

## KATRINA, THE CONSTITUTION, AND THE LEGAL QUESTION DOCTRINE

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Does the Fourteenth Amendment and its Equal Protection Clause—the promise that no state shall deny “equal protection of the laws”<sup>1</sup>—require that public officials, either state or federal, use their sovereign power in such a way as to reduce debilitating poverty? More modestly, does this Constitutional commitment to the “equal protection of the laws” require that public officials aim to ameliorate, if not eliminate, the multiple vulnerabilities of this country’s poor? Alternatively, isn’t it possible that the Fourteenth Amendment’s grand, Constitutionalized guarantee of equality—borne, after all, of struggles over enslaved laborers—carries an anti-caste or anti-subordination mandate, and is therefore at least in tension with the exploitation in the workplace of poor people for the economic profit of others? Might the Fourteenth Amendment be read as Constitutionally delegitimizing the extreme economic inequalities, the physical and mental insecurities, and the debilitating vulnerabilities to risk that are occasioned by unregulated capital, and as constitutionally mandating a national, a state, or a local response?

These questions or questions like them recur, somewhat hauntingly, throughout the Constitutional scholarship of the last half-century. The late Charles Black argued eloquently at the end of his storied career that although the Constitution, as developed by the Court up to the mid-century mark, carried no such meaning, he could nevertheless envision a day in the not too distant future when it might be authoritatively read to so require.<sup>2</sup> The Constitution, he claimed, in a declaration of Constitutional utopianism, and all Supreme Court authority to the contrary notwithstanding, contained positive rights to a minimal level of welfare that a more discerning and

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1. U.S. CONST. amend. XIV, § 1.

2. CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* (1997).

compassionate Court would one day come to recognize.<sup>3</sup> Professor Frank Michelman in the late sixties quite famously put forward a much more conventionally lawyerly although equally heroic argument that the Warren and Burger Courts' caselaw, properly if capaciously read, established the basis for the recognition of some welfare rights under certain circumstances.<sup>4</sup> No need for utopianism, Michelman's lawyerisms implied; extant authority, properly construed, leads directly, if somewhat complexly, to the desired result. Continuing in the tradition of loyal Constitutional opposition, Professor Peter Edelman argued in the late eighties that poor people, like women or the mentally retarded, should be recognized as a quasi-suspect class, such that legislation that directly targets them or adversely impacts their interest should draw some degree of heightened scrutiny by courts.<sup>5</sup> He has recently reinvented that argument toward the end of suggesting that the recent welfare reform act,<sup>6</sup> passed over his vigorous and principled protest during the Clinton Administration,<sup>7</sup> is unconstitutional and ought to be held as such.<sup>8</sup> A few years ago, Cass Sunstein tried to breathe fresh air into FDR's attempt of three-quarters century back to craft a second Bill of Rights—a Bill, this time, that would inure not to the benefit of iconoclasts, dissidents, despised minorities, outcasts, and outlaws, but rather to the benefit of the country's poor.<sup>9</sup> Martha Nussbaum has weighed in from her vantage point in the humanities: the very idea of Constitutionalism itself, she argues, at least in liberal democracies or republics, and certainly including our own, should be understood as entailing that states are obligated to ensure that all citizens enjoy those basic capabilities necessary to lead a decent life.<sup>10</sup>

3. *Id.* at 141–65. For commentary on Black's suggestion, see Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779 (2004), and Robin West, *Response to State Action and a New Birth of Freedom*, 92 GEO. L.J. 819 (2004).

4. Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) [hereinafter Michelman, *Protecting the Poor*]; Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973) [hereinafter Michelman, *Pursuit*].

5. See Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987).

6. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, H.R. 3734, 104th Cong. (1996).

7. Mary McGrory, *Voting with Conscience, and Feet*, WASH. POST, Sept. 17, 1996, at A2.

8. Peter Edelman, *Welfare and the Politics of Race: Same Tune, New Lyrics?*, 11 GEO. J. ON POVERTY L. & POL'Y 389 (2004).

9. CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* (2004).

10. MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000).

To state my premises upfront, I believe that the Constitution does so require. The presence of widespread, unaddressed, and ignored impoverishment in our cities and rural counties, I “can’t help”<sup>11</sup> but believe, constitutes a breach of our collective moral and Constitutional obligations. Because of that, I “can’t help” but also believe that the failure of local, state, and federal authorities to protect the poor in the City of New Orleans against the ravages of that poverty in the aftermath of Hurricane Katrina and the breach in the levees that came in its wake, constitutes the greatest Constitutional failure of our young democracy, at least since the advent of Jim Crow. I also “can’t help” but know, however, that no Court will ever so hold, and for reasons that go far deeper than either political ideology or institutional constraint.

In this paper I will not develop the case for constitutionally protected welfare rights—I have tried to do that elsewhere.<sup>12</sup> Instead, I want to explore the tension between what I will take to be at least a *plausible* account of the state’s Constitutional obligations to the poor, and what seems to me as at least equally self-evident, to wit, that no American court will discover and then impose such Constitutional obligations upon recalcitrant state or federal legislators. My conclusion will be pragmatic. I want to urge those who feel likewise regarding the Constitutional obligations of state actors, to redirect their hermeneutic skills away from the forum in which such arguments will likely never prevail—the courts—and to those fora in which they may well make a difference: legislatures that may indeed have unrecognized moral and Constitutional duties to legislate on behalf of the well-being of all.

In order to reach this pragmatic conclusion, however, I hope to show that a good deal of jurisprudential work is in order. To make the case for non-adjudicated Constitutional welfare rights—indeed, to make the case for a non-adjudicated Constitution—we need to reexamine not only our understanding of Constitutionalism. More fundamentally, we need to reexamine our jurisprudential understanding of the nature of law.

In Part One below, I argue very briefly—because the territory is so familiar—that the question, “Does the Constitution contain welfare rights?” has one very clear and not very heartening answer, if we mean, by the Constitution we are expounding, the Constitution as read and interpreted by courts—what I will call the “adjudicated Constitution.” I will also urge that

11. The phrase comes from Oliver Wendell Holmes’s essay, Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1919); the sentiment, obviously, does not.

