

How New Is the New Textualism?

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In light of Chief Justice Roberts's tie-breaking vote to uphold the Patient Protection and Affordable Care Act (ACA) as a legitimate exercise of Congress's taxing power,¹ it is worth asking whether the arguments of liberal textualists played any role in shaping the historic decision. After all, an amicus brief filed by Jack Balkin and other constitutional law scholars² had argued that the mandate is clearly authorized by Congress's authority under Article I, section 8 of the Constitution "[t]o lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."³ Did Balkin's brief help persuade Chief Justice Roberts to uphold the Act?

Although the brief may have helped, it is hard to imagine that it played a decisive role. Balkin and other liberal textualist scholars had also argued that that the Framers of the Constitution intended Congress to be able to regulate interstate commerce to respond to situations that arose under the Articles of Confederation, in which the inability of states to coordinate their economic and defense policy led to collective action problems whose effects spilled across state borders.⁴ And yet that argument failed to persuade Chief Justice Roberts to uphold the ACA as a legitimate exercise of Congress's power under the Commerce Clause. It seems more likely that Chief Justice Roberts's decision to uphold the Act under the taxing but not the commerce power reflected his longstanding commitment—first expressed during his first term as Chief⁵—to persuade his colleagues to put the institutional interests of the Court above their own ideological

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1. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

2. See Brief of Constitutional Law Scholars as Amici Curiae in Support of Petitioners (Minimum Coverage Provision), *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. 2566 (No 11-398); see also Jack M. Balkin, *The Health-Care Mandate Is Clearly a Tax—and Therefore Constitutional*, ATLANTIC, May 4, 2012, <http://www.theatlantic.com/politics/archive/2012/05/the-health-care-mandate-is-clearly-a-tax-0151-and-therefore-constitutional/256706> (outlining the "tax argument").

3. U.S. CONST. art I, § 8.

4. See Jeffrey Rosen, *One Simple Argument Could Have Saved Obamacare. Too Bad Verrilli Didn't Make It*, NEW REPUBLIC, March 20, 2012, <http://www.tnr.com/article/politics/102203/supreme-court-obamacare-verrilli>.

5. See Jeffrey Rosen, *Roberts's Rules*, ATLANTIC, Jan.-Feb. 2007, <http://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559>.

agendas.⁶

Although Balkin's argument may not have been decisive, it did help to increase the range of options the Chief Justice had at his disposal as he deliberated about ways of advancing the Court's long-term institutional interests. And Balkin's brief, like his book, *Living Originalism*,⁷ represents a growing constitutional movement among liberal activists and legal scholars that James Ryan has called the "new textualism."⁸ The movement seeks to beat conservatives at their own game by insisting that arguments about the text, history, and structure of the Constitution often lead to liberal rather than conservative results. The new textualist movement has had some notable successes in helping to persuade conservative Justices and judges to endorse liberal arguments—in cases ranging from environmental protection⁹ to lower court victories for the health care mandate.¹⁰ But it is being strenuously resisted by an older generation of liberal legal scholars,¹¹ who fear that addressing conservative Justices in terms they can understand will make it harder to defend landmark Warren and Burger Court liberal precedents such as *Roe v. Wade*.¹²

As a strategic matter, the ACA decision shows that liberals would do well to embrace new textualist analysis as a way of expanding the range of arguments they can use to persuade conservative Justices to embrace liberal results. But despite its strengths in providing a common language for liberals and conservatives to debate constitutional issues in common terms, the new textualism, as practiced by Balkin and others, also has limitations stemming from its ambivalent relation to the constitutional text and from its tendency to define the text and history at such a high level of abstraction that the new textualism is often hard to distinguish from old-fashioned Warren Court living constitutionalism. For example, although Balkin insists that the Privileges or Immunities Clause might be a better textual home for privacy rights than the Due Process Clause, his method of identifying unenumerated privileges or immunities seems very similar to the substantive due process methodology deployed by Justice Blackmun in *Roe v. Wade*.

