CONSTRUCTING A LIBERAL/PROGRESSIVE "CONSTITUTION IN EXILE": AN APPRECIATION OF JACK BALKIN'S *MEMORY AND AUTHORITY*[†]

JAMES E. FLEMING[*]

CONTENTS

[†] This Essay grows out of the Law and Interpretation Section's extended program on "The Uses and Misuses of History: The Roberts Court and Its Constitutional Revolution," held at the Association of American Law Schools Annual Meeting, January 6, 2024.

[*] The Honorable Paul J. Liacos Professor of Law, Boston University School of Law. I benefitted from presenting a previous draft at the University of Maryland Discussion Group on Constitutionalism, on "Popular Constitutionalism and Populism," March 1-2, 2024. Thanks especially to Linda McClain for helpful comments.

I. WHY ORIGINALISM WON'T DIE

Several years ago, my longtime coauthor Sotirios Barber proposed that we write a book together entitled *Why Originalism Won't Die*. He conceived it as a sequel to our *Constitutional Interpretation: The Basic Questions*, which criticized all approaches to constitutional interpretation that aimed and claimed to avoid making normative judgments about the best understanding of our constitutional commitments.[1] It also would build upon my own *Fidelity to Our Imperfect Constitution: For Moral Readings and Against Originalisms*, which criticized all forms of originalism for enshrining, in the name of fidelity, an imperfect Constitution that does not deserve our fidelity.[2]

Jack Balkin's *Memory and Authority: The Uses of History in Constitutional Interpretation*[3] provides incisive answers to the questions Barber and I would need to confront if we were to write the book he proposed. Balkin demonstrates brilliantly what Barber and I have long argued: that most originalists engage in forms of "historical ventriloquism," putting their own normative arguments about the best interpretation of the Constitution in the mouths of our forebears, as if they had made the decisions for us and commanded us to follow.[4] And Balkin argues quite effectively that many originalist arguments are "as much about present-day values as they are about history. . . . [P]eople use competing constructions of the past to argue about what the country's values are and should be in the present."[5] Furthermore, he implicitly answers the question of why originalism won't die, at least in the United States, in his rich analysis of why originalism took hold in the United States in the twentieth century but not in other Western constitutional democracies.[6] From start to finish, it is a remarkably compelling book.

Balkin's book makes clear why many liberal/progressive criticisms of conservative originalists—that they get the history wrong or cherry-pick it, that they only selectively insist upon originalism and otherwise ignore it, and the like—deliver at best glancing blows (as far as the conservative originalists are concerned). For one thing, he shows that the construction of memory entails the construction of forgetting (or erasure),[7] which is essential to originalist projects

[1] *See generally* SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS (2007).

[2] *See generally* JAMES E. FLEMING, FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS (2015).

[3] JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION (2024).

[4] *Id.* at 12-13, 118, 126.

[5] *Id.* at 53.

[6] *Id.* at 77-93 (explaining how myths of America's creation, reverence for founding generation, and America's Protestant tradition came together in twentieth century to form originalism, which acts "like the spoonful of traditionalist sugar that helps the modernist medicine go down").

[7] *See id.* at 179-91.

that whitewash our historical injustices and repudiate the progressive aspirations embodied in our history. Hence, when conservative originalists erase unjust aspects of our history, and liberals and progressives criticize them for not reckoning with this history, they are unmoved by the criticisms.[8] For another, he demonstrates that conservative originalists—like everyone else who makes originalist arguments—are "cafeteria originalists."[9] Thus, conservative originalists selectively use originalism and in fact avail themselves of the full menu of forms of constitutional argument in justifying decisions, just as their critics do.[10]

The best rebuttal would offer more than just the common criticisms of conservative originalism. More importantly and constructively, it also would provide liberal/progressive counternarratives that use history, in the ways Balkin's book proposes and illustrates, in making normative arguments about the best interpretations of our constitutional commitments. Indeed, Balkin's book can serve as a manifesto and prescription for a form of liberal/progressive popular constitutionalism: demonstrating how best to use history in making arguments to build and maintain a liberal/progressive "Constitution in exile" over the next generation.

Here is a roadmap of this essay. First, I outline a typology of forms of popular constitutionalism, suggesting where Balkin's *Memory and Authority* fits into this discourse. Second, I give five compelling reasons to appreciate and build upon Balkin's project. Finally, I sketch briefly how Balkin's book might inform Linda C. McClain's and my current book project, *"What Shall Be Orthodox" in Polarized Times*. His book illuminates how our book might most effectively counter conservatives' overextension of *West Virginia State Board of Education v. Barnette*'s[11] famous warning—that government may not prescribe "what shall be orthodox"—in their challenges to liberal/progressive programs that seek to secure the status of equal citizenship for all.[12]

II. BALKIN'S PROJECT IN RELATION TO POPULAR CONSTITUTIONALISM

In 2005, I outlined a typology distinguishing five versions of popular constitutionalism, ranging from conceptions that reject judicial review

[8] *Id.* at 185 (observing "[w]hatever is erased from memory loses its power to shape meaning").

[9] *Id.* at 70-73, 160-63.

[10] *Id.* at 7, 12, 118, 159-60, 168.

[11] 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

[12] *See, e.g.*, 303 Creative LLC v. Elenis, 600 U.S. 570, 584-85, 601-02 (2023) (employing *Barnette*'s language to support reading First Amendment to limit antidiscrimination law's protection against discrimination on basis of sexual orientation).

altogether through conceptions that are compatible with judicial supremacy.[13] Here I will update that typology to show how Balkin's project supports a sixth version of popular constitutionalism. The six versions are:

(1) Populist anti-constitutionalism that at bottom opposes constitutional limits on popular self-government, and rejects judicial review enforcing such limits. Perhaps no one in U.S. constitutional law scholarship fully embraces this view, but Richard D. Parker in *"Here, the People Rule": A Constitutional Populist Manifesto*,[14] Louis Michael Seidman in *From Parchment to Dust: The Case for Constitutional Skepticism*,[15] and Aziz Rana in *The Constitutional Bind: How Americans Came to Idolize a Document That Fails Them*,[16] as their titles suggest, come close to doing so. Today, many liberals and progressives are similarly critical of judicial review.[17]

(2) Popular constitutionalism that accepts constitutional limits on self-government, but rejects judicial review to enforce those limits. This view is illustrated by Jeremy Waldron in *Law and Disagreement*[18] and by Mark Tushnet in *Taking the Constitution Away from the Courts*.[19]

---

[13] James E. Fleming, *Judicial Review Without Judicial Supremacy: Taking the Constitution Seriously Outside the Courts*, 73 FORDHAM L. REV. 1377, 1378-80 (2005).

[14] RICHARD D. PARKER, "HERE, THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO 4-5 (1994).

[15] LOUIS MICHAEL SEIDMAN, FROM PARCHMENT TO DUST: THE CASE FOR CONSTITUTIONAL SKEPTICISM 3-4 (2021).

[16] AZIZ RANA, THE CONSTITUTIONAL BIND: HOW AMERICANS CAME TO IDOLIZE A DOCUMENT THAT FAILS THEM 3 (2024).

