15 Born populist

The Trump administration, the courts and the Constitution of the United States

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15.1 Introduction

Louis Hartz in *The Liberal Tradition in America* famously declared that American liberalism differed from European liberalism because the United States, as Tocqueville maintained, 'was born equal, instead of becoming so'.[1] European liberals in the seventeenth and eighteenth centuries had to fashion a liberal constitution and liberal institutions out of decidedly non-liberal materials. They sought a powerful state that would batter down the strong feudal institutions that had entrenched various status hierarchies. This experience left the liberal European bourgeois with a natural affinity for state authority as a major bulwark of bourgeois liberty and equality. American liberals in the eighteenth century had the happier experience of fashioning a liberal constitution and liberal institutions out of decidedly liberal materials. They did not require a powerful state to uproot entrenched status hierarchies in the absence of an established church and landed nobility. This experience left Jefferson, his political allies, and his political descendants with a natural antipathy to state authority which they were more inclined to view as the enemy of liberty and equality. Or so Hartz argued.[2]

This essay explores the possibility that right-wing populist constitutionalism in the United States differs from right-wing populist constitutionalism in Europe and South America because the United States was born populist. The literature on contemporary populism commonly links Donald Trump with such other right-wing populists as Viktor Orbán in Hungary, Nicolas Maduro in Venezuela, and the PiS party in Poland.[3] Right-wing populists in the United States and elsewhere scorn elites, insist on an ethnocentric understanding of the people, reject cosmopolitanism, and seek to centralize power

1 Louis Hartz, *The Liberal Tradition in America* (Harcourt Brace and Company 1955) x; Alexus de Tocqueville, *Democracy in America* (Vol. 2, ed. Philips Bradley, Vintage Books 1990) 191.

2 See Hartz (n 1) 35–66.

3 See, i.e., Tom Ginsburg and Aziz Z. Huq, *How to Save a Constitutional Democracy* (University of Chicago Press 2018); Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (Crown 2018); Mark A. Graber, Sanford Levinson, and Mark Tushnet (eds.), *Constitutional Democracy in Crisis?* (Oxford University Press 2018).

in either the executive branch or, in the case of Poland, a political party.[4] If Trump, Orbán, Maduro, and other right-wing populists were writing a constitution from scratch, they might produce similar texts that include similar rules for staffing the national judiciary. How Trump and his political allies implement their right-wing populist constitutional vision differs from how right-wing populists in other regimes implement a similar right-wing populist constitutional vision because Trump faced different institutional challenges and had different constitutional options upon gaining power than his analogues in other regimes. Right-wing populists in such countries as Venezuela, Hungary, Poland, Turkey, and Israel when implementing their constitutional vision had to tear down a regime and various institutions with some degree of commitment to what I have called thickened progressive cosmopolitan constitutional democracy.[5] When reconfiguring the inherited political order, right-wing populists in power dramatically altered the national constitution, the dominant modes of interpreting or implementing the national constitution, and/or the people responsible for interpreting or implementing the national constitution. The Trump administration when taking office in 2017 did not confront a national constitution, interpretive practices, or a national judiciary with nearly the same degree of commitment to thickened progressive cosmopolitan constitutionalism. Trump found much to his liking in the inherited constitution, the dominant modes of interpreting or implementing the constitution, and the persons responsible for interpreting or implementing the constitution. He and other Republicans could build upon constitutional foundations established by mainstream conservative Republicans who had shared power in the United States for the previous fifty years. What other populists sought through radical transformation of the constitution, constitutional culture and constitutional judges, the experience in the United States suggests, a regime that is born populist may achieve by minor tweaks.

This essay examines the similarities and differences between constitutional manifestations of right-wing populism in the United States and elsewhere by examining the life, death, and jurisprudence of Supreme Court Justice Antonin Scalia. Scalia's opinions in *Morrison v. Olson*[6] and *Romer v. Evans*[7] hit many right-wing populist themes. Scalia in those opinions and elsewhere championed executive power, celebrated traditional morality, attacked elite cosmopolitans, and cast aspersions on using universal norms to interpret a domestic constitution. Unlike right-wing populists in other regimes, who

4 See Cas Muddle and Cristobal Rovira Kaltwasser, *Populism: A Very Short Introduction* (Oxford University Press 2017); Jan-Werner Muller, *What Is Populism?* (Penguin Books 2017).

5 Mark A. Graber, 'What's in Crisis: The Postwar Constitutional Paradigm, Transformative Constitutionalism, and the Fate of Constitutional Democracy' in Mark A. Graber, Sanford Levinson, and Mark Tushnet (eds.), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 686.

6 487 U.S. 654 (1988) (Scalia, J., dissenting).

7 512 U.S. 620 (1996) (Scalia, J., dissenting).

were uprooting constitutions committed to some version of thickened progressive cosmopolitan constitutional democracy, Scalia insisted, often dubiously, that his constitutional commitments were derived entirely from originalism, a method of constitutional interpretation that insists constitutional decision makers are bound by the meaning of constitutional provisions at the time they were ratified. In sharp contrast to right-wing populists in Europe and South America, who have had to resort to 'abusive' constitutional practices in order to fashion a supportive national judiciary, all Republicans have had to do in the past half decade to gain a strong judiciary majority on the Supreme Court is ensure one staunch conservative (Scalia) was replaced with another (Neil Gorsuch), replace a moderate conservative (Anthony Kennedy) with a more committed conservative (Brett Kavanaugh), and replace an elderly progressive who died (Ruth Bader Ginsburg) with another committed conservative (Amy Coney Barrett).

The following pages discuss only contemporary right-wing populism in the United States. Populism in the United States has a long history and is mostly though not exclusively associated with more left-wing movements.[8] While Scalia was on the bench, a populist constitutional movement developed among many law professors that was decidedly opposed to the conservative turn taken by the Supreme Court under Chief Justice William Rehnquist.[9] A fair case can be made that Senator Bernie Sanders of Vermont, the most prominent democratic socialist in the United States, is a far better representative of the American populist tradition than Donald Trump. Nevertheless, Trump is far better representative of the right-wing populist movement that is gaining power across the globe and is the subject of this volume. Whether a populist constitutional practice exists that is not simply a right-wing or left-wing populist practice is a topic for a different essay.