12. See Robin West, *Is Progressive Constitutionalism Possible?*, 4 WIDENER L. SYMP. J. 1 (1999) [hereinafter West, *Progressive Constitutionalism*]; Robin West, *Rights, Capabilities, and the Good Society*, 69 FORDHAM L. REV. 1901 (2001) [hereinafter West, *Good Society*].

the meaning so ascribed—that the Constitution contains at most a right to formal equality, with no substantive content—will likely hold constant no matter what the political leanings of the Court’s personnel. The Court has never held that the Constitution contains any positive rights to welfare, and likely will never so hold, and for reasons that are not particularly ideological and that are by no means indefensible. This is not, however, the only answer to the question the Constitution contains; in fact, the text of the Constitution itself suggests something very much to the contrary. I will conclude from this disjunction between text and adjudicated meaning something similar to what a growing chorus of “popular Constitutionalists” now maintain: our shared reliance on not only the Court’s *ultimate* authority, but its *exclusive* authority, to interpret the Constitution has blinded us to Constitutional meanings and to Constitutional obligations we might otherwise see.<sup>13</sup> This conclusion has particular significance, I will suggest, in the context of poverty: a strong case can be made that the Constitution does indeed speak to the problems of the poor, albeit not through the oracular voice of the Supreme Court. Hence, the Constitutional duties of our elected officials, both state and federal, to legislate in such a way as to address severe economic inequalities might be not only unrecognized but obscured by our growing acquiescence in the Court’s growing authority as the exclusive as well as ultimate interpreter of Constitutional meaning.<sup>14</sup>

In Part Two, I explore in more detail some of the consequences of our reliance on the adjudicated Constitution, both in relation to poor people and to our political culture more broadly. As James Bradley Thayer famously argued over a century back, widespread societal and governmental reliance on the courts for Constitutional guidance and regulation can shield the rest

13. This is not a new argument by any means. See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978). It has become commonplace that adjudication places constraints on the meanings that can be found in the constitution, and for a range of reasons. What remains undeveloped, however, is what alternatives there might be to adjudicative interpretation of Constitutional norms. Larry Kramer’s book and scholarship opens up this question.

14. The closest argument that I have found in the literature to the connection between a legislative constitution and welfare rights that I propound in the text is in a student note. In Mary Beth Lipp, Note, *Legislators’ Obligation to Support a Living Wage: A Comparative Constitutional Vision of Justice*, 75 S. CAL. L. REV. 475 (2002), Lipp argues for a popular Constitutional right to a living wage, and for the conscientious legislator’s obligation to provide one. I think her conclusions are sound—my only reservation is that I am not convinced that legislators or courts will be swayed by the sort of Comparative Constitutionalism she embraces. Rather, I think, and argue in the text, that for the legislative constitution of the sort both Lipp and I endorse to get off the ground will require not so much cosmopolitan borrowing from afar, but rather substantial philosophical rethinking of our understanding of American law, American Constitutionalism, and domestic obligation. For other related arguments, see Mark A. Graber, *The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory*, 58 OHIO ST. L.J. 731 (1997), and ELIZABETH BUSSIERE, (DIS)ENTITLING THE POOR: THE WARREN COURT, WELFARE RIGHTS, AND THE AMERICAN POLITICAL TRADITION (1997).

of us from our own Constitutional obligations and can certainly dull the felt obligations of legislators to heed Constitutional duties and constraints.<sup>15</sup> I think that Thayer was right and that his warning is very much to the point in this context: our reliance on courts may indeed have blinded us to the Constitutional obligations of legislators to attend to the needs of the country's poor. I want, however, to broaden the point. What I want to add to Thayer's warning is that in an era such as our own, when Constitutionalism is so widely assumed to be expressive of the nation's moral self-understanding, and hence its moral obligations, that same reliance can obscure not just the narrowly legalistic Constitutional obligations of legislators, but their moral and political duties of statesmanship, leadership, and governance as well. It also, I will argue, obscures the nature of even their "legal" obligations, where "legal" connotes something other than what a bad man believes that the Courts will do in fact.

I will call this general tendency—the tendency by which the moral, legal, and Constitutional obligations of legislators become obscured by undue reliance on judicial Constitutionalism—the "legal question doctrine." By that phrase, I mean to refer to an ill-advised and illogical chain of inference that is deeply embedded, although never explicitly recognized, in our Constitutional-political culture. Briefly, the chain of inference runs like this: first, substantial moral questions about governance, in our culture, are understood by many to be, virtually by definition, "Constitutional" questions; second, "Constitutional" questions are widely understood to be, and again virtually by definition, "legal" questions; and third, "legal" questions are then understood, again by definition, as "*judicial*" questions, meaning, questions *of law* for courts to decide. Moral questions about governance—questions about whether states should criminalize abortions, or whether the state should criminalize the possession of firearms, or whether states must provide for the basic welfare of all citizens, or whether states should criminalize hate speech, and so on—thereby become, through this three-fold definitional chain of inference, questions of law awaiting judicial resolution. The legal question doctrine, as I use the phrase, refers to this transformation—a transformation, wrought by Constitutional culture, of moral and political questions about governance into judicial questions about law.

The legal question doctrine, I believe, has very bad consequences for our overall political culture: courts are understood to be the domain of rational, responsible, and politically noble discourse; legislatures, by default,

15. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

become the domain of horse-trading and swashbuckling. The consequences for poor people, though, are even worse. The result of this migration of the question concerning the duty we owe the poor out of the realm of the moral and political, and into the realm of the judicial and legal, seems pretty clear. If the Court's understanding of the States' Constitutional obligations to address the problems of poor people is convergent with the scope of our moral and political obligations to do so, as the legal question doctrine seemingly implies, then the latter, no less than the former, is quite narrow indeed.