[17] *See, e.g.*, Ryan D. Doerfler & Samuel Moyn, *The Ghost of John Hart Ely*, 75 VAND. L. REV. 769, 770-76 (2022) (attacking empirical assumptions about judicial independence and competence underlying John Hart Ely's famous and influential argument that judicial review should reinforce representative democracy and arguing instead that courts should defer to representative processes); Nikolas Bowie & Daphna Renan, *The Supreme Court Is Not Supposed to Have This Much Power: And Congress Should Claw It Back*, ATLANTIC (June 8, 2022), https://www.theatlantic.com/ideas/archive/2022/06/supreme-court-power-overrule-congress/661212/ (arguing *Dred Scott* and *Civil Rights Cases* show Congress, not Supreme Court, should decide important political issues).

[18] JEREMY WALDRON, LAW AND DISAGREEMENT 15-17 (1999) (arguing disagreements about people's rights should be resolved by majoritarian processes). Subsequently, Waldron had an instructive exchange with Richard Fallon concerning his arguments against judicial review. *See* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1352-53 (2006) (providing case against judicial review centered on how it obfuscates rights disagreements in legislatures and undermines democratic legitimacy); *see also* Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1699-1701 (2008) (contending judicial review overenforces rights, which is better than underenforcement, and that judicial review provides political legitimacy).

[19] MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS, at ix-xi (1999) (advocating for populist constitutional law, limited judicial review, and constitutional decision-making embedded in political process). Recently, Tushnet has made similar arguments criticizing the Roberts Court. *See* MARK TUSHNET, TAKING BACK THE

(3) Popular constitutionalism that accepts constitutional limits on self-government and judicial review but rejects judicial supremacy. This view is represented by Larry Kramer in *The People Themselves*.[20] He rejects judicial supremacy in favor of both departmentalism and a form of populism. By departmentalism, I mean the idea that legislatures and executives share with courts authority to interpret the Constitution and indeed are the ultimate interpreters on certain questions. By populism, I mean the idea that the people themselves are the ultimate interpreters over and against the departments.[21] When Kramer published his book in 2004, prior to Donald Trump's emergence on the national stage of U.S. politics, people could speak of "populist constitutionalism" in U.S. constitutional law without it having the authoritarian implications it has today. Note that Kramer, unlike Waldron and Tushnet, does not propose "taking the Constitution away from the courts" altogether. Instead, he proposes judicial review "without judicial supremacy."[22]

(4) Departmentalists who are not populists. For example, Keith Whittington embraces constitutional construction by legislatures and executives alongside constitutional interpretation by courts.[23] Less obviously, Larry Sager falls within this category of popular constitutionalism because his "underenforcement thesis" commits him to the idea that certain constitutional norms are judicially underenforced; their fuller enforcement is left to legislatures and executives, who share with courts the authority to interpret the Constitution.[24] We could put Cass Sunstein's *The Partial Constitution*[25] and certainly my first book, *Securing*

CONSTITUTION: ACTIVIST JUDGES AND THE NEXT AGE OF AMERICAN LAW 245-47 (2020) (forecasting popular constitutionalism's growing acceptance in progressive discourse in wake of conservative constitutional regime).

[20] *See generally* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

[21] *Id.* at 248 ("The Supreme Court is not the highest authority in the land on constitutional law. We are.").

[22] *Id.* at 249-53.

[23] *See* KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 16-19 (1999) (providing overview of important constitutional episodes driven by nonjudicial branches' constitutional construction); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 13-16 (1999) (arguing originalism should limit courts' interpretive discretion while other branches engage in broader constitutional construction).

[24] *See* LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 84-128 (2004) (arguing elected officials have constitutional obligation to interpret and implement Constitution, even in situations in which courts would not fully enforce constitutional commitments due to their limited institutional capacities).

[25] *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 9-10, 138-40, 145-61, 350 (1993) (arguing executives and legislatures have obligation to interpret and enforce Constitution, even if courts might not do so in certain cases due to their limited institutional competence).

Constitutional Democracy,[26] in this category, too. Like Sager, Sunstein and I have argued that certain constitutional norms may not be judicially enforceable, but they are nonetheless binding on legislatures and executives as part of "the Constitution outside the courts."

(5) Social movement popular constitutionalism that does not necessarily challenge judicial supremacy, but focuses on how popular social movements outside the courts transform the norms that ultimately are accepted by the courts. This version is illustrated, as of 2005, by Reva Siegel, Robert Post, and Willy Forbath, among others.[27] Some of these scholars may be more critical of judicial supremacy today than they were then, especially now that conservative originalism is ascendant on the Supreme Court.[28]

(6) Today, I would add a sixth form of popular constitutionalism: building and maintaining a "Constitution in exile" during long periods of time when the Supreme Court is dominated by a vision or visions that one rejects as irredeemably flawed. In 2005, I did not view conservative discourse about the "Constitution in exile"—calls for restoration of the "lost" libertarian Constitution that has been in exile since the New Deal liberal revolution in 1937[29]—as a form of popular constitutionalism. After all, its proponents stressed original meaning originalism as the theory whereby *courts* were obligated to restore the lost Constitution.[30] But over the years I have come to understand this discourse as part of a conservative social movement—stemming from what Albert O. Hirschman famously called the "rhetoric of reaction"[31]—all in the name of restoring an imagined past while delegitimizing every institution and

[26] *See* JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY 5-6, 70-71, 74, 167-70 (2006); *see also* James E. Fleming, *The Constitution Outside the Courts*, 86 CORNELL L. REV. 215, 216-17 (2000).

[27] *See* Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 976-85 (2004) (analyzing scholarship by Siegel, Post, and Forbath).

[28] *See, e.g.*, Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1203 (2023) (describing "process of taking back the Constitution from the Court").

[29] *See* JAMES E. FLEMING, CONSTRUCTING BASIC LIBERTIES: A DEFENSE OF SUBSTANTIVE DUE PROCESS 227-28 (2022) (citing, as example, Douglas H. Ginsburg, *Delegation Running Riot*, 18 REGULATION 83, 84 (1995) (book review) (coining phrase "the Constitution in exile")); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 359, 409-10 (updated ed. 2013) (arguing Constitution's original meaning is "much more libertarian than the one selectively enforced by the Supreme Court" and closer to constitutional conceptions enforced by Court before 1937).

[30] *See* BARNETT, *supra* note 29, at 360 (advocating for courts to "adopt a Presumption of Liberty and restore the lost Constitution").

[31] *See generally* ALBERT O. HIRSCHMAN, THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY (1991) (arguing reactionary counterthrusts tend to follow progressive movements).

program liberals and progressives have used to pursue their conceptions of our constitutional commitments and justice.[32]

How is this discourse related to popular constitutionalism? It takes place at a time where its proponents know that their arguments are unlikely to persuade the courts (at least for now)—and it aims to motivate the electorate to vote and to move the conversation and the culture in its direction over the long term. Thus, conservatives have effectively played the long game, and the courts have moved in their direction. They have kept that exiled Constitution of the old order alive, partly through projects of memory, authority, and justification as Balkin conceives them in his book.[33] Their efforts to do so have borne fruit, both explicitly and implicitly, through resurrection of pre-1937 ideas in relatively thick to relatively thin forms. I will mention three examples: (1) through justices directly invoking and calling for reviving the old doctrines (think of Justice Thomas on the commerce power and freedom of the press);[34] (2) through aggressive judicial protection of rights conservatives claim have been so fundamental that they were taken for granted in days gone by but which are now said to be vulnerable (think of Justices Scalia and Thomas on the individual right to bear arms in *District of Columbia v. Heller*[35] and *New York State Rifle & Pistol Association, Inc. v. Bruen*[36]); or (3) through reverting to a state of affairs imagined to have existed before the Warren Court's (and early Burger Court's) supposed constitutional revolution (think of the Roberts Court's approach to

[32] For instructive analysis of originalism in relation to social movement conservatism, popular constitutionalism, and the right's "living constitutionalism," see Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 195-96 (2008); and Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 565 (2006).