15.2 The populist jurisprudence of Antonin Scalia

Justice Antonin Scalia's influence on the course of American constitutional law helps explain why Donald Trump and Republicans in 2016 inherited constitutional doctrine and a judiciary that was largely born populist instead of becoming so. Scalia served as an associate justice on the Supreme Court of the United States from 1986 to 2016. During that time, he became a hero to a generation of right-wing lawyers by frequently articulating what in

8 See Michael Kazin, *The Populist Persuasion: An American History* (Basic Books 1995).

9 See, i.e., Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press 1999); Richard Parker, *'Here, the People Rule': A Constitutional Populist Manifesto* (Harvard University Press 1988); J. M. Balkin, 'Populism and Progressivism as Constitutional Categories' (1995) 104 Yale Law Journal 1035. For a critique of this literature, see Mark A. Graber, 'The Law Professor as Populist' (2000) 34 University of Richmond Law Review 373.

other countries would be considered a right-wing populist jurisprudence.[10] Scalia in *Morrison v. Olson* championed a unitary executive capable of exercising the entire executive power. His dissent in *Romer v. Evans* insisted that the Constitution of the United States be interpreted consistently with what right-wing populists regard as traditional moral values. He scorned the use of international standards for interpreting domestic law. When Scalia died the year before Trump took the oath of executive office, his pro-executive, traditional values, anti-cosmopolitan jurisprudence enjoyed strong support on the Supreme Court and throughout the federal bench in the United States.

Scalia's dissent in *Morrison v. Olson* is his most influential opinion. The issue in that case was the constitutionality of the provision in the Ethics in Government Act that authorized the appointment of an independent counsel to investigate corruption in the executive branch of the government. The independent counsel was appointed by a judicial panel and could be removed from office by the Attorney General/President only for good cause. The judicial majority in *Morrison* had little difficulty sustaining this measure. Chief Justice Rehnquist's majority opinion ruled that the independent counsel was an 'inferior officer' whose appointment according to Article II, Section 2 Congress could vest in 'the Courts of Law'.[11] The 'good cause' requirement, Rehnquist asserted, left the executive with 'ample authority to assure that the counsel is competently performing his or her statutory responsibilities'.[12] Scalia, dissenting alone, rejected any diminution in executive authority, even one designed to ensure executive officials were obeying the law. His dissent insisted that executive power in the United States is absolute unless the text of the Constitution plainly specifies otherwise.

Scalia in *Morrison* championed a 'unitary executive'. The crucial premise of this understanding of the constitutional separation of powers is that the provision in Article II, Section I declaring 'The executive power shall be vested in a President of the United States' 'does not mean *some of* the executive power, but *all of* the executive power'.[13] Presidents may take any action free from interference from other governing institutions, whether those actions be firing government watchdogs or torturing suspected terrorists, as long as that action was traditionally considered executive in nature and the Constitution does not explicitly grant that executive power to the judiciary or legislature.[14] The Constitution, Scalia asserted, did not permit the Supreme Court to 'determine how much of the purely executive powers of

10 See Saikrishna Bangalore Prakash, 'A Fool for the Original Constitution' (2016) 130 Harvard Law Review Forum 24 ('Justice Antonin Scalia was one of my heroes'); Ted Cruz (@tedcruz), Twitter (February 13, 2016, 2:27 p.m.), https://twitter.com/tedcruz/status/698634625246195712?lang=en [https://perma.cc/PEM7-SEW3] ('Justice Scalia was an American hero').

11 See *Morrison*, at 671–673.

12 *Morrison*, at 692.

13 *Morrison*, at 705 (Scalia, J., dissenting).

14 See Steven G. Calabresi and Christory S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (Yale University Press 2008); John Too, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11* (University of Chicago Press 2005).

government must be within the full control of the President'. 'The Constitution', he proclaimed, 'prescribes that they *all* are'.[15] In his mind, the constitutionality of the independent counsel statute raised only two questions. Was 'criminal prosecution … the exercise of purely executive power' and had the president been deprived 'of exclusive control over the exercise of that power'.[16]

The independent counsel law, Scalia asserted, had two constitutional flaws. First, the independent counsel was appointed unconstitutionally. Article II, Section 2, declares the President 'shall have Power … to … appoint … all other Officers of the United States …, but the Congress may by Law vest the Appointment of such inferior Officers … in the Courts of Law'. Scalia claimed that the independent counsel was a principal officer of the United States who had to be appointed by the president. 'Because appellant is not subordinate to another officer', he stated, 'she is not an "inferior" officer and her appointment other than by the President with the advice and consent of the Senate is unconstitutional'.[17] Worse, Scalia wrote, the statute ignored how 'Government investigation and prosecution of crimes is a quintessentially executive function'. Presidents had to have the absolute power to fire any federal prosecutor, even prosecutors commissioned to ferret out executive corruption. 'If the removal of a prosecutor, the virtual embodiment of the power to "take care that the laws be faithfully executed" can be restricted', he stated, 'what officer's removal cannot?'[18]

Scalia gave two responses to those who worried that executive corruption would thrive in the absence of independent authority to investigate the executive. First, the public would hold a president accountable for failing to prosecute corruption. '[W]hen crimes are not investigated and prosecuted fairly', Scalia declared, 'the President pays the cost in political damage to his administration'.[19] Second, absolute power was a fact of political life. Scalia's dissent concluded, 'A system of separate and coordinate powers necessarily involves an acceptance of exclusive power that can theoretically be abused'.[20] Viktor Orbán would have been pleased.

Romer v. Evans gave Scalia an opportunity to display his commitments to the cultural commitments of right-wing populism. The issue in that case was the constitutionality of an amendment to the Colorado constitution forbidding localities within the state and the state legislature from passing laws prohibiting discrimination on the basis of sexual orientation or otherwise providing legal protections to persons on the basis of sexual orientation. Veterans could secure an ordinance from a local town council, a county government, or the state legislature forbidding businesses from discriminating

15 *Morrison*, at 709 (Scalia, J., dissenting).
16 *Morrison*, at 705 (Scalia, J., dissenting).
17 *Morrison*, at 723 (Scalia, J., dissenting).
18 *Morrison*, at 726 (Scalia, J., dissenting).
19 *Morrison*, at 729 (Scalia, J., dissenting).
20 *Morrison*, at 710 (Scalia, J., dissenting).

against persons who served in the military. After the passage of Amendment 2, sexual minorities could gain such protection only by convincing their fellow citizens to ratify a state constitutional amendment. The judicial majority on the Supreme Court of the United States regarded a state constitutional ban on any state institution providing any protection to gays and lesbians with respect to any action or any right anywhere in the state as so overbroad as to compel the conclusion that the measure was based on unconstitutional animus towards sexual minorities.[21] Scalia, this time speaking for Justices Clarence Thomas and Chief Justice William Rehnquist, disagreed. He insisted state prohibitions against anti-discrimination laws was a constitutional expression of traditional sexual mores.