Ultimately, however, the success or failure of the new textualism will

6. See Jeffrey Rosen, *Big Chief*, NEW REPUBLIC, July 13, 2012, <http://www.tnr.com/article/politics/magazine/104898/john-roberts-supreme-court-aca>.

7. JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

8. James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523 (2011).

9. See *Massachusetts v. EPA*, 549 U.S. 497 (2007).

10. See *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529 (6th Cir. 2011) (Sutton, J., concurring).

11. See Jeffrey Rosen, *Constitution Avenue*, NEW REPUBLIC, June 8, 2012, <http://www.tnr.com/article/politics/103943/magazine/constitution-avenue-supreme-court?page=0,3>.

12. 410 U.S. 113 (1973).

depend on the ability of liberals to stop squabbling about constitutional methodology and to agree on the substantive values that they believe the Constitution protects. History shows that the most effective Supreme Court Justices, such as Justice Brandeis, were successful because of their ability to combine a vigorous substantive defense of the justice of the laws they upheld with willingness to be constrained by the constitutional text. Justice Brandeis was willing to strike down laws when they clashed with the textual prohibitions of the First and Fourth Amendments, translated in light of new technologies.¹³ He insisted on deference to democratic decisions when there was no clear textual argument for invalidation.¹⁴ But unlike Justice Holmes, who had contempt for the progressive economic regulations he upheld,¹⁵ Justice Brandeis defended those regulations as a rational and necessary response to the values he insisted the Constitution protects—namely, suspicion of the “curse of bigness,” whether threatened by government or private corporations.¹⁶ To be similarly effective today, liberal Justices cannot simply embrace the constitutional textualism that Balkin champions; they also need to embrace a substantive liberal vision—such as Justice Brandeis’s crusading economic populism—that mobilized citizens and legislators have enacted into law.

I. THE NEW TEXTUALISM: SUCCESSES AND FAILURES

How effective has the new textualism been in persuading conservative Justices to favor liberal results? Its success as a litigation strategy can be measured by the victories of the leading new textualist advocacy group, the Constitutional Accountability Center (CAC), and its predecessor, the Community Rights Counsel (CRC), both founded by Douglas T. Kendall.¹⁷ Starting in 1997, CRC and CAC filed briefs emphasizing that constitutional text and history should lead the court to uphold environmental laws, health and safety laws, campaign finance laws, and other regulations. CRC and CAC have had some striking successes before the Supreme Court, including the *Tahoe-Sierra Preservation Council* case in 2002,¹⁸ *Massachusetts v. EPA* in 2007,¹⁹ and *Padilla v. Kentucky*²⁰ in

13. See, e.g., *Olmstead v. United States*, 277 U.S. 438, 471 (Brandeis, J., dissenting).

14. See, e.g., *Louis K. Liggett Co. v. Lee*, 288 U.S. 517 (1933) (Brandeis, J., dissenting); *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

15. See, e.g., JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* 89 (2007) (quoting Justice Holmes as saying that he “loathe[d] the thick-fingered clowns we call the people”).

16. The phrase comes from a book written by Justice Brandeis before his time on the Court. LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 162 (1914).

17. See generally Rosen, *supra* note 15.

18. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002).

19. 549 U.S. 497 (2007).

20. 130 S. Ct. 1473 (2010).