[33] *See generally* BALKIN, *supra* note 3.

[34] On the commerce power, see, e.g., United States v. Lopez, 514 U.S. 549, 584-85 (1995) (Thomas, J., concurring) (rejecting "substantial effects" test for determining reach of Congress's power to regulate interstate commerce); Printz v. United States, 521 U.S. 898, 937 (1997) (Thomas, J., concurring) (again rejecting "substantial effects" test). On freedom of the press, Justice Thomas more than once has urged the Court to grant certiorari in a case to reconsider the landmark ruling establishing the "actual malice" standard from *New York Times Co. v. Sullivan*, 376 U.S. 254, 262 (1964). *See, e.g.*, Coral Ridge Ministries Media, Inc. v. S. Poverty L. Ctr., 142 S. Ct. 2453, 2454 (2022) (Thomas, J., dissenting from denial of certiorari); Berisha v. Lawson, 141 S. Ct. 2424, 2424-25 (2021) (Thomas, J., dissenting from denial of certiorari); and McKee v. Cosby, 139 S. Ct. 675, 675-76 (2019) (Thomas, J., concurring in denial of certiorari).

[35] *See* 554 U.S. 570, 594 (2008) (five-four majority opinion of Justice Scalia).

[36] *See* 597 U.S. 1, 17 (2022) (six-three majority opinion of Justice Thomas).

reproductive freedom and religious liberty in *Dobbs v. Jackson Women's Health Organization*[37] and *Kennedy v. Bremerton School District*[38]).[39]

Where conservatives initially failed to make as much headway as they hoped, they have more than made up for it by packing the Supreme Court and, to a lesser extent, the lower federal courts with movement conservatives.[40] Today, with good reason, they expect that conservative victories, like *Dobbs* and *Bruen*, applying narrow inquiries into "history and tradition" will beget further conservative victories.[41]

Until around 2022, we mostly associated discourse about a "Constitution in exile" with conservatives.[42] But since 2022, after the *Dobbs* and *Bruen* decisions, it has definitively sunk in that liberals and progressives are going to have to carry out an analogous project of building and maintaining a liberal Constitution in exile for the foreseeable future. Some political scientists and law professors have predicted that conservatives will have a majority on the Supreme Court at least through the 2050s or even until 2065.[43] Moving forward, liberals and progressives need to learn from the conservatives' successes and from Balkin's analysis. Yet whereas the conservative rhetoric of reaction lends itself to a discourse of *restoration* of an old, lost constitutional order—or a "return to

[37] *See* 597 U.S. 215, 222 (2022) (overruling *Roe* and *Casey*, which had protected pregnant persons' right to decide whether to terminate their pregnancies).

[38] *See* 597 U.S. 507, 540-41 (2022) (overruling "*Lemon* test" under Establishment Clause).

[39] For a suggestion that the Roberts Court may see repudiating Warren Court (and early Burger Court) decisions as a return to conservative "normalcy," see James E. Fleming, *The Taft and Roberts Courts' Quests for Returns to Conservative "Normalcy": A Comment on Robert Post's* The Taft Court, BALKINIZATION (Feb. 23, 2024, 10:30 AM), https://balkin.blogspot.com/2024/02/the-taft-and-roberts-courts-quests-for.html [https://perma.cc/BLU9-5LHP].

[40] By "packing the Supreme Court," I do not refer to any formal "court-packing" legislation. Rather, I refer to the Supreme Court "packing itself" in *Bush v. Gore*, 531 U.S. 98 (2000), and to Republican Senate Majority Leader Mitch McConnell's theft of the Supreme Court seat that ultimately went to Gorsuch in 2017 and his theft of the Supreme Court seat that went to Barrett eight days before the 2020 presidential election. For further discussion, see Bruce Ackerman, *The Court Packs Itself*, AM. PROSPECT (Dec. 4, 2001), https://prospect.org/features/court-packs/ [https://perma.cc/SV7W-M9D8].

[41] *Dobbs*, 597 U.S. at 216 ("Guided by . . . history and tradition . . . the Court finds the Fourteenth Amendment clearly does not protect the right to an abortion.").

[42] *See* FLEMING, *supra* note 29, at 227 ("For years, conservative judges and scholars have been calling for restoring the 'Constitution in exile' . . . .").

[43] *See, e.g.*, Charles Cameron & Jonathan P. Kastellec, *Conservatives May Control the Supreme Court Until the 2050s*, WASH. POST (Dec. 14, 2021, 6:00 AM), https://www.washingtonpost.com/politics/2021/12/14/supreme-court-roe-conservatives/ (explaining why Supreme Court will "remain conservative for another 30 years"); Adam Chilton, Dan Epps, Kyle Rozema & Maya Sen, The Endgame of Court-Packing 2 (Aug. 9, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3835502 (stating Supreme Court is not expected to have Democratic-leaning majority until 2065).

normalcy" (inevitably a prior state of affairs in which conservatives ruled the country)—liberals and progressives typically deploy a discourse of *redemption* of the promises of the Constitution to all, especially those who have been excluded or marginalized.[44]

III. FIVE COMPELLING REASONS TO BUILD UPON BALKIN'S *MEMORY AND AUTHORITY*[45]

First, Balkin develops the most sophisticated and comprehensive analysis to date of the forms of argument (and the uses of history) in constitutional interpretation. He begins, as many do, with Philip Bobbitt's well-known formulation of the six modalities or forms of argument that lawyers and judges typically employ: "text, history, structure, prudence [including consequences], precedent [including judicial decisions, interbranch conventions, political tradition, and social custom], and ethos."[46]

As a critic of originalism and a defender of moral readings, I have always been especially critical of Bobbitt's conceptions of (1) historical arguments and (2) arguments from "ethos"—the former is too narrow and the latter is too unspecified. Balkin trenchantly observes that Bobbitt wrote as if historical argument were its own separate modality, but, in fact, history is a resource people employ in using all of the modalities.[47] Equally important, Balkin considerably improves on Bobbitt's understanding of arguments from ethos and related ideas, distinguishing (a) arguments from ethos; (b) arguments from political tradition; and (c) arguments from honored authority.[48]

Balkin presents eleven different modalities or styles of justification—ways in which lawyers, judges, and citizens argue for constitutional interpretations or constructions (and use history in doing so). According to Balkin, a modality might argue that an interpretation or construction is correct because it:

(1) elucidates the meaning of the text (arguments from text);

---

[44] BALKIN, *supra* note 3, at 175 (distinguishing "restoration" which "seeks a return to the values and practices of an age that has been lost" and "redemption" which "seeks to fulfill promises made in the past").

[45] This section incorporates and updates some of my analysis of Balkin's previous work in my own prior scholarship. *See* FLEMING, *supra* note 2, at 126-27, 139-40 (analyzing arguments in JACK M. BALKIN, LIVING ORIGINALISM (2011) [hereinafter BALKIN, LIVING ORIGINALISM] and JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD (2011) [hereinafter BALKIN, CONSTITUTIONAL REDEMPTION]).

