case finding the existence of this duty in the Sixth Amendment for the federal courts was *Johnson v. Zerbst*.¹⁴² *Johnson v. Zerbst* itself is very brief, assuming rather than arguing this rather significant interpretive change. The rationale for this modern interpretation of the Sixth Amendment, however, was previously announced in *Powell v. Alabama*.¹⁴³ There, Justice Sutherland stated (in language later quoted in *Gideon*), that, “[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law.”¹⁴⁴ And he concluded, “In a case such as this . . . the right to have counsel appointed, when necessary, is a logical corollary from the constitutional right to be heard by counsel.”¹⁴⁵

Yet how does one reconcile Justice Sutherland’s announcement that the right to have counsel appointed is a logical corollary to the Sixth Amendment right to counsel, when the historical record seems to indicate that the original intent of the Sixth Amendment was no more than a guarantee of the right to retain counsel? In the eighteenth century, an important impetus for the the Sixth Amendment right to counsel clause was the Founders’ rejection of the English common-law practice of forbidding counsel to appear for a defendant in trials for felonies.¹⁴⁶ Given this background, the assertion of a defendant’s right to retain counsel to be heard in court in all criminal proceedings was an important advancement and one worth specifying in the Bill of Rights.¹⁴⁷ A plausible originalist argument therefore is that the Sixth Amendment was originally understood as guaranteeing no more than defendant’s right to retain counsel.¹⁴⁸

From the framework of a narrative of progress, however, it is important to note that the “logical” connection that Justice Sutherland describes between the right to be heard by counsel and the state’s duty to provide counsel to the indigent defendant was already perceived by some states at the time of the adoption of the Sixth Amendment. Several states had statutes providing for the appointment of counsel for indigent defendants,

142. 304 U.S. 458 (1938). “It is clear that the federal courts never thought they were required by the Sixth Amendment to appoint counsel for indigent defendants at any time before *Johnson v. Zerbst*, in 1938.” WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 77 (1955).

143. 287 U.S. 45 (1932); BEANEY, *supra* note 142, at 34–35, 151–57.

144. *Powell*, 287 U.S. at 69.

145. *Id.* at 72 (emphasis added).

146. BEANEY, *supra* note 142, at 8–12. See also Randolph N. Jonakait, *The Too-Easy Historical Assumptions of Crawford v. Washington*, 71 *BROOK. L. REV.* 219, 220–24 (2005) [hereinafter Jonakait, *Historical Assumptions*].

147. See Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 *RUTGERS L.J.* 77, 95–96 (1995).

148. BEANEY, *supra* note 142, at 32–33; Jonakait, *Historical Assumptions*, *supra* note 146, at 232–33.

especially in the case of murder trials.¹⁴⁹ The existence of these laws shows that some states considered that the concept of a fair trial itself required the appointment of counsel for indigent defendants. The point of these historical antecedents is that the doctrine did not emerge as a whole-cloth creation in *Powell* or *Johnson* or *Gideon*. Well before these cases, American law felt the implicit conflict between the concept of a fair trial and the fact that indigent parties were not always represented by counsel. This conflict was recognized by the Indiana Supreme Court in *Webb v. Baird* in 1854, when that court stated that no citizen “put in jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ such aid.”¹⁵⁰ The Indiana Supreme Court pointed to the origin of this conflict in the court’s own sense of what was required for a fair trial: “[n]o Court could be respected, or respect itself, to sit and hear such a trial.”¹⁵¹ The court concluded, “The defense of the poor, in such cases, is a duty resting somewhere, which will be at once conceded as essential to the accused, to the Court, and to the public.”¹⁵²

As it turns out, although the Indiana Supreme Court found a duty of the state to provide for indigent defense and acknowledged that the court was an agent of the state that had the power to employ counsel, the Indiana Supreme Court could find no provision to permit payment of counsel.¹⁵³ Although the *Webb* court acknowledged the modern sense of duties of the welfare state, the structures of government did not yet exist to accommodate those duties. The fruition of this duty had to wait until the emergence of the modern welfare state in the twentieth century, with that state’s more developed structures to accommodate a correspondingly expanded sense of welfare responsibilities towards its citizens.¹⁵⁴

The right to counsel is therefore a particularly telling example of the movement from a concept of negative liberty to one of positive liberty within a narrative of progress based on the development of the modern state. In terms of the analytical distinction between negative and positive

149. “[F]rom the earliest period under the colonial legislatures the states have attempted through statutes to aid the indigent defendant by extending to him the assistance of counsel.” BEANEY, *supra* note 142, at 138.

150. 6 Ind. 11, 15 (Ind. 1854) (cited by Justice Black in his dissent to *Betts v. Brady* 316 U.S. 455, 476–77 (1942)).

151. *Id.*

152. *Id.* (emphasis added).

153. *Id.* at 19–20.