In Part Two I also identify and discuss two possible, and I think plausible, responses to the dilemma posed by the legal question doctrine, both with respect to poverty and to politics more generally. Both I think are fairly implied (although not argued) by some directions in contemporary Constitutional scholarship. The first position I call "Constitutional skepticism," and it has both substantive and, loosely speaking, "procedural" dimensions. The Constitutional skeptic believes, simply, that transforming moral and political questions into Constitutional questions is a wrong turn—Constitutionalism itself is a bad idea, regardless of who, or what institution, bears ultimate responsibility for interpreting Constitutional meaning.<sup>16</sup> The skeptic, in other words, doubts the wisdom of the first definitional inference in the legal question doctrine: the transformation of moral into Constitutional questions. The second possible response I will call "Constitutional romanticism." Constitutional romantics, as I will use the phrase, question not so much the wisdom of turning moral questions into Constitutional questions, but rather the wisdom of turning Constitutional questions into questions of ordinary law. (Thus, in terms of the legal question doctrine, they problematize the second prong: the transformation of Constitutional questions into legal questions.) Accordingly, Constitutional romantics, notably Dean Larry Kramer of Stanford Law School, and

16. In contrast to the position I have called "Constitutional romanticism," this position is largely hypothetical; as noted below, there are very few Constitutional scholars in the legal academy who take it. Outside of law schools, it is not so uncommon, particularly on the political left. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1986); Michael Mandel, *Against Constitutional Law (Populist or Otherwise)*, 34 U. RICH. L. REV. 443 (2000). Some critical race literature also sounds these intensely skeptical themes. See DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987). For the most part, however, our deepest Constitutional skeptics eventually embrace an idealistic if radically counter-factual interpretation of the document, while knowing that no Court in the near future will accept it. Catharine MacKinnon's skepticism fits this model, for example, see Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991), as does Mari Matsuda's, as expressed in Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987). I explore this dynamic in Robin L West, *Constitutional Scepticism*, 72 B.U. L. REV. 765 (1992).

possibly also Mark Tushnet of Georgetown, have recently argued against judicial exclusivity and for an enriched, populist, and more inclusive conversation, among citizens and officials both, about the breadth of our Constitutional rights and duties.<sup>17</sup> Such a conversation might generate multiple understandings of the Constitution that are fair to the text of the document, but that go considerably beyond the interpretations the Court has seen fit to impose. Although neither Kramer nor Tushnet make the case, it is certainly possible that such an enriched popular conversation about the meanings of Constitutionalism might yield, at least in popular Constitutional consciousness, an awareness of our Constitutional obligations to provide better lives for poor people.<sup>18</sup>

I have a lot of sympathy for both of these positions. They both strike me as plausible responses to the legal question doctrine, and as preferable to what I view as the paralyzed state of our politics—a paralysis at least partially brought on by the legal question doctrine and the over-reliance on courts it engenders. They also, at least potentially, speak to the inegalitarianism of contemporary American society—the former by identifying Constitutionalism as a part of the problem that must be overcome, and the latter by expanding the scope of what we view as authoritative Constitutional pronouncements beyond judicial perimeters. I will ultimately urge, however, that there is a third possible response to the adjudicative Constitution that in my view the current scholarship—both the romantic and skeptical—somewhat obscures. The problem with the legal question doctrine may rest not only in our tendency to constitutionalize moral questions, nor in our tendency to treat Constitutional questions as legal questions, but rather in our relentless post-realist tendency to assume that legal questions, because they are legal, must therefore be questions best suited for judicial resolution. This is the position I would like to simply put on the table in this piece. Our Constitution might look very different if we seriously regarded it as an aspirational document intended for a legislative, rather than a judicial, audience, and hence a legislated, rather than adjudicated, interpretive response. Specifically, it might yield a different set of responses, at least with respect to the Constitutional and moral obligations owed by state actors to the country's poor.

In Part Three of this piece, I will look at what I propose to call the “legislated Constitution”—the Constitution looked to by the conscientious

17. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Larry Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4 (2001).

18. Mary Beth Lipp makes the connection explicit. Lipp, *supra* note 14, at 479–80.

legislator as she seeks to fulfill her political obligations—and note how it contrasts with the adjudicated Constitution—the Constitution looked to by the conscientious judge fulfilling his or her legal obligations to state the law. I will briefly argue that the legislated, rather than either the adjudicated Constitution or the popular Constitution, can plausibly be read as guaranteeing an equality that is supportive of egalitarian goals rather than in tension with them, and again, that this is true no matter who is in power.

Lastly, I will suggest that the coherence of the legislated Constitution depends, in part, upon an accompanying jurisprudence (or, awkwardly, legisprudence), and it is a jurisprudence that is currently entirely missing from even the most utopian Constitutional theorizing. I will conclude by suggesting what that jurisprudence might look like, and what its creation (or rediscovery, whichever you prefer) will require.

### I. EQUALITY AND THE ADJUDICATED CONSTITUTION

First, on equality and the adjudicated Constitution. Again, the question as posed by two generations and running of progressive legal scholarship, and to my mind painfully evoked by the ongoing debacle in the City of New Orleans, is whether the Fourteenth Amendment's various guarantees, but particularly the guarantee of "equal protection of the laws," imply the existence of Constitutionally protected social or economic welfare rights, such as to guarantee to poor people a minimally decent life, and consequently mandate some level of congressional or state legislative intervention so as to give those rights substance.<sup>19</sup> Now, as a matter of both current and past judicial doctrine, posing the question in this way is to answer it. As virtually all legal commentators would surely agree, this question is almost absurd. Doctrinally, it is as clear as these things can ever possibly be that the Equal Protection Clause, as expounded by courts, carries no such meaning.<sup>20</sup> The Supreme Court has never come close to so holding. Rather, and with steadfast consistency, the Court, over the last century, has embraced what we now call a "formal" rather than "substantive" interpretation of the equality mandate, the bottom line effect of which is to purge from the Constitutional duty of lawmakers to provide "equal protection of the

19. For a history of this possibility, both on and off the Court, see William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 *FORDHAM L. REV.* 1821 (2001).

20. See *United States v. Morrison*, 529 U.S. 598 (2000) (holding that the Equal Protection Clause does not require protection against violence, and that Congress does not have power under Section 5 to determine whether unequal enforcement of prohibitions on violence is sufficiently egregious to trigger a remedy to a Section 1 violation); *Washington v. Davis*, 426 U.S. 229 (1976) (stating that the Equal Protection Clause does not require substantive racial equality); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that the Equal Protection Clause does not require a public education).



laws” any *positive* duty whatsoever to act, whether toward the end of protecting people or otherwise. What the Clause imposes, again according to almost a hundred years of equality jurisprudence, is a duty on legislators to *refrain* from acting in particularly irrational ways.<sup>21</sup> Legislators must treat like groups alike and different groups differently when drawing lines, and when they do so, they must do it rationally rather than irrationally. They must not make distinctions between people on the basis of spurious difference not reflected in reality.<sup>22</sup> When they depart from this mandate—when they treat groups differently that are in truth the same, and particularly when they do so out of racial or ethnic or sexual animus—they have violated the Equal Protection Clause, and the law that reflects these spurious distinctions may be struck. Legislators are required, by virtue of the Court’s understanding of the Equal Protection Clause, to draw lines in a rational fashion when dispensing government largesse or sanction.<sup>23</sup> The Court has not interpreted that phrase (or any other) so as to require that legislators act in such a way as to assure all citizens some measure of equality, or more modestly, to assure our poorest citizens some minimal hold on society’s resources.<sup>24</sup>