[46] BALKIN, *supra* note 3, at 17 (citing PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 13 (1991)) (listing Bobbitt's six standard modalities that have "become widely adopted in constitutional theory"); PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 26 (1982)).

[47] *Id.* at 17, 20-21 ("People can—and do—use history to support arguments from each of these modalities.").

[48] *Id.* at 19-20, 34-53.

(2) reveals the structural logic underlying the constitutional system (arguments from structure);

(3) reveals the underlying purposes or principles behind the Constitution or some part of the Constitution (arguments from purpose);

(4) resolves gaps or ambiguities by choosing the interpretation that is the most just or that otherwise has the best consequences (arguments from consequences);

(5) shows how previous judicial precedents require a particular result (arguments from judicial precedent);

(6) appeals to existing political settlements or conventions among political actors (arguments from political convention);

(7) appeals to the people's customs and lived experience (arguments from custom);

(8) appeals to natural law or natural rights (arguments from natural law);

(9) appeals to important and widely honored values of Americans and American political culture (arguments from national ethos);

(10) appeals to American political traditions and to the meaning of important events in American cultural memory (arguments from political tradition); or

(11) appeals to the values, beliefs, and examples of culture heroes in American life (arguments from honored authority).[49]

For example, Balkin demonstrates that in our constitutional practice, lawyers, judges, and citizens use adoption history, not to make a single form of "originalist argument" as conventionally understood, but to make many different kinds of arguments.[50] Indeed, he argues, "For each modality . . . there is a different way to use history."[51] Furthermore, he shows that arguments using adoption history (and arguments about the founding period) often appeal to three types of normative argument: arguments from "national ethos," "political tradition," or "honored authority" (for example, "culture heroes" who are treated as objects of respect, wisdom, and emulation).[52] "In fact," he argues, "most of the originalist arguments that lawyers and judges make are usually also arguments from political tradition, national ethos, or honored authority."[53]

On Balkin's analysis, history functions as a "resource" for making arguments about the best understandings of our constitutional commitments, not as a "command" that makes our decisions for us.[54] More generally, Balkin shows, most uses of history in constitutional interpretation or construction are not originalist in any conventional sense. That is, they do not purport to represent the relatively concrete original meanings or original expected applications of the framers and ratifiers. Moreover, many arguments originalists make are "hybrid" arguments and are more abstract, aspirational, or hortatory than conventional

[49] *Id.* at 18-20.

[50] *Id.* at 149.

[51] *Id.* at 21.

[52] *Id.* at 34-53, 153-59.

[53] *Id.* at 34.

[54] *Id.* at 10-13.

versions of originalism acknowledge.[55] People invoke history for the lessons they believe it teaches about our experience.[56] They strive to put our constitutional practice in its best light. I have argued that this is how history functions in moral readings,[57] but not as it is said to function in conventional originalist accounts: as commands determining answers to the questions that we confront today.

If Balkin's book accomplishes nothing else, I hope his analysis will displace Bobbitt's as the go-to typology or starting point for thinking about forms or modalities of argument in constitutional interpretation. Balkin's typology is more sophisticated and comprehensive. Balkin understands more richly how unavoidably presentist and normative constitutional argument is, including that invoking history. As he puts it, "[P]eople use competing constructions of the past to argue about what the country's values are and should be in the present."[58] Moreover, "[p]eople employ the past to contend about important values in the present and to assert the proper direction of future action."[59]

Second, Balkin provides the most constructive analysis of narrative, story, and memory yet developed in U.S. constitutional thought.[60] Like Reva Siegel, Balkin has developed an illuminating account of how the construction of constitutional memory and forgetting (or erasure) shape the uses of history in normative constitutional interpretation.[61] Much of the work on narrative or stories has focused on the standpoints of minoritized communities or outsiders.[62] Balkin has shown how not only minoritized communities or outsiders, but also social movements in general can contribute to constitutional change by pressing their narratives in support of realizing or redeeming the promises of the Constitution.[63] Ken Kersch has observed that conservatives have been more effective in constructing narratives about preserving constitutional values than

[55] *Id.* at 159-60.

[56] *See id.* at 163 (describing how people "draw normative lessons" from history).

[57] FLEMING, *supra* note 2, at 136-40.

[58] BALKIN, *supra* note 3, at 53.

[59] *Id.* at 50; *see also id.* at 41, 147-48.

[60] *See id.* at 179-227.

[61] *See id.* at 179-91.

[62] *See, e.g.*, Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 7-10 (1989).

[63] *See* BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 45, at 26 ("Through [the narrative of redemption] we understand many important social movements in American history as working out the meaning of the Declaration and the Constitution, engaging in popular uprisings that help to redeem their promises."); BALKIN, LIVING ORIGINALISM, *supra* note 45, at 81-89 (discussing how conflict between social movements over meaning of Constitution is source of constitutional change and provides democratic legitimacy to court decisions).

liberals and progressives.[64] I conceive Balkin as basically telling liberals and progressives that they should not forsake their claims to fidelity to the original meaning of the Constitution (conceived abstractly, as his living originalism or framework originalism conceives it), but should instead use constitutional memory to construct narratives about redeeming the Constitution's promises. Moreover, he provides the framework and forms of argument liberals and progressives need to do this.

As I would put it, Balkin's book illustrates how liberals and progressives should construct narratives concerning the values and commitments of our constitutional democracy and how to interpret and construct the Constitution to make it the best it can be. Narratives and memories that are intelligible and persuasive to the people may motivate them to vote. For example, *Dobbs* should serve for liberals and progressives over the next generation much as *Roe* did for conservatives during the forty-nine years between 1973 and 2022,[65] namely, to motivate people to vote for candidates supporting reproductive freedom as well as to support legislation, ballot initiatives, and constitutional amendments to secure such freedom. So far, liberal, progressive, and common-sense criticism of *Dobbs* (and its implications) has been working, and we need to maintain and expand those criticisms. For example, through stories like that of pregnant Kate Cox's challenging Texas's restrictive abortion law before having to travel to another state for an abortion.[66] And stories like that of the Alabama Supreme Court ruling that frozen embryos are children under the wrongful death statute, thus imperiling IVF.[67] For such stories show what *Dobbs*'s overruling of *Roe* hath wrought.

---

[64] *See generally* Ken Kersch, *The Great Refusal: Liberals and Grand Constitutional Narrative*, WIS. L. REV. ONLINE 44 (2015), https://wlr.law.wisc.edu/wp-content/uploads/sites/1263/2015/07/Kersch-Final.pdf [https://perma.cc/AYY8-LAZX].

[65] For Balkin's own analysis, in 2003, of how "Roe v. Wade has . . . been good for Republicans" because it "helped spur the conservative social movements of the 1970's and 1980's . . . . and helped form a winning coalition that has shaped politics for a generation," see Jack M. Balkin, Opinion, *A Ruling the G.O.P. Loves to Hate*, N.Y. TIMES (Jan. 25, 2003), https://www.nytimes.com/2003/01/25/opinion/a-ruling-the-gop-loves-to-hate.html.