Scalia's dissent interpreted the comprehensive prohibition of anti-discrimination laws as 'a rather modest attempt by seemingly tolerant Coloradans to preserve sexual mores against the efforts of a politically powerful minority to revise those mores through the use of the laws'.[22] This effort to preserve long-standing traditions was justified on both substantive and procedural grounds. Scalia's constitution did not distinguish between sexual minorities and psychopaths. His *Romer* dissent stated, 'one could consider certain conduct reprehensible—murder, for example, or polygamy, or cruelty to animals—and could exhibit even "animus" toward such conduct'.[23] Amendment 2 prevented powerful elites from uprooting the traditional morality of the people. Sexual minorities in Colorado, Scalia insisted, 'possess political power much greater than their numbers, both locally and statewide'.[24] Putting state constitutional obstacles in the way of anti-discrimination laws was a vital means for average citizens to prevent this perceived powerful elite from running roughshod over Colorado politics by making such demands as having a right to employment when they had the skills necessary to perform the job in question.

The *Romer* dissent feeds into a common right-wing populist narrative that sees straight white male Protestants as the victims of laws than ban discrimination on the ground of sexual orientation, race, gender, and religion. Scalia insisted Colorado had prohibited only 'special protection for homosexuals', even though laws banning discrimination on the basis of sexual orientation routinely provide the same protections for heterosexuals as homosexuals. The underlying logic is that while the law typically permits a multitude of discriminations, such as discriminations on the basis of test scores or even hair color, legal rules typically carve out exceptions for such matters as race, gender, and religion. 'Ordinary' Americans, in this view, are disadvantaged by anti-discrimination laws that give persons of color, women, and sexual minorities the right to sue when they are denied admission to a university because of their race, gender, or sexual orientation, but do not permit straight

21 See *Romer*, at 632.
22 *Romer*, at 636 (Scalia, J., dissenting).
23 *Romer*, at 644 (Scalia, J., dissenting).
24 *Romer*, at 646 (Scalia, J., cdissenting).

white Protestant males to sue when they are denied admission because their parents did not attend that institution. Or so right-wing populists claim.

Scalia concluded his *Romer* dissent with some right-wing populist anti-elitism. He accused the Court of 'tak[ing] sides in the culture wars', by siding with 'the lawyer class from which the Court's members are drawn'.[25] This lawyer class furthered the marginalization of straight white Protestant males when exhibiting special solicitude for gays and lesbians. Scalia scornfully observed that law firms interviewing at law schools could discriminate on the basis of 'prep school', 'eat[ing] snails', and 'hat[ing] the Chicago Cubs', but not because the 'interviewer … disapproves of the applicant's homosexuality'.[26] Fortunately, from his perspective, 'more plebian attitudes' still reigned in the national legislature which at that point had been 'unresponsive to extend to homosexuals the protection of federal civil rights laws … and which took the pains to exclude them specifically from the Americans with Disabilities Act of 1990'.[27]

Seven years later, Scalia elaborated on these right-wing populist themes when dissenting from the judicial decision in *Lawrence v. Texas*[28] that forbade states from criminalizing homosexual sodomy. As in *Romer*, Scalia castigated elites while celebrating traditional morality. He described claims that constitutional privacy rights encompassed consensual behavior by adults as 'the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda'.[29] Ordinary Americans knew better. Scalia expressed sympathy for the 'Many Americans [who] do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home' who could no longer throw same-sex couples in prison.[30] Scalia's *Lawrence* dissent combined anti-elitism with anti-cosmopolitanism. Justice Anthony Kennedy's majority opinion pointed to decisions protecting same-sex intimacy in other constitutional regimes as evidence that any moral consensus against homosexuality had long dissipated.[31] Scalia would not hear of such foreign influence on American constitutional law. 'The Court's discussion of these foreign views', he complained, was '[d]angerous dicta … since this Court … should not impose foreign moods, fads, or fashions on Americans'.[32]

Scalia's votes in other cases were consistent with right-wing populism, even as they sometimes demonstrated distinctive Republican Party and right-wing American populist twists. His religion jurisprudence was orthodox right-wing

25 *Romer*, at 652 (Scalia, J., dissenting).
26 *Romer*, at 652–653 (Scalia, J., dissenting)
27 *Romer*, at 653 (Scalia, J., dissenting).
28 539 U.S. 558 (2003).
29 *Lawrence*, at 602 (Scalia, J., dissenting).
30 *Lawrence*, at 602 (Scalia, J., dissenting).
31 *Lawrence*, at 576–577.
32 *Lawrence*, at 588 (Scalia, J., dissenting).

populism. Scalia claimed a constitutional commitment to monotheism[33] that justified state aid to religious organizations,[34] voluntary religious exercises in schools,[35] and the construction of religious monuments in public spaces.[36] His jurisprudence on democratic rights relentlessly served the interests of the Republican Party. Scalia insisted that million-dollar donations to political campaigns had the same constitutional status as reasoned discourse (even if the money was spent buying food for volunteers),[37] maintained that states had the right to require persons to have a state identification card in order to vote, even when no evidence indicated such measures were necessary to prevent fraud,[38] and asserted that federal courts had no business adjudicating egregious gerrymanders that enabled Republicans to control state legislatures while gaining substantially less than the majority of popular votes.[39] On other matters, most notably gun rights, Scalia advanced the distinctive world views of right-wing populism in the United States. Right-wing populists celebrated when Scalia in *District of Columbia v. Heller* issued a majority opinion holding that the Second Amendment of the Constitution protected an individual right to have a handgun for self-defense.[40]

Where Scalia was most distinctively American was in his justification of constitutional right-wing populism. Right-wing populists must often oppose tradition to constitutionalism. They commonly claim to speak in the name of a long-standing people, whose traditions have sometimes been suppressed by new progressive constitutions sponsored by cosmopolitan elites. Scalia united tradition and constitutionalism. He claimed to be speaking for the long-standing people who codified their traditions when framing and ratifying the ancient Constitution of the United States.

15.3 Originalism and American right-wing populism

Scalia claimed the United States was born right-wing populist and, barring constitutional amendment or replacement, had a legal obligation to remain right-wing populist. He insisted that his constitutional understanding of the separation of powers, federalism, fundamental rights, religion, guns, and freedom of speech were grounded in the original understanding of the Constitution of the United States. Government could provide certain forms of support for religion, he claimed, because '[t]hose who wrote the Constitution believed that morality was essential to the well-being of society and

33 *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, 545 U.S. 844, 893–894 (2005) (Scalia, J., dissenting).
34 *Zelman v. Simmons-Harris*, 536 U.D. 639 (2002).
35 *Lee v. Weisman*, 505 U.S. 577 (1992) (Scalia, J., dissenting).
36 *Van Orden v. Perry*, 545 U.S. 677 (2005) (Scalia, J., concurring).
37 *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (Scalia, J., concurring).
38 *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008) (Scalia, J., concurring).
39 *Vieth v. Jubelirer*, 541 U.S. 267 (2004).
40 554 U.S. 570 (2008)

that encouragement of religion was the best way to foster morality'.[41] Scalia insisted further that ascertaining the original meaning of the Constitution or original public meaning[42] was the only legitimate method of interpreting the Constitution of the United States. A 1989 lecture and essay declared,