Let me elaborate on the underpinnings of the Court’s formal understanding of the Equal Protection Clause for just a moment. What the “equal protection” promised by the Fourteenth Amendment requires, according to the Court’s interpretive gloss, is a limited right to be free from the legislator’s casual or malign discriminatory instincts toward specified groups, as expressed in laws that unequally discriminate for irrational reasons against those groups’ members. Thus, the evil against which the citizen needs Constitutional protection, according to the Court’s understanding of the Clause, is the lawmaker and the law itself, and specifically the law that is “un-

21. The Court has also held repeatedly over the last century that the liberty protected by the Due Process Clause likewise imposes no positive obligations on states, or lawmakers, to actually *do* anything for anybody; it imposes only negative constraints against certain forms of legislative malfeasance. See *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005) (holding that the Due Process Clause does not grant a property right in a restraining order against a private party); *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189 (1989) (asserting negative rights only; no right to a police force). Thus, the Fourteenth Amendment in its entirety, if we put these two lines of authority together, confers only so-called “negative rights” against various sorts of overly intrusive or discriminatory law; it confers no “positive rights” on citizens to anything government might provide, from education, to police protection, to health care or housing. Welfare rights, no matter how defined, given this view of the Fourteenth Amendment’s core meaning, are cleanly off the table.

22. See 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 14–15 (3d ed. 2000).

23. See *Rodriguez*, 411 U.S. at 33 (holding that “it is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection”).

24. This deep historical antipathy of the Court to the very idea of positive rights, and of state obligations to provide for them, furthermore, has worsened, not lessened, over the past twenty years. It shows no signs of abating. See *Gonzales*, 125 S. Ct. 2796.

equal” because irrationally discriminatory. The vague phrase “equal protection” is thereby given a specific, and narrow, content. The point of the Clause is not a broad guarantee of protection (equal or otherwise) against various unstated evils or harms—such as private violence, or natural catastrophe, or hurricanes, or war, or poverty, or economic subordination, or any other interference with welfare—but rather, a guarantee of protection against pernicious laws and lawmakers that irrationally discriminate against some group of citizens when, and if, such affirmative government services are offered. The modifier “equal,” on this reading, is reduced to a limited guarantee of legislative rationality. The point of the Clause is not to render various groups equal, but to render them, if a host of conditions are met, equal beneficiaries of some governmental actions, and then only if the inequality is a function of irrational discriminatory animus. The interpretive reduction of the word “equal” to something meaning closer to “rational,” and the consequent understanding of equal protection as protecting only a limited right against discrimination, rather than a robust right against subordination, and a correlative right to a more substantive equality, has of course been mightily criticized by the critical, feminist, and race-based critics of the Court’s equality jurisprudence.<sup>25</sup>

What has gone relatively unnoticed, however, or at least un-remarked upon, in the course of the development of this judicial interpretation of the

25. This critique of “formal equality” and its limitations is the common point of departure of virtually all of the critical scholarship on the Court’s equality jurisprudence, ranging from the early pieces from the Critical Legal Studies movement on race discrimination, through later feminist and critical race scholarship. Much of this critical argument was either made or anticipated in Owen Fiss’s brilliant piece on the shortfalls of the Court’s equality jurisprudence, in his essay from the mid-seventies. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976). A related argument was made by Alan Freeman in his extremely influential piece on race discrimination law. Alan D. Freeman, *Antidiscrimination Law: A Critical Review*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 96 (David Kairys ed., 1982). The thread of both Fiss’s argument and Friedman’s were later incorporated into Catherine MacKinnon’s brilliant synthesis and redirection of this critique of formal equality to the situation of women, which later became the core of her powerful rearticulation of radical feminism. See CATHARINE A. MACKINNON, SEX EQUALITY (2001); MacKinnon, *supra* note 16. Critical race theorists elaborated and considerably modified the claims with respect to race, arguing against the dominant understanding of equality, but also against the Critical Legal Scholars’ critique of rights and rights discourse. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987). While these scholars and many others rigorously criticized the Court’s employment and deployment of formal equality in the context of race and gender law, I am unaware of critical treatments of the Court’s equality jurisprudence in relation to its impact on poverty. In other words, while there has been a steady stream of utopian and positive arguments to the effect that the Fourteenth Amendment can and should be read so as to protect welfare rights, see sources cited *supra* note 21, there has been little purely critical attention focused on the extent to which the Court’s embrace of formal equality has stunted those efforts—in a way that might parallel the treatment of the Court’s jurisprudence with respect to race and gender (other than my own). I am sure I am missing some, though, and will happily stand corrected, as will this footnote.

phrase, as well as in the course of development of the mountains of criticism that have responded to it, is the fate of the two-letter preposition *of*, in the phrase “equal protection of law.” The “of” in the phrase “of law,” in the Court’s reading of the Amendment, has been effectively replaced by the preposition “against.” We are not, under the judicial construction of the phrase, entitled to equal protection *of* the law, or *of* the state, or *of* the law-maker, in virtually any sense. We are, rather, somewhat entitled to equal protection *against* law—or, at least, some of us are sometimes protected against one kind of bad law, and that is a law that is bad because it irrationally discriminates on the basis of a short list of specified characteristics, such as race, ethnicity, sex, or religious affiliation. That transformation of the Clause’s meaning—from “equal protection *of* law,” to “equal protection *against* law”—I want to suggest, has been hugely consequential. The Fourteenth Amendment, intended, perhaps, as a guarantor of the benefits of law to those who had previously not enjoyed its protections, and, hence, as a guarantor against legislative nonfeasance, has become instead a guarantor against legalistic malfeasance. Law itself, on this formal understanding, rather than construed as a blessing to be bestowed equally on all citizens, is construed as an evil against which the Constitution stands guard.