[66] *See, e.g.*, J. David Goodman, *Texas Supreme Court Rules Against Woman Who Sought Court-Approved Abortion*, N.Y. TIMES (Dec. 11, 2023), https://www.nytimes.com/2023/12/11/us/texas-abortion-kate-cox.html (describing how, despite Kate Cox's fetus having fatal condition and health risk to her posed by carrying pregnancy to term, she was not allowed to obtain abortion within Texas); Greer Donley, Opinion, *What Happened to Kate Cox Is Tragic, and Completely Expected*, N.Y. TIMES (Dec. 17, 2023), https://www.nytimes.com/2023/12/17/opinion/kate-cox-abortion-texas-exceptions.html (arguing Kate Cox's case was predictable interpretation of Texas legislation).

[67] *See, e.g.*, Roni Caryn Rabin & Azeen Ghorayshi, *Alabama Rules Frozen Embryos Are Children, Raising Questions About Fertility Care*, N.Y. TIMES (Feb. 20, 2024), https://www.nytimes.com/2024/02/20/health/ivf-alabama-abortion.html ("Referencing anti-abortion language in the state constitution, the judges' majority opinion said that an 1872

The battles over *Roe* and now *Dobbs* are not just about abortion but something much bigger: what kind of a Constitution we have, what kind of a country we are, and in what direction we should be moving if we are to fulfill our constitutional aspirations. Should we move (1) backward toward *restoration* of an old, unjust, unfree, and unequal order or (2) forward toward *redemption* of the Constitution's promises of liberty and the status of equality for all?

Third, Balkin develops the best account to date of constitutional legitimation and of what Justice Brennan and others have called "contemporary ratification."[68] In many formulations, the idea of contemporary ratification seems hardly more than a metaphor or slogan. In *Living Originalism*, Balkin richly described the processes of constitutional legitimation and contemporary ratification through constitutional Protestantism, social movements, and the like: the processes whereby the "basic law" of the Constitution becomes both "higher law" and "our law," not just an authoritarian imposition by people who are long dead and gone.[69] In *Memory and Authority*, he extends that analysis, arguing that for a constitutional originalism to yield legitimate decisions, it must deploy a thin conception of original meaning (like that of his own living originalism) rather than a thick conception of original meaning that entails that the framers long ago decided most of our questions for us.[70] Balkin's account is both descriptive (explaining how processes of constitutional interpretation and change have operated in practice) and normative (arguing we should engage in his proposed practice of constitutional law in order to contribute to decisions we can recognize as legitimate). Balkin argues his thin originalism will enable Americans to acknowledge judicial decisions as our own, rather than illegitimate products of the dead hand of the past.

Fourth, Balkin offers an extraordinarily illuminating account of what Richard Fallon has termed the conservative justices' "selective originalism."[71] Many critics of the Supreme Court have blasted the conservative justices for being selective in their use of history, for ignoring or denying that the history is contested or inconclusive rather than determinative, and the like.[72] Or they have

statute allowing parents to sue over the wrongful death of a minor child applies to 'unborn children,' with no exception for 'extrauterine children.'").

[68] William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986) (arguing Constitution is general blueprint, not specific code, and that its contemporary legitimacy depends upon interpreting its general commitments as reflecting best understandings of those commitments as they have been developed over time and accepted by the people).

[69] BALKIN, LIVING ORIGINALISM, *supra* note 45, at 41-49, 59-73.

[70] BALKIN, *supra* note 3, at 131-34; *see also id.* at 120-48.

[71] Fallon has provided a full documentation and trenchant criticism of the "selective originalism" of the current Supreme Court. *See generally* Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221 (2023).

[72] *See id.* at 265 ("Through self-descriptions and reliance on originalist premises in some of their opinions, the originalist Justices signal commitments that they then subordinate or ignore in a substantial fraction of the Court's cases.").

charged the Court with being selective or hypocritical in its application of originalism, applying it where the history supports conservative outcomes and abandoning it in favor of conservative precedents where the history supports liberal outcomes.[73] Balkin's analysis enables us to see why the conservative justices are completely unfazed by any of these criticisms. If we understand their actual practice as invoking history through the full array of modalities of constitutional argument in service of what they see as the best interpretation of the Constitution—rather than being true to an academic theory of originalism—it is no surprise that conservative justices are "cafeteria originalists" (just like everyone else is).[74]

Thus, Balkin makes clear that conservative justices make normative arguments about the best understanding of the Constitution that they present as originalist arguments. They deploy the full array of modalities of argument, using history as a resource in constructing the arguments they believe puts our Constitution and constitutional practice in their best light. Or, they show that the arguments they find most compelling on normative grounds have a footing in our history. We should observe that the conservative justices' "history" might involve quite abstract normative commitments, like a "color-blind Constitution,"[75] or abstract normative narratives, such as our ancestors coming to this country to escape from religious persecution and the like. And it might invoke honored authorities rather than make claims about specific original meaning as of 1791 or 1868, such as when Justice Thomas quoted abolitionist Frederick Douglass in his interpretation of the Equal Protection Clause as prohibiting affirmative action.[76] If the specific original public meaning favors the other side, e.g., as with affirmative action, they shunt it off to the side and justify their decisions on more abstract grounds, like their aspirational ideal of a color-blind Constitution.[77] Furthermore, if the precedents favor their side, but the specific original public meaning supports the other side, they rely upon those precedents.[78]

---

[73] *Id.*

[74] BALKIN, *supra* note 3, at 70-73, 156-63 (explaining "cafeteria originalists" pick and choose when to make originalist appeals).

[75] *Id.* at 48-49 (citing Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007)) (explaining how both plurality opinion and Justice Thomas's concurrence in *Parents Involved* framed NAACP's campaign to overturn *Plessy* as aimed toward achieving color-blind Constitution).

[76] *Id.* at 214-15.

[77] *See, e.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 322 (2023) (Sotomayor, J., dissenting). The dissenters pointed out that in the immediate aftermath of the adoption of the Fourteenth Amendment, Congress provided for race-conscious relief to newly freed, formerly enslaved persons. *Id.*

[78] BALKIN, *supra* note 3, at 49 (citing *Parents Involved in Cmty. Schs.*, 551 U.S. 701) (explaining how both sides in *Parents Involved* "identified with Thurgood Marshall, the NAACP, and the civil rights movement, and both disidentified with the defendant school boards").

Then, because of the imperatives of their articulated jurisprudential commitments to some form of conventional originalism, conservative originalists package their interpretations and constructions as indisputable commands of the Constitution or, in Balkin's vivid formulation, engage in "historical ventriloquism,"[79] putting their own normative arguments about the best interpretation of the Constitution in the mouths of our ancestors. Through it all, conservative originalists have to engage in "perpetual retrofitting of originalist theory to reach particular results" that accord with "contemporary social and political values."[80]

Fifth, as stated above, Balkin's book can serve as a manifesto and prescription for liberals and progressives, showing them how most effectively to deploy the modalities of constitutional argument in building and maintaining the most attractive conceptions of a liberal/progressive "Constitution in exile" over the next generation. It has become commonplace in recent years for liberals and progressives, facing the new reality of a six-three conservative majority, to argue that—instead of developing or defending normative accounts or moral readings of the Constitution—we need to develop liberal/progressive originalist arguments.[81] The thought seems to be: moral readings may have worked occasionally while Justice Kennedy was on the Court—with the Court deciding cases like *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[82] *Lawrence v. Texas*,[83] and *Obergefell v. Hodges*[84]—but *Dobbs* shows that those days are gone.[85] Post-Kennedy and post-*Dobbs*, the only way liberals and progressives can have any hope of persuading the conservatives on the Court is to make originalist arguments. We already see Justice Ketanji Brown Jackson trying this approach, at least in the context of the debate between anti-caste and color-blind conceptions of the Equal Protection Clause.[86]

We'll see how this strategy works out. I am dubious. None of the conservative justices seems persuaded by any of the liberal originalist arguments. The only votes that may occasionally be in play, at least in culture war conflicts, are those of Chief Justice Roberts and Justice Kavanaugh. And they are the least

[79] *Id.* at 12-13, 118, 126.