> originalism seems to me more compatible with the nature and purpose of a Constitution in a democratic system. A democratic society does not, by and large, need constitutional guarantees to insure that its laws will reflect 'current values'. Elections take care of that quite well. The purpose of constitutional guarantees—and in particular those constitutional guarantees of individual rights that are at the center of this controversy—is precisely to prevent the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable. Or, more precisely, to require the society to devote to the subject the long and hard consideration required for a constitutional amendment before those particular values can be cast aside.[43]

Scalian originalism is the official method of constitutional interpretation of right-wing American constitutional populism. The *Guidelines on Constitutional Litigation* issued by the Department of Justice during the Reagan Administration declared, 'constitutional language should be construed as it was publicly understood at the time of its drafting and ratification'.[44] Scalia and his acolytes insist they are guided by the original meaning of the Constitution of 1789, even as several generations of scholars have demonstrated the incoherence of originalism as a means for interpreting an eighteenth century at the turn of the twenty-first century and that originalism does not explain the decisions Scalia and others actually make.[45] Such protestations of originalism are largely unique to right-wing American constitutional populists. Right-wing populists in other regimes are not interested in the original understanding of constitutions they correctly perceive were drafted by progressive cosmopolitans. The framers of the Constitution of the United States were also progressive cosmopolitans by the standards of their day. Nevertheless, because the Constitution of the United States is very old and knowledge of the framing is slight, distorted understandings of framing intention and language can often be wielded against contemporary progressive cosmopolitans.

Right-wing populists in the United States claim to be bound by the original meaning of constitutional provisions. Professor Adrian Vermeule observes,

41 McCreary County, at 887 (Scalia, J., dissenting).

42 See Lawrence B. Solum, 'Originalist Methodology' (2017) 84 University of Chicago Law Review 269.

43 Antonin Scalia, 'Originalism: The Lesser Evil' (1989) 57 University of Cincinnati Law Review 849, 862.

44 Office of Legal Policy, U.S. Department of Justice, *Guidelines for Constitutional Litigation* (Government Printing Office 1988) 3.

45 The most recent entry is Jonathan Gienapp, *The Second Creation: Fixing the American Constitution in the Founding Era* (Harvard University Press 2018).

> allegiance to the constitutional theory known as originalism has become all but mandatory for American legal conservatives. Every justice and almost every judge nominated by recent Republican administrations has pledged adherence to the faith. At the Federalist Society, the influential association of legal conservatives, speakers talk and think of little else.[46]

Even Trump purports to be an originalist. His Constitution Day message in 2017 'call[ed] on all citizens and all branches of government to reflect on the original meaning of our Constitution, and to recall the founding principles we too frequently forget'.[47]

This American emphasis on originalism is exceptional. Kim Lane Scheppele observes, '[i]nquiring this closely into a constitution's original meaning is done almost nowhere else in the world'.[48] Constitutional decision makers in other regimes rarely spout originalist justifications for their rulings. Right-wing populists are particularly disinclined to be originalists. The reason is obvious. As Zachary Elkins, Tom Ginsburg, and James Melton note, most constitutions last barely more than a generation, if that.[49] When populists come into power, they are likely to be confronted with a constitution written by more progressive cosmopolitans.[50] Their constitutional project is to subvert, revise, or replace that constitution, as was done in regimes such as Hungary, Poland, and Venezuela.[51] The last thing most right-wing populists want is to pledge allegiance to a constitution written by their mortal enemies. Right-wing populist constitutionalists in Israel, for example, are committed to undoing the constitutional revolution initiated by Aharon Barak and his cosmopolitan progressive allies.[52]

46 Adrian Vermeule, 'Beyond Originalism' *The Atlantic* (March 31, 2020) https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/

47 Donald J. Trump, Proclamation 9639 – Constitution Day, Citizenship Day, and Constitution Week, 2017 Online by Gerhard Peters and John T. Woolley, The American Presidency Project https://www.presidency.ucsb.edu/node/331107.

48 Kim Lane Scheppele, 'Jack Balkin is an American' (2013) 25 Yale Journal of Law and the Humanities 23.

49 Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions* (Cambridge University Press 2009).

50 For a claim that many recent constitutions and constitutional reforms sought to entrench a related neoliberal vision, see Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004).

51 See Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019); David Landau and Rosalind Dixon, 'Abusive Judicial Review: Courts Against Democracy' (2020) 53 University of California, Davis Law Review 1313; David Landau, 'Abusive Constitutionalism' (2013) 47 University of California, Davis Law Review 189.

52 See 'Justice Minister to Radical Former Chief Justice: Your Path Leads to the Tyranny of the Minority' *The Jewish Press* (February 4, 2018) https://www.jewishpress.com/news/politics/justice-minister-to-radical-former-chief-justice-your-path-leads-to-the-tyranny-of-the-minority/2018/02/04/ ('Every day at the Justice Ministry I take another step in creating a democratic alternative to the constitutional revolution'). Yaniv Roznai, 'Israel: A Crisis of Liberal Democracy?' in Mark A. Graber, Sanford Levinson, and Mark Tushnet (eds.), *Constitutional Democracy in Crisis?* (Oxford University Press 2018) 363–367.

Right-wing populists in the United States seemingly face a similar difficulty. A long literature from Charles Beard to Gordon Wood to Michael Klarman depicts the constitutional revolution of 1787 as an elite struggle against the populist impulses unleashed by the American Revolution.[53] The details vary from scholar to scholar, but broad agreement exists that the Constitution of the United States was designed to privilege elite rule and elite political commitments. One of those elite commitments was international law. In sharp contrast to contemporary right-wing populists, who insist that no external standard limit their country's governance,[54] the American framers were fanatics on the subject of international law. Early Supreme Court justices routinely charged juries that they had the same obligation to maintain customary international law as they did to maintain domestic positive law.[55]

The primary populist solution to this problem is the selective use of history.[56] As a general rule, Scalia, Thomas, and other originalists cite history extensively when history provides strong support for right-wing populist positions. When contemporary historians dispute original understandings, right-wing populists in the United States cite only those historians who support right-wing populist positions, even when the weight of historical analysis cuts against right-wing populism. When the historical evidence is clearly against a right-wing populist position, right-wing populists ignore history. The end result is that the more right-wing populist justices on the Supreme Court in the United States who espouse originalism are as likely as the more progressive justices on that tribunal who claim to be guided by other principles of constitutional interpretation to make decisions based on contemporary constitutional visions and values.