What has this formal rather than substantive understanding of equality meant, in practice, for the country’s poor? What sort of “equality” is guaranteed, given a formal understanding of equality, by the Constitution’s equality clauses? Very little, and then only if a slew of conditions are first met. The Constitution’s “equality” guarantee might—*might*—prohibit legislators from intentionally and irrationally discriminating against the poor in the bestowal of various privileges, rights, or social goods. Thus, it is arguable, given our doctrine, that legislators cannot deny to poor people rights or privileges or goods solely on the grounds of their poverty, where that poverty bears no relation to any legitimate public purpose, just as they cannot deny such rights on the basis of race. So, were the City of Baltimore, for example, to open a public swimming pool, but then deny admission to citizens who earn under \$10,000.00 a year, and regardless of their ability to pay the admission charge, it is quite possible that no matter what the stated reason for doing so, a federal court might find that action to be an unconstitutional denial of poor people’s right to equal protection of the law.<sup>26</sup> Poor people, like black people, or women, or the disabled, such a court might well say, are indeed entitled to this guarantee of formal equality as those guarantees are now understood. Like members of other so-

26. See LOUIS MICHAEL SEIDMAN, CONSTITUTIONAL LAW: EQUAL PROTECTION OF THE LAWS 240 (2003).

called suspect classes, they are entitled not to be discriminated against by lawmakers motivated by animus against them, rather than by some plausible vision of the public good.

To be sure, this is not nothing—poor people are sometimes irrationally discriminated against by legislators (likewise, gays, lesbians, women, blacks), and when much more than swimming privileges are at stake.<sup>27</sup> Thus, read generously, we might infer from the Court's authority that poor people cannot be denied not only the right to swim in a public pool, but, say, also the right to drive out of New Orleans in the event of a flood if rich people are accorded that right. Poor women cannot be denied the right to pay for and obtain an abortion if rich people are accorded such a right. And of course, in some very rare instances, the Court has gone further. If a "fundamental" right is at stake, the protection may be more absolute. Poor people cannot be denied the right to vote by the imposition of a poll tax, even if the tax is imposed on all. But these "fundamental rights" are considerably more rare than the proverbial bald eagle. There is no such fundamental right, the Court has held, to a decent public education,<sup>28</sup> to the protection of a police force against violence,<sup>29</sup> or to abortions;<sup>30</sup> there is no reason to anticipate a holding that there is such a right to health care, shelter, or food. As a weapon for combating poverty itself, the promise of formal equality is baldly—even grotesquely—illusory. It is like a bad joke, the American version of letting them eat cake, or not denying poor people the right to sleep under bridges (or on them), whenever rich people may. It is not, after all, *poverty* that is targeted by an anti-discrimination principle, even if such a principle can be read capaciously so as to prohibit discrimination against the poor. It is, rather, the irrational failure to grant poor individuals goods or privileges where that grant would be forthcoming but for the individual's impoverishment, and for no good reason. It is the failure, in effect, to spot the diamond in the rough and give the diamond his due, not the nickel and dimed living conditions of those persons—whether they be diamonds or not—who actually live in the rough, that is targeted by formal rather than substantive equality. For the occasional diamond so uncovered, this might be substantial protection indeed. For poor people in general, however, this is nothing—no protection at all.

27. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (stating that the burdens of differential welfare requirements regarding residency are an unconstitutional infringement on the right to travel); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (deeming the poll tax on voting unconstitutional).

28. *Rodriguez*, 411 U.S. 1 (1972).

29. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

30. *Planned Parenthood of Se. Penn. v. Casey* 505 U.S. 833 (1992).

Well—has the Court been right, all these years, in so reading the phrase? Or, does it become right by virtue of reading it in this way? Perhaps—there is certainly something to the bromide that the Constitution means what the Court says it means, particularly when a judicial interpretation of the phrase has been as robust as this one. Nevertheless, it merits attention that the Court’s displacement of the “of” with “against,” in the phrase “equal protection of law,” as well as the “formal” understanding of equality that follows from it, is more than a little in tension with the Fourteenth Amendment’s plain meaning, language, and logic, as well as with its non-controversial history. Let me start with language, plain meaning, and logic. The Amendment does not say that all citizens are granted a right to equal protection *from* law or *against* law. It says all citizens are granted a right to the equal protection *of* law. Laws, and the states and legislators that produce them, are constructed by the most natural meaning of the Amendment as being on the whole rather good things that states ought to bestow equally, so as to protect people from some evil or harm from which they might suffer in the absence of law’s protection. It does not posit *law* as the evil against which individuals need protection. Rather, law is construed by the Amendment to be a part of the solution, as we used to say, not part of the problem. The *absence* of law is constructed by the most natural meaning of that sentence as being the bad thing from which citizens must be protected. Again—by the Amendment’s language, it is the absence of law, not the discriminatory law, that is conducive to the conditions against which states have a duty to protect us. Likewise, the Court’s continuing insistence that the Amendment construed as a whole protects only negative rights against legislative malfeasance, rather than “positive rights” to legislative action, seems belied by the Clause’s most basic grammar. Just remove the double negative: “*no* state shall *deny*.” If no state shall deny, then all states must grant. It is state *inaction*, not state action, that is unconstitutional, if this Clause is given its natural meaning. If no state shall passively deny, then all states must actively grant. They must do something. And, one thing they must do is protect people, and equally, and they must do it, furthermore, through affirmative acts of law-making.

The Amendment does not say what we are to be protected, by law, from, but the history of the phrase, dating from the early British understanding, both in law and in political theory, of what equal protection of the law requires of sovereigns, as well as the history of the Fourteenth Amendment and of the Reconstruction Amendments in their entirety, is all strongly suggestive. Steve Heyman’s recent scholarship argues persuasively that the phrase “the protection of law,” in early English Constitutional history and practice, referred to the duties of sovereign lawmakers to

use law affirmatively to protect citizens against a host of evils—natural catastrophe, private infringements of civil rights, private violence, and war, most notably.<sup>31</sup> Historians of the Fourteenth Amendment, working from the groundbreaking work of Professor Jacobus tenBroek,<sup>32</sup> have urged that the Fourteenth Amendment's Equal Protection Clause was (among much else) intended to address the states' refusal to protect freed slaves, through law, against a range of private infringements on their welfare, including a wave of private lynchings that terrorized, and subordinated, this newly freed population. Any number of scholars and judges concur in this bare, minimalist, but nevertheless positive understanding of the nature of the right bestowed.<sup>33</sup> By requiring "equal protection of law" against a range of subordinating private wrongs, the states were required by the Amendment to equalize the legally bestowed "civil rights" of blacks and whites. Thus, the framers of the Fourteenth Amendment envisioned, as an ideal, that states would use their law so as to protect all citizens equally against private wrongs. If we were really to take the history of the Clause seriously, then it seems that the Amendment squarely rests on a conception of private wrongs and private or civil rights that is quite substantive indeed: states must use law to protect citizens equally against unspecified but well understood private wrongs. Should such a state fail to provide that protection, and to provide it equally to black as well as white, Congress was authorized under Section 5 to step in.<sup>34</sup>