154. *Johnson* therefore “provides a judicial parallel to the social-welfare conception of the state that was central to the New Deal. To put the point in language congenial to New Dealers, [*Zerbst v.*] *Johnson* created a system of ‘legal social security’ for federal felony defendants.” Heffernan, *supra* note 29, at 1419 (citation omitted).

liberty discussed above, the criminal procedure rights of the Bill of Rights appear to be the purest examples in the Constitution of the classic eighteenth century paradigm of negative freedom—the limiting of the power of the state over the individual. The probable original historical meaning of the Sixth Amendment as only guaranteeing the right to retain counsel fits neatly within this paradigm of negative liberty; that is, the Sixth Amendment limits the power of the government in its criminal prosecutions by granting the defendant the right to retain counsel. In contrast, an indigent defendant’s right to appointed counsel, as expressed in *Powell*, *Johnson*, and *Gideon*, proclaims a positive liberty, something that the government is required to do for the defendant.¹⁵⁵ Viewed within a narrative of progress, however, these cases do not oppose the original meaning of the Sixth Amendment. They develop and augment the original right by articulating a duty for the welfare state to provide counsel for those unable to afford it. Under the modern view of freedom that develops along with the welfare state, formal rights are not meaningful if they cannot actually be exercised, and thus the state has the obligation to make rights meaningful by making them material.¹⁵⁶ The formal right to counsel is not meaningful if the defendant cannot afford counsel. *Powell*, *Johnson*, and *Gideon* in effect announced the duty of the welfare state to provide the material support to make the right to counsel meaningful. The rule these cases announce can therefore be placed within a rational continuity with the original eighteenth-century understanding of the Sixth Amendment. The original formal eighteenth-century right is thus “materialized” in light of the development of the modern welfare state. The Sixth Amendment principle has not changed its core meaning, but rather has developed along with the duties of the modern welfare state.

This development of the right to counsel in accordance with the increasing scope of the duties of the modern state correlates with the emergence of the Equal Protection Clause as the center of modern

155. Akhil Reed Amar notes that “[t]he appointment of counsel requires government to act ‘affirmatively’” AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 140 (1997). The only other example Amar gives of such an affirmative provision is “the compulsory process clause, which requires government to act affirmatively to enforce subpoenas.” *Id.* Amar’s recent book, *AMERICA’S UNWRITTEN CONSTITUTION*, contains a number of specific analyses connecting key Warren Court decisions to the text and history of the Constitution. However, his analysis of *Gideon* is in terms of the rather broad constitutional principles of “symmetry” and “innocence protecting.” AMAR, *UNWRITTEN CONSTITUTION* *supra* note 2, at 111–12, 198.

156. “Materialization results from the fact ‘that legal freedom, that is, the legal permission to do as one pleases, is worthless without actual freedom, the real possibility of choosing between permitted alternatives.’” HABERMAS, *FACTS AND NORMS*, *supra* note 115, at 403.

constitutional doctrine.¹⁵⁷ For example, in the conclusion to their seminal article on the Equal Protection Clause, professors Joseph Tussman and Jacobus tenBroek discuss the emergence of modern equal protection in terms of the growth of government.¹⁵⁸ They argue that, whereas the traditional American view of liberty identified liberty “with the absence of government,” the modern ubiquity of government has redefined the concept as, “[w]henever an area of activity is brought within the control or regulation of government to that extent equality supplants liberty as the dominant ideal and constitutional demand.”¹⁵⁹ Tussman and tenBroek argue that this tendency is discernible “[e]ven in areas in which constitutional restraints have been traditionally read as prohibitions”¹⁶⁰ The examples they give are of First Amendment cases that involve the government’s promotion of the exercise of free speech.¹⁶¹ But their analysis equally describes the development of the Sixth Amendment from a purely negative restriction on government power to a positive duty to appoint counsel for indigent defendants.

VIII. CONCLUSION

The preceding account has attempted to revive the Hegelian tradition of the narrative of progress of the modern state and apply it to contemporary accounts of living constitutionalism. As I have argued, this narrative of progress provides an explanatory framework for understanding the development of modern constitutional doctrine, and is congruent with Justice Breyer’s attempt in *Active Liberty* to describe the collectivist themes of modern constitutional doctrine. A Hegelian-inspired narrative of progress provides an account of how constitutional principles change by developing their inner-rationality over time. This narrative acknowledges the historical role of authorial intention, such as that of the Founders, while placing those historical intentions within a larger narrative of rational purposes made manifest over time. In drafting the Constitution, one might say the historical Founders captured a snapshot of certain

157. See Robin West, *Rights, Capabilities, and the Good Society*, 69 *FORDHAM L. REV.* 1901, 1911 (2001) [hereinafter West, *Good Society*]; Robin West, *The Missing Jurisprudence of the Legislated Constitution*, in *THE CONSTITUTION IN 2020*, at 79–91 (Jack M. Balkin & Reva B. Siegel eds., 2009).

158. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 *CALIF. L. REV.* 341, 380–81 (1949).

159. *Id.* at 380.

160. *Id.*

161. *Id.*

constitutional principles at the moment of the founding. These constitutional principles themselves contain an inner-rationality that works itself out over time, and this inner-rationality is recognized by later interpreters of the Constitution who interpret constitutional principles in light of historical developments, which themselves are framed within a narrative of progress. Specifically, the narrative of progress illuminates how constitutional principles that begin historically as limited safeguards of individual rights within a limited version of government divulge further meaning as they develop in connection with the modern welfare state. As an example, I have presented the development of the right to counsel for indigent defendants.

Some might regard any attempt to revive a Hegelian-inspired narrative of progress as inevitably falling prey to the classic problem of the philosophy of history—viewing all history as dictated solely by the force of ideas, which act like agents of the omnipresent hand of God in a narrative of providential history. I have, however, attempted to sketch out an account of the movement of reason in history that does not presuppose the traditional theological worldview of providential history. As Habermas argues in *Philosophical Discourse of Modernity*, the relationship between reason and history continues to constitute the discourse of modernity of which we find ourselves a part.¹⁶² However, as Habermas further argues, to relate reason to history, one must carefully distinguish the meaning of the words “reason” and “rationality”: “[t]hey are used neither in accord with the game rules of ontology to characterize God or being as a whole; nor in accord with the game rules of empiricists to characterize individual subjects capable of knowledge and action.”¹⁶³ Thus one must avoid two traditional opposite and opposing conceptions of reason. The first conception is that reason is a divine force set up outside human creation and history; the second conception is that reason is merely the subjective capacity of individuals.¹⁶⁴

Following Habermas here, I would argue that the challenge for a contemporary revival of a narrative of progress is to navigate the opposing senses of these two conceptions of reason. On the one hand, a contemporary narrative of progress must not treat reason as something above and beyond human creation and history. To do so would be to revert to traditional providential narratives based on an external God. On the

162. HABERMAS, TWELVE LECTURES, *supra* note 57, at 392–93 n.4 (Lecture III).

163. *Id.* at 392 n.4 (Lecture III).

164. “Reason is valid neither as something ready-made, as an objective teleology that is manifested in nature or history, nor as a mere subjective faculty.” *Id.*

other hand, a contemporary narrative of progress cannot reduce reason to merely the local beliefs and practices of individuals at discrete historical moments. To do so is to fall into historicism, with a series of discrete historical moments each with its own discrete worldview or system of beliefs, but with no thread to tie those moments or beliefs together.

A related objection is that however one attempts to define reason in history, any narrative of progress will artificially foist a template over history, both distorting the past and limiting valuable changes in the future. As to the issue of distorting the past by fitting it within the needs of the present, I would argue that this problem emerges whenever some continuity has to be drawn between the past and the present.¹⁶⁵ Furthermore, given the ascendance of originalism, living constitutionalism cannot escape addressing the issue of the continuity between modern constitutional doctrine and original constitutional meaning and intent. Because constitutional interpretation must draw some continuity between the past and the present, my argument is that the Hegelian-inspired narrative of progress provides less distortion of the past precisely because it acknowledges the distinctive conceptual frameworks of different historical periods in the course of describing the dialectical development of one period into another. As I have described, Hegel's dialectical narrative acknowledges the distinctiveness of the modern state while describing the modern state's development from the earlier stage of economic individualism and limited government, which are reflected in the institutions of civil society.

The issue of whether a narrative of progress limits future developments raises a separate set of concerns. Certainly, it would be the height of hubris to imagine that our current conceptual schemes anticipate everything that might arise in the future. Indeed, rightly or wrongly, Hegel's *Philosophy of Right* has often been criticized for announcing an end to history in his version of the modern state. Such criticism raises the important point that a theory of progress should not foreclose further beneficial change. This is the concern that leads Richard Rorty to, on the one hand, embrace all the practical developments of modernity and the modern state, while, on the other hand, rejecting the philosophical narrative of progress on which they

165. A related issue is the role of the professional historian. One view is that the historian is precisely supposed to recount how the past is *different* from the present. See HERBERT BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* (2d ed. 1931). As I have argued, however, constitution interpretation inevitably involves tracing some sort of continuity between past and present. For a detailed analysis of the tensions between contemporary professional historians and constitutional theory, see KALMAN, *supra* note 61.

have traditionally been based. Rorty argues that rejecting any philosophical basis for progress, including Hegel's dialectical movement of the concept, can only change our account of progress for the better:

Instead of seeing progress as a matter of getting closer to something specifiable in advance, we see it as a matter of solving more problems. Progress is . . . measured by the extent to which we have made ourselves better than we were in the past rather than by our increased proximity to a goal.¹⁶⁶