Comparing how right-wing populists analyze the constitutional status of abortion and affirmative action illustrates this selective use of history. When Scalia and his judicial allies discuss abortion, practice when the relevant constitutional amendment, the Fourteenth, was ratified is decisive. States in 1868 routinely banned abortion, so none of the majestic generalities of the Fourteenth Amendment should be interpreted as protecting abortion

53 Charles A. Beard, *An Economic History of the Constitution of the United States* (The Free Press 1986); Gordon S. Wood, *The Creation of the American Republic 1776–1787* (University of North Carolina Press 1998); Michael J. Klarman, *The Framer's Coup: The Making of the United States Constitution* (Oxford University Press 2016).

54 See (n 7) and the relevant text.

55 See John Jay, 'John Jay's Charge to the Grand Jury of the Circuit Court for the District of New York, April 12, 1790' in *The Documentary History of the Supreme Court of the United States* (Vol. 2, Columbia University Press 1985–2007) 29; Martin S. Flaherty, *Restoring the Global Judiciary: Why the Supreme Court Should Rule in U.S. Foreign Affairs* (Princeton University Press 2019) 50–63; Jonathan Gienapp, 'Historicizing the Constitution: Originalism and the Original Constitution' 47–48 (unpublished manuscript on file with author).

56 This paragraph summarizes Mark A. Graber, 'Justice Thomas and the Perils of Amateur History' in Earl Maltz (ed.), *The Jurisprudence of the Rehnquist Court* (University of Kansas Press 2003).

rights.[57] This recourse to framing practice disappears when the more conservative justices on the Rehnquist and Roberts Court discuss affirmative action. The persons responsive for the Fourteenth Amendment frequently adopted race-conscious programs designed to help all person of color (and not merely former slaves).[58] Scalia and Thomas ignore this evidence. They rest their opposition to affirmative action on general principles of color-blindness that are nowhere to be found in the constitutional text or framing practice.[59]

Right-wing populists in the United States are nevertheless loath to admit the role values play in their constitutional analysis. A rare exception occurred in early 2020. Adrian Vermeule, a prominent Harvard Law professor, published an essay in a popular journal urging conservatives to abandon originalism for a jurisprudence rooted in Catholic integrationalism. Vermeule declared, 'such an approach—one might call it "common-good constitutionalism"—should be based on the principles that government helps direct persons, associations, and society generally toward the common good'.[60] 'Common-good constitutionalism' played core right-wing populist themes. Vermeule stated, 'the state will enjoy authority to curb the social and economic pretensions of the urban-gentry liberals who so often place their own satisfactions (financial and sexual) and the good of their class or social milieu above the common good'.[61] Again, Viktor Orbán would have approved, but not right-wing populists in the United States. The essay was dutifully condemned by conservatives across the conservative political spectrum, even as Vermeule's proposal probably better explained the path of right-wing populist constitutional decision-making than sincere efforts to determine the original public meaning of constitutional provisions.[62]

Populist embrace of originalism, if not particularly true to the framers either in result or in method,[63] is true to some important features of right-wing populism. Constitutional veneration is a form of authentic Americanism.

57 See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 952–953 (1992) (Rehnquist, CJ., concurring and dissenting); *Planned Parenthood*, at 980 (Scalia, J., concurring and dissenting)

58 See Eric Schnapper, 'Affirmative Action and the Legislative History of the Fourteenth Amendment' (1985) 71 Virginia Law Review 753, 755–758.

59 See, i.e., *Grutter v. Bollinger*, 539 U.S. 306, 349–350, 353–354 (Thomas, J., concurring and dissenting); *Grutter*, at 349 (Scalia, J., concurring and dissenting); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (1995) (Scalia., J., concurring); *Adarand*, at 240–241 (Thomas., J. concurring).

60 Vermeule (n 46).

61 Ibid.

62 See Randy E. Barnett, 'Common-Good Constitutionalism Reveals the Dangers of Any Non-originalist Approach to the Constitution' *The Atlantic* (April 3, 2020), https://www.theatlantic.com/ideas/archive/2020/04/dangers-any-non-originalist-approach-constitution/609382/; Dan McLaughlin, '"Common-Good Constitutionalism" Is No Alternative to Originalism' *National Review* (April 2, 2020), https://www.nationalreview.com/2020/04/common-good-constitutionalism-is-no-alternative-to-originalism/.

63 See H. Jefferson Powell, 'The Original Understanding of Original Intent' (1985) 98 Harvard Law Review 885.

A political movement that sought to dispense with the Constitution or with the framers would be inconsistent with populist understandings of national identity in the United States. A constitution that is almost two hundred and fifty years old is more likely to provide support for more right-wing populist constitutional commitments than one that is twenty-five years old and ratified during the heyday of thickened progressive cosmopolitan constitutional democracy. Eighteenth-century texts do not embrace environmentalism, feminism, or the sexual revolution. The values underlying an ancient text can more easily be imagined or fabricated than those underlying texts framed and ratified within recent memory. Constitutional originalism benefits from the ease with which a history for right-wing populist claims that are not enshrined in the Constitution can easily be invented.

The Constitution of the United States is a symbol of authentic Americanism in a way almost no other national constitution can be an analogous national symbol. Most national constitutions are of recent vintage. In seeking their reinterpretation or destruction, right-wing populists argue that the recently adopted national constitution is not the true expression of the real people. Conservatives opposed to the constitutional revolution in Israel oppose the constitutional revolution initiated by a series of Basic Laws and judicial decisions interpreting those Basic Laws to the actual historic and present will of the true Israeli people.[64] The Constitution of the United States cannot be presented as an inauthentic representation of the historical will of the American people. For more than two centuries, Americans have for the most part revered the Constitution.[65] A right-wing populism that purports to represent authentic Americanism must claim to be true to the original spirit of the Constitution of the United States. Even some prominent left-wing populists are embracing a living originalism partly as a means of demonstrating their appropriate American bona fides.[66]

Most American populists, most of the time, on the left and the right, have had a romance with the Constitution of the United States. Gordon Wood documented a democratic revolution that took place in the United States, at least with respect to white males, during the first part of the nineteenth century.[67] This revolution was done in the name of the Constitution, even as the revolutionaries sought to overthrow the persons responsible for the Constitution. Martin Van Buren performed the remarkable task of detailing both how elites had seized control of the constitutional convention in 1787, but how a mass-based populist party was the best institutional means for preserving the Constitution those elites framed.[68] The Populist Platform of

64 See (n 52) and the relevant text.

65 See Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (Alfred A. Knopf 1986).

66 See Jack Balkin, *Living Originalism* (Harvard University Press 2011).

67 Gordon S. Wood, *The Radicalism of the American Revolution* (Alfred A. Knopf 1992).

68 Martin Van Buren, *Inquiry into the Origin and Course of Political Parties in the United States* (Augustus M. Kelley 1867/1967).