To be sure, this does not logically entail an argument for positive welfare rights. The sufferance of unchecked poverty is not the same thing as the sufferance of lynchings, the deprivation of private civil rights, or unchecked violence. But they are similar, I believe, in ways that ought to be relevant to our understanding of the Fourteenth Amendment's promise. The fears attendant to extreme poverty are in many ways not unlike the fears attendant to unchecked private violence: both poverty and violence render

31. Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991).

32. The historical argument that the Equal Protection Clause was intended by its framers to target state inaction rather than state action, and accordingly constructs positive rights to protection, rather than negative rights against irrational legislation, was first made in the legal literature, I believe, in JACOBUS TENBROEK, *EQUAL UNDER LAW* 237–39 (rev. ed. 1965).

33. See, e.g., Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1374–75 (1990); Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988); Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37 (1990); LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 246–47 (1985).

34. I have elaborated on the argument in the text regarding welfare rights in particular in West, *Progressive Constitutionalism*, *supra* note 12, and West, *Good Society*, *supra* note 12. Heyman's writings on the meaning of the Equal Protection Clause, and its English heritage, can be found in Heyman, *supra* note 31.

life nasty, brutish, and short. Extreme poverty, no less than extreme violence, is a consequence of the unchecked private exploitation of a weak subordinated class by the strong—the economically weak, in the case of poverty, the politically or physically weak, in the case of violence. Both forms of private exploitation, furthermore, can be addressed by law, and the risks attendant to them can be accordingly minimized. Life is better for all when they are. When they are not—when some of us are unprotected by law against unchecked private, economic exploitation, no less than when some of us are unprotected by law against unchecked private violence—we risk the creation of a caste society that is squarely at odds with our post-reconstruction Constitutional form of governance.

Obviously, this is contestable, but my point here is only that it is *possible*; the strength of the argument depends upon the strength of the analogy. We have a state—we enter the social contract—in order to achieve certain civil ends, and the state is obligated, by that contract, to protect us in such a way as to secure those ends. That is why we give up, as Hobbes shows, our natural rights to private enforcement of our lives and property.<sup>35</sup> The Equal Protection Clause extends the duty of the state to do so to all citizens, including the newly freed slaves and their descendants. Thus, it is at least possible that the Equal Protection Clause, read in a natural and generally historically uncontestable way, implies the existence of these duties on states and state actors and correlative rights on the part of citizens: the state must provide equal protection of the law against unspecified evils. I conclude from this only that the possible existence of minimal positive rights to be equally protected by law against the risks and vulnerabilities of extreme material deprivation caused by unchecked private markets—a right, that is, to some level of economic independence, a floor of basic human flourishing, or of human capabilities, or of a level of well-being—fits rather easily within both the plain meaning and the history of the Fourteenth Amendment's equality mandate. The possible existence of such positive rights of welfare should not be ruled out of bounds by the canard that the Amendment guarantees only negative rights, and then only negative rights to be free from one sort of pernicious, because irrational, law. The non-controversial history and the plain-as-plain-can-be language of the Amendment both belie that limited understanding of the Amendment's grand promise.

Why then, if all of this is truly as clear as the nose on your face, has the Supreme Court so steadfastly abided by its formal understanding of

35. THOMAS HOBBS, LEVIATHAN 153 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651).

equality, so seemingly belied by the history and language itself? Why, indeed, has it failed to even *acknowledge* these claims?<sup>36</sup> It seems to me that there are three possibilities. One possibility, suggested by a number of scholars, is institutional. Perhaps the Court has shied away from this as well as all other more substantive understandings of the Fourteenth Amendment's equality mandate, even in the face of history and text, because of institutional constraints. The Court wants to require only what it can confidently enforce, and while it can mandate that irrational and discriminatory laws be struck from the books—that action is relatively costless—it simply cannot enforce a broad anti-subordinationist or welfare-based understanding of equality upon unwilling state actors.<sup>37</sup> A second possibility is that the Court has chosen this particular doctrinal path, as well as a number of others over the last half century, for essentially political and ideological reasons.<sup>38</sup> I am dubious; I do not think this is a plausible account of the last half century of judicial practice. Rather than build that skeptical case, however, let me suggest a somewhat different explanation for the Court's attraction to formal equality and its hostility toward substantive understandings of equality. My suggestion is that at least a part of the story regarding the Court's insistence on a formal rather than substantive understanding of equality might be jurisprudential rather than either doctrinal, political, or institutional. It is not, I want to suggest, simply that the courts have made a doctrinal mistake, nor is the explanation that they are staffed by conservatives blind to the injustice and misery of poverty, nor is it that the courts do not have the institutional wherewithal to enforce a more substantive, rather than narrowly formal, understanding of the meaning of

36. The Court has also rejected other arguments for the protection of poor people through the Equal Protection Clause. See Edelman, *supra* note 5; Michelman, *Protecting the Poor*, *supra* note 4; Michelman, *Pursuit*, *supra* note 4.