2010. In the 2008 *Boumediene* case, CAC's historical research on the extraterritorial application of the writ of habeas corpus in England was reflected in the opinion written by Justice Kennedy extending a form of habeas corpus to non-citizens at Guantanamo.²¹

Finally, CAC's views were reflected in the most important ruling by a lower court in the health care case, Judge Silberman's opinion upholding the health care mandate for the D.C. Circuit.²² The Center filed a brief explaining why the text and history of the Commerce Clause supports the government's position²³; Judge Silberman's opinion echoed CAC's view, with a startlingly definitive conclusion that the Commerce Clause of the Constitution provides "no textual support" for the challenge to the health care mandate because "to 'regulate' can mean to require action, and nothing in the definition appears to limit that power only to those already active in relation to an interstate market."²⁴

As in the case of Chief Justice Roberts's decision to uphold the ACA, of course, it is impossible to prove that the relationship of the CAC's arguments to these liberal victories is one of causation rather than correlation. And not all of CAC's arguments have been successful: in a series of 5-4 decisions, the Roberts Court has ignored constitutional text and history when they don't suit the purposes of the conservative Justices.²⁵ But in those cases, new textualist arguments have been useful in criticizing the conservatives for betraying their own principles. After the *Citizens United* decision,²⁶ I testified with Kendall in a 2010 hearing held by Senator Patrick Leahy on the future of corporate spending in American elections.²⁷ Drawing on a brief CAC had filed in the case²⁸ that was echoed, if not cited, in Justice Stevens's partial dissent,²⁹ Kendall convincingly traced the history of how corporations have been treated differently than people from the Founding through Reconstruction and the Progressive Era.³⁰ The argument became enough of a meme that President

21. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

22. *See Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011).

23. Brief of Amicus Curiae Constitutional Accountability Center in Support of Appellees and Affirmance at 13-19, 26-28, *Seven-Sky*, 661 F.3d 1 (No. 11-5047).

24. *Seven-Sky*, 661 F.3d at 16.

25. *See, e.g., Parents Involved in Community Schools v. Seattle Sch. District No. 1*, 551 U.S. 701 (2007) (ignoring original understanding of the Fourteenth Amendment).

26. *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

27. *See "We the People"? Corporate Spending in American Elections After Citizens United: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 5-7 (2010) [hereinafter "*We the People*?"] (statement of Jeffrey Rosen, Professor of Law, George Washington University); *id.* at 10-11 (statement of Douglas T. Kendall, President, Constitutional Accountability Center).

28. Brief of the League of Women Voters of the United States and Constitutional Accountability Center as Amici Curiae in Support of Appellee at 13-19, *Citizens United*, 130 S. Ct. 876 (No. 08-205).

29. *See Citizens United*, 130 S. Ct. at 948-54 (Stevens, J., concurring in part and dissenting in part).

30. "*We the People*?", *supra* note 27, at 10-11 (statement of Douglas T. Kendall, President, Constitutional Accountability Center).

Obama echoed it when he launched his 2012 campaign by declaring, “[C]orporations aren’t people. People are people.”³¹

II. THE NEW TEXTUALISM IN THEORY

The reason that Kendall and CAC had no shortage of arguments about how the text and history of the Constitution point toward progressive results is that, during the past two decades, there has been an explosion of new textualist arguments in the legal academy on which the advocates were able to draw. The first intellectual guru of the new textualism was Akhil Reed Amar. In a series of articles,³² and in his book, *America’s Constitution: A Biography*,³³ Amar has argued that by engaging conservatives on their own turf, liberals can show that many constitutional provisions are more in tune with progressive values than conservative ones. Rather than focusing narrowly on the original understanding of the constitutional Framers, as conservatives like Robert Bork at times do,³⁴ Amar has emphasized the importance of examining the original public meaning of the entire constitutional text, including the Progressive Era amendments.³⁵ He stresses that these amendments, which the Tea Party ignores or wants to overturn, have expanded political participation for women and minorities, expanded Congress’s power to enforce laws guaranteeing equality, and allowed for a progressive income tax.³⁶ Amar has inspired a generation of younger scholars to do focused work on how individual clauses of the Constitution can lead to progressive results.³⁷