1892 similarly pledged allegiance to the Constitution of the United States as creatively interpreted by members of that agrarian movement. Party members sought 'to restore the government of the Republic to the hands of the plain people; with which class it originated' and declared their 'purposes to be identified with the purposes of the National Constitution'.[69] In wrapping themselves around the Constitution of the United States and insisting on a return to an imagined past, contemporary right-wing populists are exhibiting the same behaviors and employing the same justificatory logics as past generations of American populists (and the vast majority of popular movements in the United States).

Originalism is also useful for right-wing populists (and their conservative allies) in the United States because many items on the contemporary progressive (or left-wing populist) agenda could not be specifically imagined in the late eighteenth century. The culture wars of the eighteenth and nineteenth centuries were over prohibition rather than sexuality. Some version of Protestant Christianity was presumed to be the law of the land.[70] Sexual expression was heavily regulated. Affirmative action was unheard of and government had very little administrative capacity. For these reasons, claiming that the Constitution supports important parts of the contemporary conservative agenda is often effective rhetoric. The distance between the late eighteenth century and the early twenty-first century provides the historical fodder from common right-wing populist claims that the American framers did not risk their lives for [insert some progressive right or progressive government power]. The persons responsible for the Fourteenth Amendment did not self-consciously intend to protect abortion rights. The persons responsible for the commerce clause were not thinking of national health care. Progressives and left-wing populists have made originalist arguments for abortion rights and federal power to pass national health care laws,[71] but these assertions require more constitutional sophistication than the blunt decree that Abraham Lincoln was not at all concerned with reproductive choice or the Affordable Care Act of 2010.

In this respect, again, the Constitution of the United States is far more favorable to right-wing populism than other national constitutions. Newer constitutions typically make explicit mention of second- or third-generational constitutional concerns. They protect rights to gender equality. They announce rights to health care.[72] Vague clauses are naturally interpreted in light of practices of a few years ago, when those clauses were ratified.[73] What is explicit in new constitutions must be inferred when interpreting the

69 'Populist Party Platform' in Henry Steele Commager (ed.), *Documents of American History* (Vol. I, 7th ed., Appleton-Century-Crofts 1962) 594.

70 See *Holy Trinity Church v. United States*, 143 U.S. 457, 471 (1892) ('this is a Christian nation').

71 See Balkin (n 66) 174–177, 214–219.

72 See Peter E. Quint, 'What is a Twentieth-Century Constitution' (2007) 67 Maryland Law Review 238.

73 See Scheppele (n 48) 29–39.

Constitution of the United States. That constitution makes no mention of the equality rights of persons associated with the minority rights revolution. The text tends to focus on negative rights.[74] Originalists would have a vague clause interpreted in light of practices in 1787 or, perhaps, 1868, but certainly not practices after World War II when most foreign national constitutions were adopted.

Right-wing populists in the United States find originalism more attractive than right-wing populists in other regimes find originalism because the history underlying older constitutions can more easily be manipulated to support desired outcomes than the history underlying constitutions framed within recent memory. Claiming Lech Walesa was a right-wing populist is a challenging task when Walesa and many of his political supporters are still around to contest that designation. Neither George Washington nor Abraham Lincoln can magically appear to contest their appropriation for contemporary political projects. Walesa and other framers of post-Communist constitutions in Eastern Europe were clearly identified as progressive cosmopolitans. Neither the persons responsible for the Constitution of 1787 or the post-Civil War Amendments fit neatly into a 'progressive cosmopolitan' or 'right-wing populist' category. The American framers largely bequeathed their descendants quotations that, taken out of historical contexts, can be used by right-wing populists (or anyone else) for whatever political purposes they think best.[75] Consider framing attitudes towards social pluralism, a central concern of both right-wing populism and progressive cosmopolitanism. *Federalist* 10 seems progressive when claiming the Constitution of the United States will work because a large nation will enable a diverse people to share a common civil space.[76] *Federalist* 2 seems (right-wing) populist when insisting that the Constitution will work because Americans are 'one united people—a people descended from the same ancestors, speaking the same language, (and) professing the same religion'.[77] Pick your poison.

Historical distance influences strategies for interpretating constitutional provisions and past decisions. George Washington and Abraham Lincoln may be reimaged. Aharon Barak must be overcome. Jamal Greene suggests originalism is an easy sell for right-wing populists because originalism offers a vastly simplified account of American history that reverberates among Americans who distrust social pluralism.[78] Few Americans who do not study the Constitution for a living have any clue about what the framers thought about the status of international law. Hence, claims that Americans should not be enamored of foreign law may gain far more support among citizens suspicious

74 See *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983).

75 See *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 634–635 (1952).

76 Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (Clinton Rossiter, ed.) (New American Library 1961) 77–84.

77 Ibid. 38.

78 Jamal Greene, 'Selling Originalism' (2009) 97 Georgetown Law Journal 657, 708–714.

of cosmopolitan elites than among constitutional historians.[79] Steven Griffin documents the contortions conservatives engage in when claiming that the constitutional framers in 1868 committed the United States to contemporary notions of racial and gender equality.[80] These legal gymnastics are possible because few Americans know or care about the history of the Reconstruction Amendments. Such appeals to oversimplified or mythological histories function better to subvert than reinterpret more recently adopted constitutions. Orbán and Fidesz preferred adopting a new constitution that reflected their conception of Hungarian nationalism rather than adopting the pretense that the post-Soviet Hungarian Constitution committed the Hungarian regime to some version of right-wing populism.[81]

15.4 Judicial populism before (and a bit after) the rise of right-wing populism

Scalia's influence on constitutional jurisprudence in the United States highlights the strength of right-wing populist jurisprudence in the United States before a self-conscious right-wing populist became chief executive. Trump upon taking office faced a far more sympathetic judiciary than did most other new populist leaders. A generation of Republican presidents and senators had staffed the courts with jurists sympathetic to a right-wing populist agenda, even though few labeled those justices or that agenda populist. These previous Republican efforts enabled Trump and his political allies to complete the task of consolidating a populist judiciary in the United States by relying on fairly normal processes of judicial replacement, which at most entailed what might be described as a more intense politics as usual. Republican efforts to secure a friendly judiciary often engaged in unprecedented actions that scholars described as 'constitutional hardball'.[82] Still, these actions were never inconsistent with plain constitutional text even as they uprooted long-standing constitutional conventions. The main challenge Republicans successfully overcame through unconventional legal behaviors was replacing one Supreme Court justice (Scalia) sympathetic to right-wing populist constitutionalism with another Supreme Court justice (Neil Gorsuch) sympathetic to right-wing populist constitutionalism.