[80] *Id.* at 114-15.

[81] *See, e.g.*, Akhil Reed Amar, *Why Liberal Justices Need to Start Thinking Like Conservatives*, TIME (June 30, 2022, 8:00 AM), https://time.com/6192277/supreme-court-originalism/ [https://perma.cc/4ADB-6L9B].

[82] 505 U.S. 833, 846 (1992) (reaffirming *Roe*'s protection of pregnant persons' right to terminate pregnancy).

[83] 539 U.S. 558, 578-79 (2003) (extending right of intimate association to gay and lesbian persons).

[84] 576 U.S. 644, 681 (2015) (extending right to marry to same-sex couples).

[85] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 302 (2022).

[86] *See* Adam Liptak, *In Her First Term, Justice Ketanji Brown Jackson 'Came to Play*,*'* N.Y. TIMES (July 7, 2023), https://www.nytimes.com/2023/07/07/us/supreme-court-ketanji-brown-jackson.html?searchResultPosition=4.

originalist among the conservative justices.[87] I think institutionalist, minimalist, or legitimacy arguments are more likely to win their votes than liberal/progressive originalist arguments.[88]

Nonetheless, reading Balkin's book has persuaded me of the likely truth of a more sophisticated version of this commonplace argument that liberals and progressives need to make originalist arguments. To become more effective in making constitutional arguments over the next generation—while their Constitution is in exile—liberals and progressives need to use history more effectively through the forms of argument Balkin has elaborated. They need to become more effective in engaging in the discourse of memory, authority, and justification as he elaborates them, in particular, through his last three forms of argument (those from national ethos, political tradition, and honored authority). That is not the same thing as saying that liberals and progressives should all become originalists in any conventional sense. Balkin urges them to make originalist arguments in service of an abstract "framework originalism" or "living originalism."[89]

In any case, given the strong likelihood that liberal/progressive conceptions of the Constitution are going to be "in exile" for at least the next thirty years, it is imperative to keep liberal/progressive moral readings or normative accounts of the Constitution alive. Doing so will provide a systematic basis for criticizing the radicalism and injustice of the current conservative Court's vision and interpretations of the Constitution. It also will build and maintain a foundation for constructive programs for a liberal/progressive Constitution in the future, when circumstances permit its instantiation in U.S. constitutional law.

IV. IMPLICATIONS FOR FUTURE WORK: HOW BALKIN'S ANALYSIS OF NARRATIVE, STORY, AND MEMORY CAN INFORM LINDA C. MCCLAIN'S AND MY PROJECT, "'WHAT SHALL BE ORTHODOX' IN POLARIZED TIMES"

In this final section, I briefly sketch some implications of Balkin's analysis of narrative, story, and memory for Linda C. McClain's and my book project, *"What Shall Be Orthodox" in Polarized Times*. One of the most celebrated

[87] *See, e.g.*, Oriana González & Danielle Alberti, *The Political Leanings of the Supreme Court Justices*, AXIOS, https://www.axios.com/2019/06/01/supreme-court-justices-ideology (last updated July 3, 2023) (placing Chief Justice Roberts and Justice Kavanaugh closest to middle of political spectrum); John O. McGinnis, *Which Justices Are Originalists?*, LAW & LIBERTY (Nov. 9, 2018), https://lawliberty.org/which-justices-are-originalists/ [https://perma.cc/DZ4P-9DQS] (noting Chief Justice Roberts and Justice Kavanaugh are not as staunchly originalist as Justice Thomas).

[88] *See* Adam Liptak, *Along with Conservative Triumphs, Signs of New Caution at Supreme Court*, N.Y. TIMES (July 1, 2023), https://www.nytimes.com/2023/07/01/us/supreme-court-liberal-conservative.html ("[T]he court remains deeply conservative but is more in tune with the fitfully incremental approach of Chief Justice John G. Roberts Jr., who is attentive to his court's legitimacy, than with the take-no-prisoners approach of Justice Clarence Thomas.").

[89] *See generally* BALKIN, *supra* note 3, at 97-101.

passages in U.S. constitutional law is: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[90] Justice Robert Jackson wrote these words in his majority opinion in *West Virginia v. Barnette*, which protected the First Amendment right of Jehovah's Witness children not to participate in a compulsory flag salute in public schools.[91] In recent years, protests against imposed orthodoxy—often invoking *Barnette*—occur in a growing number of contexts.[92] Many (like *Barnette*) concern schools: conflicts over how best to teach about U.S. history, civics, and patriotism and state restrictions and mandates on teaching about race and gender. Is a teacher who is asked to support a school's anti-racism statement being forced to "confess" an orthodoxy? What about a teacher who—based on a religious belief that "sex" is fixed at birth—objects to using a student's preferred pronouns?

Antidiscrimination law is another area in which claims of compelled orthodoxy proliferate. Invoking *Barnette*, business owners have objected—on religious liberty and freedom of speech grounds—to providing wedding-related goods and services to same-sex couples.[93] They argue that, to avoid the government compelling an orthodoxy about marriage, they must be exempt from laws prohibiting discrimination on the basis of sexual orientation. During the 2022-23 term, the Supreme Court accepted a website designer's arguments along these lines in *303 Creative LLC v. Elenis*.[94] Justice Gorsuch's conservative majority opinion centrally features *Barnette*.[95]

Our book will analyze battles over "what shall be orthodox" in contemporary legal and political controversies in the United States In evaluating the uses of *Barnette*, we situate Jackson's opinion in the context of two of his famous dissenting opinions. One is from the notorious *Korematsu v. United States*,[96] in which the Court upheld the incarceration of Japanese Americans in

[90] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[91] *See id.*

[92] *See, e.g.*, Nicholas Debenedetto, *This 80-Year-Old Supreme Court Case Offers Hope for Teachers Who Think DEI Has Gone Too Far*, REASON (July 6, 2023, 1:45 PM), https://reason.com/2023/07/06/this-80-year-old-supreme-court-case-offers-hope-for-teachers-who-think-dei-has-gone-too-far/ [https://perma.cc/A3JD-DLVC]; Zach Smith, *Birmingham Officials Punish Pastor for Speech. That Can't Stand*, HERITAGE FOUNDATION (July 15, 2020), https://www.heritage.org/civil-society/commentary/birmingham-officials-punish-pastor-speech-cant-stand [https://perma.cc/6BUG-42M5].

[93] *See* Masterpiece Cakeshop v. Colo. C.R. Comm'n, 584 U.S. 617, 629 (2018).

[94] *See* 600 U.S. 570, 584-85, 588-89 (2023) (analogizing Colorado's prohibiting discrimination by businesses on basis of sexual orientation to West Virginia's mandating recitation by schoolchildren of Pledge of Allegiance at issue in *Barnette*).