In the past decade, Amar has been joined as a new textualist leader by Balkin, whose new book, *Living Originalism*, offers a sustained synthesis of new textualist scholarship. It also includes creative arguments about how the original meaning of the constitutional text supports broad congressional power, the health care mandate, and the post-New Deal regulatory state, as well as much of the Warren and Burger Courts’ civil rights and civil liberties jurisprudence. Like Amar, but unlike Justice Scalia, Balkin insists that the original meaning of the text should prevail over the original expectation of its framers, and that the application of the general principles embedded in the text can change over time.³⁸

31. See Amy Gardner & Felicia Sonmez, *Obama Dings Romney’s “Corporations Are People” Line in Official Campaign Kickoff*, WASH. POST, May 5, 2012, http://www.washingtonpost.com/politics/obama-to-showcase-technology-at-kickoff-rallies-saturday/2012/05/05/gIQAZNA32T_story.html (quoting President Obama).

32. See, e.g., Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991).

33. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* (2005).

34. For a description of Bork’s philosophy, see BALKIN, *supra* note 7, at 368 n.13.

35. See AMAR, *supra* note 33, at 403-30 (discussing the Progressive Era reforms).

36. See *id.*

37. See, e.g., Jeff Rosen, Note, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073 (1991).

38. See BALKIN, *supra* note 7, at 6-7 (contrasting his method with Justice Scalia’s).

Despite its success in convincing judges and inspiring younger scholars, the new textualists have met fierce resistance in progressive academic circles. Some of the resistance is generational. Liberal scholars who came of age during the heyday of the Warren and Burger Courts and spent much of their careers fighting the originalism of Robert Bork view the embrace of constitutional text and history as a kind of capitulation to the enemy. For example, William Marshall, University of North Carolina professor, and Geoffrey Stone, University of Chicago professor and Chair of the American Constitution Society's Board of Directors, rejected the new textualism in a published debate with Kendall and Ryan. "[I]n the debate over constitutional meaning, liberals should not pretend that honest answers to vexing constitutional questions can be gleaned simply by staring hard at an ambiguous text," they wrote.³⁹ At a 2011 meeting of the American Constitution Society, Stone pressed his criticisms in a debate with Amar. "There are [textualist] theories underlying progressive activism, but they're not easy to explain," he declared. "What Akhil [Amar] says may be true but try explaining it to the American people in a way that's compelling." (Amar's populist response: "I think I just did. . . . I stand on the Constitution and not on fancy theories of adjudication."⁴⁰) Along the same lines, at the Yale conference on *Living Originalism*, there was resistance to Balkin's arguments by colleagues who defended living constitutionalism and expressed skepticism about the virtues of being tethered to the constitutional text.⁴¹

There's an elephant in the room of the debate over the new textualism that explains much of the liberal legal establishment's skepticism: *Roe v. Wade*.⁴² The right to privacy doesn't appear in the text of the Constitution, and many liberal legal scholars and activists fear that *Roe* is hard to justify in textualist terms. It's true that Balkin's textualist defense of *Roe* is the least convincing part of his book. Though he argues that the right to choose abortion should be considered one of the privileges or immunities of citizenship protected by the Fourteenth Amendment, he concedes that "[i]f we look only to state legislative action, the right to abortion had not yet gained the status of a privilege or immunity of national citizenship

39. Geoffrey Stone & William Marshall, *Geoffrey R. Stone and William P. Marshall Respond*, DEMOCRACY: J. IDEAS, Summer 2011, <http://www.democracyjournal.org/21/stone-marshall-respond.php?page=all>.

40. See *Text, History, and Principle: What Our Constitution Means and How To Interpret It* (June 18, 2011), <http://www.acslaw.org/news/video/text-history-principle-what-our-constitution-means-and-how-to-interpret-it>.

41. See, e.g., Justin Driver, Assistant Professor of Law, University of Texas at Austin, Does Originalism Have What Liberals Want? Panel Presentation at the Constitutional Interpretation and Change Conference at Yale Law School (Apr. 27, 2012); Neil S. Siegel, Professor of Law, Duke Law School, Jack Balkin's Rich Historicism and Diet Originalism: Health Benefits and Risks for the Constitutional System: Panel Presentation at the Constitutional Interpretation and Change Conference at Yale Law School (Apr. 27, 2012).