Republicans became committed to remaking the Supreme Court when Richard Nixon became president in 1968 and more aggressively pursued that commitment after the election of Ronald Reagan in 1980. Nixon's court strategy was largely limited to finding justices who interpreted narrowly

79 Ibid. 713–714.

80 Stephen M. Griffin, 'Optimistic Originalism and the Reconstruction Amendments' (2020–2021) 95 Tulane Law Review.

81 See Muller (n 4) 64–66.

82 See Joseph Fishkin and David E. Pozen, 'Asymmetric Constitutional Hardball' (2018) 118 Columbia Law Review 915. See generally, Mark Tushnet, 'Constitutional Hardball' (2004) 37 John Marshall Law Review 523.

constitutional protections for persons accused of criminal activity.[83] Reagan's strategy was more comprehensive. The Reagan Justice Department called for justices committed to the original understanding of constitutional provisions, and sought to wield originalism in favor of what conservatives claimed were traditional moral values and executive power.[84]

What in 2020 looks like a right-wing populist agenda had a more complicated pedigree from the vantage point of 1980.[85] The Republican Party at that time was becoming a coalition of evangelicals, white ethnics opposed to further integration, foreign policy hawks, and new entrepreneurs opposed to federal regulations. The first two might be considered right-wing populist. The latter two were not. Republicans in the late twentieth century were more often thought to represent American elites than the lower middle classes that form the backbone of populist movements.

Republican cultural commitments in the late twentieth century reflected the increasing strength of the more right-wing populist wing of the party.[86] Republican party platforms supported bans on abortion, 'voluntary' prayer in public schools and providing public funding for parochial schools. When gay and lesbian rights became more prominent, Republicans called for continued bans on same-sex relationships and same-sex marriage. Republican party platforms initially called for judicial restraint, but over time, several activist programs were added. Republicans aggressively favored judicial decisions declaring unconstitutional affirmative action programs, gun control measures, and laws that restrict the participation of religious groups in public programs.

Republican commitments to executive power in the late twentieth century better reflected the more elite wing of the party. Most commentators in the late twentieth century thought the structure of American constitutional politics privileged Republicans running for president and Democrats running for Congress. Hence, as a matter of partisan advantage, Republicans had an interest in promoting presidential power, less because of a commitment to anti-pluralism than because presidential power was thought likely to be Republican power. Republican commitments to executive power had two other non-populist foundations. First, the Republican Party in the late twentieth century was committed to a far more muscular foreign policy than the Democrats. Americans had 'lost' Vietnam, prominent conservatives maintained, because Congress had interfered far too much in presidential policymaking. The separation of powers needed to be interpreted to give the president unilateral power to wage the Cold War as the president saw fit. Second, Republicans were concerned with what they perceived as out-of-control bureaucracies that

83 See Kevin J. McMahon, *Nixon's Court: His Challenge to Judicial Liberalism and Its Political Consequences* (University of Chicago Press 2011).

84 See David Alistar Yalof, *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees* (University of Chicago Press 1999) 133–167.

85 For the changes in Republican commitments and coalition, see John Gerring, *Party Ideologies in America 1828–1996* (Cambridge University Press 1998).

86 All Republican Party Platforms can be found on the website of the American Presidency Project, https://www.presidency.ucsb.edu/.

they believed were dedicated to more liberal, Democratic principles. Again, increases in presidential power to control the bureaucracy were seen as measures likely to advance Republican policy commitments, populist or otherwise.

Republicans were quite successful at gaining at least partial control over the federal bench in the years before Donald Trump became president. From 1969 to 2016, Republicans appointed eleven Supreme Court justices, while Democrats appointed only four. The last three Chief Justices of the United States, Warren Burger, William Rehnquist, and John Roberts, have been Republican appointees. This disparity was partly a consequence of disproportionate Republican control of the presidency. From 1968 until 1992, Republicans controlled the presidency for all but four years. Some of this disparity was luck. Chief Justice William Rehnquist happened to die while President George H. W. Bush was in office. No justice left the bench during the Carter administration. Ruth Bader Ginsburg ignored President Obama's hints that she should retire at a time when she could be replaced by a liberal justice.[87]

Republicans also had a greater impact than Democrats on the direction of judicial decision making because Republican strategies for staffing the courts differed from those of Democrats.[88] Democrats tended to focus on diversity. Presidents James Carter, Bill Clinton, and Barack Obama sought to increase the percentage of women and persons of color on the federal bench. None would appoint a black women conservative to achieve that end, but none was interested in appointing a movement progressive with a distinctive leftish agenda. Ruth Bader Ginsburg, who had led the fight for gender equality in the 1970s, was the closest to a movement liberal on the Supreme Court. Her cause had gone mainstream long before Ginsburg joined the federal bench. Republicans were far more concerned with ideology when making judicial appointments. Presidents Ronald Reagan, George H. W. Bush, and George W. Bush, or their justice departments, intensively screened possible judicial nominees to ensure their commitments to the Republican constitutional vision. The result was a conservative bloc that regularly sought to pass the court in more right-wing populist directions on matters such as federalism, religion, and gun rights, and a more progressive bloc that on matters other than same-sex intimacy tended to engage in what Mark Tushnet described as 'defensive-crouch liberalism'.[89]

Republican efforts to control the federal bench before 2016 placed Trump and his political allies in a much better position than most right-wing populists upon assuming political office. Trump did not need to conduct a purge

87 See Susan Dominus and Charlie Savage, 'The Quiet 2013 Lunch That Could Have Altered Supreme Court History' *The New York Times* (September 25, 2020), https://www.nytimes.com/2020/09/25/us/politics/rbg-retirement-obama.html.

88 For comparisons between Republican and Democratic strategies for judicial appointments, see Henry J. Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Bush II* (5th ed. Rowman & Littlefield Publishers 2007); Yalof (n 84).

89 Mark Tushnet, 'Abandoning Defensive Crouch Liberal Constitutionalism' *Balkinization* (May 6, 2016), https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html.

of hostile justices or fundamentally restructure the federal judiciary. Rather, he and his supporters could fashion a more supportive right-wing populist judiciary largely by practicing what might be considered a more intense politics as usual. This more intense form of politics as usual was on full display during the struggle to fill Justice Scalia's seat, the confirmation battle over Brett Kavanaugh, and the staffing of the lower federal courts. Republicans repeatedly took actions that were unprecedented, but none in any sense violated the letter of the constitutional text.