[95] For fuller analysis, see Linda C. McClain, *Do Public Accommodations Laws Compel "What Shall Be Orthodox"?: The Role of* Barnette *in* 303 Creative LLC v. Elenis, 68 ST. LOUIS U. L.J. 755 (2024).

[96] 323 U.S. 214 (1944).

euphemistically termed "relocation centers" during World War II.[97] Jackson lamented that the Court had validated a principle of racial discrimination that "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[98] We draw also on Justice Jackson's dissent in *Terminiello v. Chicago*.[99] There, the Court applied an absolutist conception of the First Amendment to protect an inflammatory anti-Semitic and anti-communist speech that incited a turbulent crowd to riot.[100] Stressing the relationship between order and liberty, Jackson cautioned, "[I]f the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."[101]

We hope to emulate Jackson's practical wisdom in grappling with disputes over civic education and patriotism, antidiscrimination law and freedom of speech and religion, and reproductive freedom and gender identity. Our goal is to offer analyses that avoid using *Barnette*'s principles, like a "loaded weapon," to eviscerate civic education programs and antidiscrimination laws aimed at securing the status of equal citizenship for all—programs and laws crucial to the health and very survival of our constitutional democracy.

In wrestling with these controversies, we confront recurring dilemmas with the following dialectical structure. Liberals and progressives propose or adopt a measure to mitigate what they perceive as the oppression and discrimination of long-standing conservative orthodoxies. Conservatives retort that liberals and progressives themselves are imposing a new orthodoxy. Likewise, when conservatives propose or enact remedies for what they see as unjust incursions on their freedom wrought by liberals and progressives, the latter view the remedies themselves as unjust. This pattern has played out in earlier constitutional and civil rights conflicts.[102] While it is unlikely that any analysis could fully mediate these polarized oppositions, we aim to understand and alleviate them.

I shall briefly note how this dynamic has been playing out with respect to conflicts between LGBTQIA+ rights and the freedom of speech and religion claims of persons opposed to same-sex marriage on religious grounds. Initially, in the wake of constitutional change concerning LGBTQIA+ rights beginning in

[97] *Id.* at 223-24.

[98] *Id.* at 246 (Jackson, J., dissenting).

[99] 337 U.S. 1, 13-37 (1949).

[100] *See id.* at 6.

[101] *Id.* at 37 (Jackson, J., dissenting).

[102] *See infra* notes 103-07 and accompanying text.

Romer v. Evans[103] and culminating in *Obergefell v. Hodges*,[104] many states revised their antidiscrimination laws to prohibit discrimination on the basis of sexual orientation or gender identity.[105] Such changes sought to mitigate or overcome the oppression and discrimination resulting from long-standing conservative orthodoxies about sexuality and gender.[106] Conservatives have retorted that such liberal/progressive antidiscrimination laws themselves are imposing a new orthodoxy on those who object to, for example, same-sex marriage, on religious grounds.[107]

In addressing these conflicts in our book project, McClain and I plan to draw on Balkin's framing of ideas about memory and authority along with Peggy Davis's idea of "motivating stories" (from her book, *Neglected Stories*,[108] in the context of the meaning of Due Process Liberty under the Fourteenth Amendment at the time of Reconstruction). It is illuminating to approach battles over the meaning and implications of *Barnette*'s "fixed star" passage through the lens of the "motivating stories" people tell about the case.

In *Barnette* itself, Justice Jackson mentions or alludes to several types of cautionary tales and warnings concerning the compulsion of orthodoxy.[109] The general context of World War II itself—and the Supreme Court's recognition of the threats posed by the rise of "nationalism" and "our present totalitarian enemies"[110]—is important. We should also bear in mind that the Court's decision three years earlier in *Minersville School District v. Gobitis*,[111] upholding a compulsory flag salute against Jehovah's Witness school children's

[103] 517 U.S. 620, 635-36 (1996) (holding Amendment 2 to Colorado's State Constitution, which prohibited extension of official protections to persons discriminated against on basis of sexual orientation, violated Equal Protection Clause of U.S. Constitution).

[104] 576 U.S. 644, 680-81 (2015) (holding Fourteenth Amendment requires states to license marriages between two people of same sex, and to recognize marriages between two people of same sex that were legally licensed and performed in another state).

[105] *See, e.g.*, Nancy Levit, *After* Obergefell*: The Next Generation of LGBT Rights Litigation*, 84 UMKC L. REV. 605, 605-07 (2016) (discussing history of litigation and legislation around discrimination based on sexual orientation, including state antidiscrimination laws).

[106] *See id.*

[107] *See, e.g.*, Louise Melling, *The New Faith-Based Discrimination*, BOS. REV. (Dec. 14, 2022), https://www.bostonreview.net/articles/the-new-faith-based-discrimination/ [https://perma.cc/44XH-ZYLN] ("In arguments before the Court last week, 303 Creative cast itself as the victim, and antidiscrimination laws were painted as cruel, authoritarian mandates of 'orthodoxy.'").

[108] *See* PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 169, 180 (1997).

[109] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943) (noting throughout history there have been "[s]truggles to coerce uniformity of sentiment in support of some end thought essential to their time and country").

[110] *Id.* at 640-41.

[111] 310 U.S. 586 (1940).

rights, had licensed or, at any rate, contributed to an uptick in violence against Jehovah's Witnesses[112] (Jackson was well aware of these facts since he served as FDR's Attorney General until FDR nominated him to the Court in 1941).[113] In *Barnette*, Jackson specifically alluded to the horrors of Nazi Germany, for example, in his stark warnings about where compulsion of opinion leads: "Compulsory unification of opinion achieves only the unanimity of the graveyard."[114] He also drew sharp contrasts between our nation and our "totalitarian enemies," for example, in the following passage about nationalism, patriotism, and freedom: "To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds."[115]

In the historical context of *Barnette*, Justice Jackson's warnings about the dangers of government compelling an orthodoxy seem measured, apt, and instructive. In today's "culture war" battles, conservatives challenging measures protecting LGBTQIA+ rights have employed similar rhetoric and narratives in arguing that the protection of such rights imposes an orthodoxy on dissenting religious persons. Their analogies to *Barnette* and warnings about totalitarian thought control and compulsion of orthodoxy in this context seem overwrought and overextended. For example, in *303 Creative*, Justice Gorsuch's majority opinion, in accepting the website designer's argument that the Colorado antidiscrimination law forbidding discrimination on the basis of sexual orientation compelled her artistic expression, quotes George Orwell: "[I]f liberty means anything at all, it means the right to tell people what they do not want to hear."[116] In a similar prior case involving a photographer, a prominent conservative amicus brief quoted Aleksandr Solzhenitsyn's admonition to "his fellow Russians" to "live not by lies," that is, "to refuse to endorse speech that they believe to be false."[117] These analogies between antidiscrimination laws protecting LGBTQIA+ persons and totalitarian thought control seem strained in the extreme, but liberals and progressives have to face the reality that we have a Supreme Court with a six-three conservative majority that finds them compelling. Conservative justices making these arguments are not making arguments that are originalist in any conventional sense, but instead are constructing cautionary tales from abstract commitments. They contend that

[112] *Id.* at 599-600.