42. 410 U.S. 113 (1973).

when the Court decided *Roe* in 1973,⁴³ since only four states out of fifty had adopted the broad constitutional rule the Court imposed. Balkin is on stronger textualist ground when he argues that the right to choose abortion might be grounded in the Fourteenth Amendment's guarantee of equal citizenship for women, since restrictions on abortion force women to "take on the life-altering responsibilities and social obligations of motherhood," denying them full sex equality.⁴⁴ (Justice Ginsburg has persuaded her liberal colleagues on the Supreme Court to rethink *Roe* in similar terms.⁴⁵) But at this point, any connection to the original meaning of the text is so attenuated that it is hard to distinguish Balkin's living originalism from *Roe*-style living constitutionalism. For this reason, Professor Michael W. McConnell of Stanford Law School criticized Balkin at the *Living Originalism* conference for being the mirror image of the conservative judicial activists he deplored—namely, for manipulating constitutional text and history in an effort to give partisan judges an excuse for second-guessing democratic decisions.⁴⁶ And to the degree that Balkin and other new textualists refuse to recognize that textualist arguments have their limits, and that not every liberal policy goal can be justified in constitutional terms, they diminish the new textualism's appeal as a principled framework for structuring political and legal debate. This free-floating textualism also makes it harder to criticize conservatives for being similarly results-oriented when they manipulate the levels of abstraction of constitutional text and history in order to justify their own preferred policies.

III. THE NEW TEXTUALISM IN PRACTICE

At the *Living Originalism* Conference, Dean Robert Post of Yale Law School criticized Balkin for another reason. Post insisted that liberals should focus on defending progressive policies—such as healthcare—in substantive terms, rather than get distracted by debates about constitutional methodology.⁴⁷ And he is correct that, when it comes to success as a Supreme Court Justice, what you believe in is more important than the constitutional methodology that you embrace to get there. Think of the different ideological wings that define liberalism today. There are

43. BALKIN, *supra* note 7, at 216.

44. *Id.* at 214.

45. See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 169 (2007) (Ginsburg, J., dissenting); *Planned Parenthood of Se. Pa. v. Casey*, 833, 922 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

46. Michael W. McConnell, Richard and Frances Mallery Professor of Law, Stanford Law School, *Originalism and Precedent: Panel Presentation at the Constitutional Interpretation and Change Conference at Yale Law School* (Apr. 27, 2012).

47. Robert C. Post, Dean, Yale Law School, *Introductory Remarks at the Constitutional Interpretation and Change Conference at Yale Law School* (Apr. 27, 2012).

Great Society liberals, who want to protect civil rights and the social safety net; there are mobilized subgroups who seek equality for women, gays and lesbians, and ethnic minorities; there are neo-progressives, such as Obama and his regulatory czar, Cass Sunstein, who want to promote a rational view of government through the rule of experts; there are civil liberties advocates, who care about free speech and privacy and their erosion by the Patriot Act; and there are economic populists, such as Elizabeth Warren and the Occupy Movement, who respect the rule of experts but have lots in common with the Tea Party in their distrust of Wall Street.

During the Warren Court era, many of these different wings of liberalism were represented on the Supreme Court, and the Justices were eclectic in their constitutional methodologies. For example, Justices Douglas and Black were both libertarians and economic populists. As a matter of constitutional methodology, however, Justice Black was the patron saint of new textualism while Justice Douglas was the guru of living constitutionalism—both got to the same place, despite their methodological disagreements.

Nevertheless, since the Clinton era, Democratic presidents have been more focused on appointing Supreme Court candidates based on their gleaming meritocratic resumes, combined with their symbolic value as icons of identity politics. Justice Ginsburg was the last liberal Justice appointed because of her connection to a substantive wing of the Democratic Party—the feminist movement. By contrast, all of her current liberal colleagues—Justices Breyer, Sotomayor, and Kagan—were appointed with little or no attention paid to what vision of liberalism they actually embrace.