Partisan warfare broke out when Scalia suddenly died on February 13, 2016, nine months before the next presidential election. Senate Majority Leader Mitch McConnell promptly announced the Republican-controlled Senate would not even consider confirming another Supreme Court nomination until after the identity of the next president was known. Republicans successful carried out this threat. The Senate refused to consider whether President Obama's nominee, Merrick Garland, a judicial moderate, should join the high court. McConnell's refusal to hold hearings was unprecedented. As Democrats repeatedly pointed out, the Senate had never refused to consider a presidential nomination to the Supreme Court. Still, while McConnell's ploy might have provided political cover for Republicans who did not want to vote against a Supreme Court nominee, his behavior was not a clear constitutional violation. The Constitution of the United States might be interpreted as requiring the Senate vote on a judicial nomination, but text hardly compels such a reading. Garland's eventual nomination was hardly a sure thing. Republicans might have followed a previous script and filibustered the nomination to death. All Republicans might have voted against the Garland nomination.

Trump in office and his political supporters played variations on this more intense politics as usual when fashioning a more right-wing populist federal bench. Trump and Senate Republicans moved more quickly than any previous regime to fill all federal judicial vacancies but did not attempt to create new judicial offices. Republicans urged senior conservative justices to resign so that they could be replaced with younger conservative justices, but made no effort to remove more senior liberal justices from the federal bench. In a less polarized environment, Republicans might have regarded the charges of sexual assault against Brent Kavanaugh as disqualifying, particularly when Kavanaugh appeared to commit perjury repeatedly at the Senate hearing to determine whether he was qualified to sit on the highest court in the land. With one exception, however, Republican senators decided to support the Kavanaugh nomination rather than require President Trump to nominate another justice who might be a less reliable judicial conservative.

This more intense politics as usual was on full display when Justice Ruth Bader Ginsburg died on September 18, 2020, less than seven weeks before the next national election. President Trump immediately announced that he would nominate a justice to fill that seat within a week and did so eight days later. McConnell immediately announced the Senate would hold hearings on that nomination. These announcements were consistent with the constitutional text, which says nothing about how quickly a justice may be nominated and confirmed. No past precedent existed, given that no justice had ever died less

than two months before a national election during a time of substantial political polarization. The most that could be said was that Republican efforts to increase the influence of right-wing populism on the Supreme Court were hypocritical, given Republican claims in 2016 that no replacement should be made for a Justice who died nine months before a national election by the incumbent, and unseemly, given their declarations were made even before funeral services for Ginsburg had taken place.[90]

15.5 Populist pasts and presents

The past structures the present. Regimes that have similar aspirations and constitutional visions implement those aspirations and constitutional visions in different ways in light of different constitutional and regime inheritances. Stephen Skowronek observes that all new regimes are fashioned by the political conditions and institutional structures of the old regime.[91] Political leaders that appear similar may also differ in the justificatory logics available to them. Quentin Skinner notes how all revolutionaries must 'march backwards into battle'.[92] The differences between Trump and other right-wing populists capture the different ways right-wing populists implement constitutional visions in regimes that are born and not born populist.

Regimes that are born populist have an easier time implementing a constitutional vision than regimes that not so 'advantaged'. Populists in regimes not born populist must often engage in a complete restructuring of the national judiciary, which typically includes wholesale replacement of hostile judges. Trump merely tweets when he dislikes a judicial ruling and, with his allies in the Senate, fills up immediately all judicial vacancies that occur in the normal course of events. Populists in regimes not born populist must often engage in whole replacement of judges in order to challenge the long-standing use of comparative and international law as legitimate sources for interpreting the national constitution. The Supreme Court of the United States rarely used such materials before Trump took office. One judicial appointment was sufficient to guarantee that such materials will play no role in Supreme Court majority opinions for the foreseeable future. Where populists in other regimes must reverse entrenched practices, Trump at most must tweak (and tweet).

Trump also inherited a far more populist constitution than did right-wing populists in Europe, the Middle East and South Asia. The Constitution of the United States was framed, ratified, and significantly amended long before anyone had ever heard of the constellation of ideas that comprise thickened progressive cosmopolitan constitutional democracy. Twentieth-century progressives in the United States had developed modes of constitutional

90 See Dana Milbank, 'They Couldn't Even Wait until Ruth Bader Ginsburg Was in Her Grave' *The Washington Post* (September 20, 2020) (https://www.washingtonpost.com/opinions/2020/09/20/they-couldnt-even-wait-until-ruth-bader-ginsburg-was-her-grave/).

91 Stephen Skowronek, *Building a New American State* (Cambridge University Press 1982) 285.

92 Quentin Skinner, *Visions of Politics* (Vol. I: Regarding Method, Cambridge University Press 2002) 150.

interpretation that justified transforming the United States into a thickened progressive cosmopolitan constitutional democracy. Still, as vibrant interpretive traditions and practices provided Trump and his allies with the constitutional materials necessary for claiming that the existing constitution, without any changes, was committed to their distinctive populist vision and not the progressive vision of their political rivals. Right-wing populists in the United States could claim to be originalists, however bad their history. Other right-wing populists faced a far more daunting constitutional landscape when first taking office. Fidesz in Hungary and PiS in Poland confronted constitutions drafted within recent memory known to be committed to some version of thickened progressive cosmopolitan constitutional democracy. They could not be originalists because not even a bad constitutional history was available to justify their constitutional agenda. This inherited constitutional landscape explains America, and only American right-wing populists could adopt constitutional originalism as a governing philosophy without having to alter the constitution and constitutional politics significantly to maintain power and make their constitutional vision the official law of the land.

The extent to which the United States was born right-wing populist challenges those who would prefer a more progressive or left-wing populist regime. One challenge is gaining control over the federal judiciary. A coalition of progressive cosmopolitans and left-wing populists may have to emulate in part right-wing populists abroad if they wish to prevent a right-wing populist federal judiciary from playing havoc with their legislative agenda. President Biden will inherit a federal judiciary far more hostile to liberal constitutionalism than President Trump inherited a judiciary hostile to right-wing populist constitutionalism. Reconfiguring that judiciary may require tactics more similar to those that right-wing populists recently employed in Poland than those right-wing populists recently employed in the United States. The other challenge is providing a justificatory logic for that new regime in a nation that was arguably born populist. One path is that of being born again. American progressives and left-wing populists might imitate foreign progressives and populists by writing a new constitution that better expresses left-wing constitutional commitments and constructs the democratic institutions most likely to achieve that constitutional vision.[93] The more likely path is the distinctly American route of renaming the baby. Just as the person once known as Jonathan can be called John or even Jane, so with some tweaking in the particular persons and texts, the same ancient framers who right-wing populists ritually invoke when supporting presidential power and regulations on sexuality can be invoked by constitutional movements favoring legislation and sexual freedom.[94] The choice between these strategies is nevertheless contingent on progressives and left-wing populists gaining the power necessary to make their constitutional vision the law of the land. As the old saw goes, the first step in the recipe for rabbit stew is to find a rabbit.

93 See Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It*) (Oxford University Press 2006).

94 See Balkin (n 66).