37. See Sager, *supra* note 13.

38. This comes through loud and clear in the ACS's promotional literature, which seeks to equate the present position of progressive legal critics and constitutionalists with the position of conservative constitutionalists during the heyday of the Warren and Burger courts. According to the ACS, sometime in the 1980s, then out-of-power conservative constitutionalists sought to develop what they viewed as the true meaning of the Constitution, which they then embodied in documents that later became foundational for the Federalist Society. Still later those position papers became something of a blueprint for the present conservative Supreme Court, in its ongoing judicial re-interpretation of basic Constitutional law. The ACS aims to repeat this success story, but this time on behalf of progressive understandings of our foundational law. Progressive constitutionalists, the story goes, should use their relative respite from power, and develop understandings of the true and progressive meaning of the Constitution, so that a future Court, say in 2020, not beholden to current ideological perversions, can embrace it. See generally *THE CONSTITUTION IN 2020* (Reva Siegel & Jack Balkin eds.) (forthcoming) (collection of papers presented at the April 2005 meeting of ACS at Yale Law School). We might call this the "DaVinci Code" approach to Constitutional interpretation: the outgroup thinks of themselves as a secret society, holding the true story of the life of Jesus, awaiting the hospitable time period in which to release it.



equality. Rather, the Court might be drawn to formal rather than substantive understandings of equality in more or less the same way that bees are drawn to honey: formal equality runs deep in the judicial DNA.

Why? Look at one striking feature of the “formal” meaning of equality embraced by the Court that has gone relatively unexamined in scholarly literature: the degree to which the formal understanding of the Constitutional equality guarantee—that legislators must treat likes alike and differences differently, and must more or less rationally ascertain those differences—echoes, and in fact perfectly mirrors, judicial understanding of the requirements of *stare decisis*, of the meaning of precedent, of the meaning of legal justice, of the Rule of Law, and so forth. Judges, when deciding virtually all cases, *must* treat likes alike and rationally discern differences, and they must do so, furthermore, toward the end of doing justice.<sup>39</sup> Equipped with this understanding of the meaning of legal justice, of the Rule of Law, and of legal equality, courts over the last century have been faced collectively with the task of defining the “equal protection of law” required, by the Constitution, of legislators. Perhaps unsurprisingly, given this understanding of the meaning of justice, given our history of irrational racism emanating from legislatures, and given an incredibly wide degree of interpretive latitude, the twentieth-century Court, for good and for ill, wound up reading the equality provision of the Fourteenth Amendment as imposing the same legalistic requirement on legislators that it imposes on itself. Legislators, if subject to a mandate of equal treatment, no less than judges, who are subject to the mandate of the Rule of Law, must treat “like groups alike,” just as judges must treat “like litigants alike.” This is, after all, what equality and respect for the Rule of Law require of both branches. Legislators should only differentiate between groups for good reasons and not bad, just as judges should only differentiate between individuals for good reasons and not bad. Both branches should do so, furthermore, toward the end of maintaining as much continuity as possible, not disruption, between the past and the present. The meaning of the “equality” to be required of legislators, but interpreted by judges, is thus overlaid with the judges’ own understanding of the “equality” they require of themselves. Equal protection of the law in the judicial context clearly requires like

39. The literature on *stare decisis*, the rule of precedent, and their connection to the Rule of Law is enormous, but it is fair to say that the shared core of it asserts that judges must decide like cases alike, and they must do so because of their moral obligation to do justice. See PAUL W. KAHN, THE CULTURAL STUDY OF LAW 31–90 (1999); Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 87–89, 99–105 (1977).

treatment of likes—this is, again, the shared judicial understanding of what equality under law means. “Equal protection of law” in the legislative context, but as interpreted by judges, requires, then, no less, but also no more.

Now, my claim is that it is this overlay of the demands of adjudicative rationality (or non-discrimination) on the mandate of equal protection that the Constitution quite explicitly imposes on legislatures that has severely limited the substantive scope of the mandate. Constitutional equality, on the Court’s reading, requires that legislators behave rationally, just as *stare decisis*, precedent, and the Rule of Law require that judges do so in the face of rules and particulars, and it does so toward the end of conserving and preserving the institutions of the past with as little disruption as possible. Equality, so says the Court, requires no more. It does not require that legislators undertake legislation to reduce the substantive economic inequality between persons or groups of persons. It does not require that legislators use law to “protect” anyone from anything. It does not require that law be the means by which social or economic equality is guaranteed, or comes to pass, or at least becomes more likely than not. It requires only that when legislators legislate, they do so rationally. It targets law itself as the evil that frustrates equality, rather than inequality as the evil against which we might sensibly seek out law’s protection. It does so not because the language requires this reading or the history suggests it. If anything, the language and history both require something considerably more capacious. It does so, I think, because of judicial, jurisprudential habit. Legal equality, from a judicial point of view, means rational differentiation of cases toward the end of like treatment. Constitutional equality, then, from a judicial point of view, imposes that adjudicative understanding of the equal protection they are constitutionally obligated to deliver—and notably, only that adjudicative understanding of the equal protection they are constitutionally required to deliver—on legislators.

It seems to me that this overlay of a judicial understanding of what equality requires of judges, to a Constitutional understanding of what the Constitutional guarantee of equality requires of legislators, is not a lousy coincidence or an unfortunate verbal pun. Nor is it, in my view, a correctable doctrinal mistake. Formal equality is the jurisprudential ideal at the heart of the meaning of adjudicative law. Treating likes alike is what judges do when they are doing their jobs morally and doing it well, and the body of doctrine that emerges from that moral imperative and the craft that follows is precisely what adjudicative law *is*. Put that judicial ideal together with a undeniable social fact, to wit, that courts, as well as the larger legal culture, progressives as much as anyone else, both left and right, have ren-

dered the Constitution and Constitutional law a child of adjudicative law. The conclusion for the Constitutional meaning of equality, I think, is overdetermined. It is a perfectly natural, albeit unfortunate, inference that the equality guaranteed by that body of adjudicative law, in the eyes of judges, is the equality guaranteed by adjudicative law quite generally. Formal equality is, therefore, from the pens and minds of judges, the limit of the equality required of legislators when they are enacting law.