[113] *See* Robert L. Tsai, *Reconsidering* Gobitis*: An Exercise in Presidential Leadership*, 86 WASH. U. L. REV. 363, 397 (2008) (noting Justice Jackson's "disgust for *Gobitis* was well documented before his appointment" to the Court).

[114] 319 U.S. at 641.

[115] *Id.*

[116] 303 Creative LLC v. Elenis, 600 U.S. 570, 602 (2023) (quoting dissent from Tenth Circuit decision below).

[117] Brief for The Cato Institute et al. as Amici Curiae Supporting Petitioners at 7, Elane Photography, LLC v. Willock, 2013-NMSC-040, 309 P.3d 53 (No. 33,687), https://www.cato.org/sites/cato.org/files/pubs/pdf/Elane-Photog-filed-brief.pdf.

those abstract commitments are embodied in First Amendment precedents, though in other contexts, such as substantive due process protections of liberties, they insist that we must construe precedents quite narrowly and confine them specifically to their facts.[118]

Liberals and progressives also can make warnings about an authoritarian state imposing an orthodoxy when challenging conservative measures seeking to hinder efforts to promote equality and remedy forms of structural injustice. They likewise can invoke Orwell for those purposes. For example, in *Pernell v. Florida Board of Governors of the State University System*,[119] a federal district court issued an injunction against Florida's Individual Freedom Act (the so-called "Stop W.O.K.E. Act")—modeled on President Trump's executive order banning "divisive concepts" about racism, sexism, and the like in governmental trainings—in response to a First Amendment challenge brought by students and professors.[120] Judge Mark E. Walker began his opinion by quoting from Orwell's *1984*.[121] In describing the "positively dystopian" world the Florida law created for professors—in which they "enjoy 'academic freedom' so long as they express only those viewpoints of which the State approves"—he quoted the very passage that Justice Gorsuch would invoke subsequently in *303 Creative*: "It should go without saying that '[i]f liberty means anything at all it means the right to tell people what they do not want to hear.'"[122] The judge criticized the state defendants' praise for the "marketplace of ideas" in a parallel case, pointing out the state's "doublespeak" when faculty had only "freedom" to express state-approved viewpoints.[123] He observed that the students and professors challenging the Florida law were appealing to the Supreme Court's "long history of shielding academic freedom from government encroachment and the First Amendment's intolerance toward government attempts to 'cast a pall of orthodoxy over the classroom.'"[124]

---

[118] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 703 (1997) (establishing approach *Dobbs* claimed to follow); Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) (requiring implicitly protected constitutional rights to be "deeply rooted in this Nation's history and tradition" and conceiving those traditions as concrete historical practices in past rather than as abstract aspirational principles built out over time on basis of experience, new insights, and moral progress).

[119] 641 F. Supp. 3d 1218, 1230 (N.D. Fla. 2022).

[120] On March 16, 2023, the Eleventh Circuit denied the appellants' motion to stay the injunction pending appeal. Pernell v. Fla. Bd. of Gov. of the State Univ., No. 22-13992, 2023 WL 2543659, at *1 (11th Cir. Mar. 16, 2023) (denying appellants' motions to stay injunction pending appeal).

[121] *See Pernell*, 641 F. Supp. 3d at 1229-30.

[122] *Id.* at 1230.

[123] *Id.* at 1230 n.4 (criticizing defendants' hypocrisy by emphasizing their refusal to allow Critical Race Theory to enter classrooms despite claiming to welcome even "wrong" ideas in classrooms).

[124] *Id.* at 1233 (quoting Keyishian v. Bd. of Regents of Univ. of N.Y., 385 U.S. 589, 683 (1967)).

Sandra Newman, a novelist and the author of *Julia: A Retelling of George Orwell's "1984*," recently observed that "[r]ight-wingers quote Orwell out of context to smear their enemies as fascists, and in the next breath laud Russian President Vladimir Putin."[125] She continues: "They claim his support when they condemn the removal of statues of Confederate generals — though Orwell abhorred slavery and might well have approved of such removals, much as he would have been likely to approve the perestroika-era removal of statues of Stalin."[126] Newman concludes: "What's Orwellian is using his work to defend the people who are moving us toward the political horror he most feared."[127] In a nutshell, as Ronald Dworkin put it long ago, conservative originalism "has achieved the Orwellian triumph, the political huckster's dream, of painting its opponents with its own shames and vices."[128] They seek to maintain a traditional conservative orthodoxy in the name of preventing liberal/progressive compulsion of a new orthodoxy.

Relatedly, I want to point to fundamental differences between the narratives constructed by the majority and dissenting opinions in *303 Creative* concerning the courage of the Court. Justice Gorsuch's conservative majority opinion praises the Court (including his own opinion) for having the courage to interpret the First Amendment to protect against overweening governmental incursions on freedom of speech.[129] Justice Sotomayor's dissenting opinion, by contrast, praises the courage of previous Supreme Court decisions upholding civil rights laws (prohibiting discrimination) against relentless challenges stemming from claims of "constitutional rights to discriminate."[130] Moreover, the dissent chastises the Court for not having the courage of prior Courts and, "for the first time in its history, grant[ing] a business open to the public a constitutional right to refuse to serve members of a protected class."[131]

To recapitulate: conservatives have been more effective than liberals and progressives in framing narratives, stories, and memories that cast or recast our past and the lessons it teaches for the present. Moreover, they have been quite adept at incorporating into their narratives earlier liberal/progressive changes which their intellectual ancestors fought tooth and nail to prevent (e.g., *Brown*

[125] Sandra Newman, Opinion, *Now Right-Wing, Anti-'Woke' Doublethink Has Come for George Orwell*, WASH. POST (Dec. 12, 2023, 6:30 AM), https://www.washingtonpost.com/opinions/2023/12/12/orwellian-criticism-right-wing/.

[126] *Id.*

[127] *Id.*

[128] RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 128 (1993).

[129] 303 Creative LLC v. Elenis, 600 U.S. 570, 601-02 (2023).

[130] *Id.* at 623 (Sotomayor, J., dissenting).

[131] *Id.* at 603.

v. Board of Education[132] and *Loving v. Virginia*[133]) and then recasting those changes so as to limit their further liberal/progressive transformative potential going forward or even to support conservative retrenchments. For example, conservative justices have rewritten *Brown* and *Loving* as reflecting not a liberal/progressive anti-caste principle but a principle of the color-blind Constitution.[134] Liberals and progressives need to become more effective at developing counternarratives and motivating stories to celebrate, as glorious achievements true to the aspirations of our Constitution, what conservatives have portrayed as betrayals of our principles to be repudiated and rolled back. Balkin's *Memory and Authority* is rich with wisdom and instructive examples of how to use history in carrying out such projects. The paths he charts should help guide liberals and progressives in building and maintaining a liberal/progressive "Constitution in exile" over the next generation.

[132] 347 U.S. 483, 494 (1954) (holding racial segregation in public schools violates Equal Protection Clause and "generates a feeling of inferiority as to [African American children's] status in the community that may affect their hearts and minds in a way unlikely ever to be undone").

[133] 388 U.S. 1, 7 (1967) (holding state law prohibiting interracial marriage violates Equal Protection Clause and is "obviously an endorsement of the doctrine of White Supremacy").

[134] *See, e.g.*, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 206 (2023) (stating Equal Protection Clause eliminates any and all discrimination against any race); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 705 (2007) (arguing *Brown* prevented any preferential, differential, or discriminatory actions toward any race).