In response to Rorty's thoughtful view, I would argue that any robust account of constitutional principles has the effect of both enabling and foreclosing change. Rorty would like to have only the enabling part and not the foreclosing part, but I cannot see how one can claim one aspect without the other.¹⁶⁷ As I have described above, both conservative and progressive accounts of constitutional principles acknowledge this conclusion. Scalia's account of constitutional principles as locking in rights to prevent their erosion is the clearest example of the foreclosing aspect of constitutional principles. But the progressive tradition also appeals to the stability of the rights of the past as the platform for expanding those rights in the future. This is reflected in Reva Siegel's account of how social movements have appealed to the Constitution as a foundation for progress.¹⁶⁸

But if any robust account of constitutional principles has to contain both an enabling part and a foreclosing part, the foreclosing part in turn raises the "dead hand" problem, which has been central to much of the debate over living constitutionalism. Originalism, of course, is not opposed to the "dead hand" of the Constitution dictating the conduct of future generations. As described in Scalia's account, the whole point of a written constitution is to lock in rights and prevent subsequent generations from violating them. Living constitutionalism, on the other hand, has stressed the need for the Constitution to change and adapt to the changing historical circumstances and needs of new generations.

166. RORTY, *ACHIEVING OUR COUNTRY*, *supra* note 18, at 28.

167. A related question is how one can have a "redemptive" account of constitutional change without a robust account of how constitutional principles are indeed changing for the better. Balkin states, "[t]oday we tell a story in which one wave of redemptive constitutionalism follows the next, but that is how the story looks to us today, not the way things had to be." BALKIN, *ORIGINALISM*, *supra* note 62, at 76. But a narrative of progress indeed insists that the movement of constitutional principles has been, in some sense, the way things had to be.

168. For a revisiting of the issue of the importance of rights to the progressive tradition, see Robin West, *Good Society*, *supra* note 157.

I agree that living constitutionalism must validate change, but I would argue that such change should be seen within the framework of principles that come before and contain some degree of their own rational integrity. This is where a Hegelian-inspired narrative of progress differs in emphasis from an “aspirational” or “redemptive” narrative of the Constitution, which is a kindred form of living constitutionalism. Constitutional theorist Jack Balkin describes aspirational constitutionalism in terms of the recognition that “a constitution always exists in a fallen condition, that it inevitably contains compromises with evil and injustice. At the same time, it maintains that the constitution and the constitutional tradition contain elements and resources that can assist in their eventual redemption.”¹⁶⁹ The most obvious compromise with evil and injustice in the Constitution of 1789, of course, was the accommodation of slavery. But even at the time many saw this as an arbitrary limitation on the application of the principle of individual political freedom, rather than seeing the *principle itself* as inherently compromised. As discussed above, individual political freedom has its own “logic” as a concept distinct from its particular historical instantiation. So too, a logic exists in the development of the concept of individual freedom in relation to the development of the modern state.

Finally, in seeking to place the development of the modern state at the center of the constitutional narrative of progress, I do not seek to dissolve the tension between individual liberties and the collective interests of the state by resolving everything in favor of the state. I am all too conscious of the dangers that the modern state can present to individual freedom. Indeed, this is the area in which the critiques of the Left have provided the most sophisticated insights. Originalism has nothing to say about the development of the modern state, and, as a consequence, cannot account for either its development or provide insights into the true nature of the dangers that the state presents to individual liberty. However, critics of modernity from the Left, such as Max Horkheimer and Theodore Adorno in *The Dialectic of Enlightenment*, have connected the emergence of the modern state to the narrative of the Enlightenment, but as a form of tragedy.¹⁷⁰ These thinkers tell the story of Enlightenment reason beginning with hopes of truth and freedom and ending in the irrationality and

169. BALKIN, ORIGINALISM, *supra* note 62, at 62.

170. See MAX HORKHEIMER & THEODOR W. ADORNO, DIALECTIC OF ENLIGHTENMENT (John Cumming trans., 1986) (1944). “In the most general sense of progressive thought, the Enlightenment has always aimed at liberating men from fear and establishing their sovereignty. Yet the fully enlightened earth radiates disaster triumphant.” *Id.* at 3.

totalitarianism of the modern age.¹⁷¹ While acknowledging the importance of this type of powerful critique of Enlightenment reason, I believe that the liberal tradition of progress provides the possibility of a happy ending for the story of the modern state. We will never get to that happy ending, however, unless we at least acknowledge we are part of this story.

171. See JÜRGEN HABERMAS, 1 *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY* 345–99 (Thomas McCarthy trans., 1984). In a similar vein, Foucault describes the emergence of the modern surveillance state in MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (Alan Sheridan trans., 1995) (1977).