If President Obama cared more about the Court and the Constitution than he did during his first term, he would have to decide which wing of the Democratic Party he stands for and appoint Justices who would pursue those substantive goals. If he supported Occupy Wall Street, he would appoint economic populists like Warren. If, at heart, he is a neo-progressive, then he would appoint his regulatory czar, Sunstein. Both Warren and Sunstein might embrace textualist arguments, but their textualism would be deployed in the service of their substantive constitutional vision.

Here, Justice Brandeis is the model. When Justice Brandeis upheld laws, he didn't do so because of an abstract devotion to judicial restraint. Instead of suggesting that the American people and their representatives were entitled to their opinion in passing a particular law, he went on to argue that their opinion was supported by overwhelming evidence. Passionate defense of the people's judgment can also be found in Justice Brandeis's dissents in cases like *Louis K. Liggett Co v. Lee*, where he objected to the majority's decision to strike down an anti-chain store law in Florida that

was designed to protect small businesses.⁴⁸ In addition to making the theoretical case for judicial restraint, Justice Brandeis reverently defended the American people's "widespread belief"⁴⁹ that social and historical realities justified the Florida legislature's response to the "curse of bigness."

On the current Supreme Court, Justice Kagan struck a similarly Brandeisian note in her dissent from the Court's decision striking down Arizona's campaign finance laws in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*.⁵⁰ Justice Kagan, writing for the four liberal Justices, brushed away the formalistic smokescreens of the conservative Justices and defended the belief of the citizens of Arizona that their political system was corrupt and needed to be reformed. Justice Kagan called for:

Less corruption, more speech. Robust campaigns leading to the election of representatives not beholden to the few, but accountable to the many. The people of Arizona might have expected a decent respect for those objectives. Today, they do not get it. . . . Truly, democracy is not a game.⁵¹

The harder challenge is to defend the rightness of constitutional principles when you're striking down laws. Justice Brandeis did this in his greatest dissents and concurrences—such as those in *Olmstead*⁵² and *Whitney*⁵³—by embracing a kind of living originalism. He began with the constitutional text and attributed constitutional principles to the Framers at a broad level of generality, but not so broad that the principles couldn't be plausibly tied to the Founding era. Justice Brandeis then translated those principles into the twentieth century in ways the Framers couldn't have imagined.

A neo-Brandeisian approach today could draw on new textualist briefs about how constitutional history favors a result protecting free speech or privacy. But in the end, Justice Brandeis's dissents were great not because he channeled what the Framers thought about modern technologies but because he proposed concrete and creative ways of translating the First and Fourth Amendments that the Framers couldn't possibly have imagined. On the lower courts, Chief Judge Kozinski is doing this today in privacy cases.⁵⁴ But it requires not only an invocation of constitutional text

48. 288 U.S. 517, 541 (1933) (Brandeis, J., dissenting).

49. *Id.* at 580 (Brandeis, J., dissenting).

50. 131 S. Ct. 2806, 2829 (2011) (Kagan, J., dissenting).

51. *Id.* at 2846.

52. *Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

53. *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

54. *See, e.g.*, *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1178 (9th Cir. 2010) (Kozinski, C.J., concurring); *see also United States v. Pineda-Moreno*, 617 F.3d 1120, 1121 (9th Cir. 2010) (Kozinski, C.J., dissenting from the denial of rehearing en banc).

and history but a creative, Brandeisian leap that fashions new tests for protecting privacy in the face of technologies the Framers couldn't have foreseen.

All this suggests that the new textualism may provide a useful rhetorical framework for liberal Justices to pursue their substantive goals, but it's no substitute for the substantive goals themselves. Still, the fact that the new textualism is broad enough to embrace all the different strands of legal liberalism increases its strategic appeal: as a big tent, it allows liberals to focus on substance rather than squabbling about methodology. That is, after all, what conservatives have recognized. There are three different strains of legal conservatism currently represented on the Roberts Court: the pro-executive power conservatives, Chief Justice Roberts, Justice Alito, and Justice Scalia; the libertarian, Justice Kennedy; and the Tea Party conservative, Justice Thomas.⁵⁵ But despite their ideological differences, all three of these camps have been willing to converge under the banner of constitutional text and history, which has solidified their ability to act as a partisan block. The liberal Justices, who have less clearly defined ideological commitments, might be better able to coordinate their opposition and to criticize the conservatives on their own terms if they learned the same lesson.

By advocating the new textualism, of course, Balkin hopes to encourage progressives to change the political rather than simply the legal debate. "Framework originalism is not an algorithm for correct decision," he writes. "It is a platform for ordinary legal argument about the Constitution. . . . [F]ramework originalism . . . describes a framework for politics and a framework for legal arguments to construct the Constitution."⁵⁶

It's true that whatever success the Tea Party has had reflects its ability to mobilize citizens to march on the Washington Mall carrying copies of the Constitution. Indeed, every major political agenda item on the right over the past few decades has been rooted in a story about the Constitution's text and history—from the attack on gun control, rooted in the Second Amendment,⁵⁷ and the attack on environmental law, rooted in the Fifth Amendment,⁵⁸ to the attack on Obamacare, rooted in the Tenth Amendment.⁵⁹

During the Civil Rights movement, as Kendall argues, progressives

55. See Jeffrey Rosen, *Disorder in the Court*, NEW REPUBLIC, June 23, 2011, <http://www.tnr.com/article/politics/magazine/90549/legal-conservatism-supreme-court-epstein-scalia-originalism-judicial-restraint>.

56. BALKIN, *supra* note 7, at 257 (emphasis removed).

57. See *District of Columbia v. Heller*, 554 U.S. 570 (2008); see also Jeffrey Rosen, *Why Are Conservatives, Not Liberals, Fixated on Amending the Constitution?*, NEW REPUBLIC, Apr. 18, 2011, <http://www.tnr.com/article/politics/86905/constitution-amendment-conservatives-united-states>.

58. See *Massachusetts v. EPA*, 549 U.S. 497 (2007).

59. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

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were effective in claiming the Constitution as their own and using it to advance their agenda of expanding equality. In recent years, by contrast, they have shied away from making political arguments in constitutional terms. Even on the subject of marriage equality, President Obama explained his change of heart in moral rather than constitutional terms: by insisting that the states should be able to decide the issue on their own, he has committed himself to the position that there is no federal constitutional right to gay marriage.⁶⁰

CONCLUSION

Balkin and other new textualists have made an invaluable contribution by urging progressives to frame their political arguments in constitutional terms, and to invoke the text of the Constitution as a sword rather than a shield. But, as Balkin recognizes, constitutional methodology will never be a substitute for political vision. To transform the policy debate, progressives of all stripes—from economic populists and neo-progressives to civil libertarians and advocates of racial, gender, and marriage equality—need to incite ordinary citizens to mobilize politically on behalf of shared values. As President Obama recognized in *The Audacity of Hope*, political change comes from the grassroots up⁶¹: only after progressives succeed in transforming the political debate by winning the hearts and minds of mobilized subgroups can they transform the legal debate as well. In this sense, the new textualism cannot precipitate the next progressive revolution; but it may be useful in preserving its legislative victories after they occur.

60. See Peter Wallsten & Scott Wilson, *For Obama, Gay Marriage Stance Born of a Long Evolution*, WASH. POST, May 10, 2012, http://articles.washingtonpost.com/2012-05-10/politics/35456048_1_gay-marriage-stance-gay-donors-marriage-rights.

61. BARACK OBAMA, *THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM* 79 (2006).