The consequence of all of this is striking, and strikingly hostile to the very idea of affirmative welfare rights (in any of their various incarnations). The equality promised by the Constitution, once interpreted in this way, cannot possibly be substantive, or transformative, or aspirational, or tied to any substantive theory of the good whatsoever. Nor can it be anti-subordinationist—it cannot target, intervene into, or aim to reconstitute private orderings. Rather, at most, it can guarantee that when legislators act, they do so on the basis of descriptive premises about the world that map onto preexisting social reality, rather than make odd and unjustified departures from it. Legislative irrationality, not worldly inequality, becomes the target of the guarantee of equality when equality is rendered formal. Law becomes the evil addressed through the Constitutional guarantee rather than the means by which the guarantee is made real, and continuity with the past, and certainly not disruption from it, becomes the literal, concrete goal of the Equal Protection Clause and hence of equality itself. To provide equal protection, the legislator must behave “rationally,” meaning in line with the directives suggested by current social reality, just as the judge, if he is to decide cases in accordance with the Rule of Law, must do so in a way that is rational and consistent with, rather than at odds with, the past. By insisting that the Equal Protection Clause means, basically, a promise of rationality-in-legislation, sort of like truth-in-lending, the Court has judicialized the legislator, at least with respect to equality. It has made him a mini-judge. The only ideals we hold him to are the ideals, and the constraints, of judging: rationality in categorization and fidelity to the past. We limit to the vanishing point his understanding of his very purpose being that of transformation, or change, through law; we limit to the vanishing point his understanding that the substantive equality that might be delivered through law might be part of his Constitutional project, rather than law being the poison that frustrates equality. The Equal Protection Clause, read formally, emasculates the legislator from being an agent of effective change. The Equal Protection Clause, read formally as a mandate that legislators as well as judges must rationally align their actions with the contours of social reality, has become an obstacle, not a vehicle, of progressive, egalitarian politics.

What does this portend for the future? Well, if the attraction to a formal rather than substantive understanding of equality is indeed a function of jurisprudential self-understanding, rather than institutional necessity or doctrinal mistake, then it is going to be next to impossible to dislodge. Quite generally, in law, if not in life, the past is indeed prologue. In all of adjudicatory law, but particularly in Constitutional law, the past is read so as to better define and delimit the future. In fact, that is its point. That is just what judge-made law aims to do—to nail down the future, so to speak, to pre-ordain it, to render it a known fact, rather than an unknown variable, an inchoate possibility. Perhaps for good enough reasons, perhaps not, courts honor the past. Integrity and consistency have real moral weight. The past has substantial authority. That is the point of the entire enterprise; it is central to judicial identity. In the Constitutional context, furthermore, the moral weight of the past is magnified. The Courts will even be less willing to overturn or depart from an understanding of equality that is as central to a judicialized understanding of the ideal of law itself as is their interpretation of formal equality. They might tinker at the margins, but they are never going to depart from its core content. Partly for this reason, I believe, progressives should not look to the courts for either programmatic solutions to problems of economic and social injustice, or even for more limited declarations of principle on which other institutional actors might act. It is, in my view, a badly misguided effort, and one that will prove futile.

## II. THE ADJUDICATED CONSTITUTION AND THE LEGAL QUESTION DOCTRINE

The adverse impact of Constitutionalism on social welfare in America, however, is not limited to the bald fact that the adjudicated Constitution—the Constitution as read by courts—does not contain affirmative Constitutional obligations on the part of state officials to address poverty, or (what amounts to the same thing) the rights on the part of the poor to some minimal level of well-being. There are, I think, graver consequences for the country's poor, hidden between the lines of the Court's Fourteenth Amendment jurisprudence. The (relatively) empty (with respect to poverty) judicial promise of formal equality belabored by courts seeking to interpret the grand promises of the Fourteenth Amendment can perversely obscure, and I think can even obliterate, *any* felt moral, legal, or Constitutional imperatives by the political branches to do something affirmative about the conditions of poverty themselves. We might call this phenomenon (if it is one), "Thayer's echo." Over a hundred years ago, Thayer famously worried

that particularly aggressive judicial review might strip the Congress of any felt obligation to behave Constitutionally. What he did not foresee, I believe, is the day when virtually all substantial moral questions about governance would eventually come to be understood as Constitutional questions as well. If we put this social fact together with the logic of his concern, the one-hundred-year-later echo of his worry is this: aggressive judicial review of the sort that has been engaged in by the Warren, Burger, and Rehnquist Courts all, in our more Constitutionally heated day, might strip the Congress of any felt obligation to act on its moral obligations as well.

By the “legal question doctrine,” I mean to refer to this deep and distinctively modern tendency, shared by courts, liberal commentators, and increasingly the public, to identify all moral questions about governance as essentially “Constitutional,” all Constitutional questions as essentially legal, and all legal questions as essentially judicial. The result of this triple definitional inference is that moral questions about our governance—should states criminalize abortion or euthanasia, do we owe more of our shared resources to poor people, should women be drafted and fight in combat in defense of the country’s interests, should anyone be drafted and fight in combat in defense of the country’s interests, should rural states enjoy enhanced representation in the United States Senate, should citizens be allowed to carry guns, and so forth—become identified as ordinary legal questions necessarily ripe for resolution by the judicial branch. The least dangerous branch thus becomes the sole depository of our moral inclinations, disagreements, arguments, and eventually conclusions. The cost of this for the quality of our politics is considerable. As the judicial branch is identified as the place to go to for principled, rational, and above all else morally sound political decision-making, the political branch—as in the legislature—becomes, by default, the place to go to for horse-trading at best, corruption and kickbacks at worst. If moral questions are by definition judicial questions, it is more than just natural, it is inevitable and good that we turn to judges rather than elected officials for morally sound political deliberations. Elected officials become the all-but-disowned illegitimate and thoroughly discreditable stepchild of politics.

Let me elaborate on the workings of the legal question doctrine by use of a syllogism and then apply its conclusion to the problem of poverty. Each premise of this syllogism, I believe, has come to be a firmly entrenched part of our Constitutional jurisprudence. Premise One is that the Constitution defines our political morality—questions of political morality are, by definition, Constitutional questions. This is the explicitly shared

understanding of the incredibly outsized role of Constitutionalism held by countless liberal legal scholars, but quite explicitly and eloquently by two of that movement's founding architects, Owen Fiss and Ronald Dworkin. For Fiss, that the Constitution addresses all significant moral questions that might ever befall us is the basis for his near-breathtaking faith in the capacity of courts, of Constitutionalism, and of well-meaning judges, along with the capacious promises of process, of voice, of fair hearing that they extend to citizens, to propel our democracy in a morally sound direction:<sup>40</sup>

The internal perspective does not exhaust all evaluation of legal interpretation. Someone who stands outside of the interpretive community thus disputes the authority of that community and its rules may provide another viewpoint . . . on the basis of some religious or ethical principle . . . or on the grounds of some theory of politics. In that instance, the evaluation is not in terms of the law; it matters not at all whether the decision is objective. It may be law, even good law, but it is wrong, whether morally, politically, or from a religious point of view.

The external critic may accept the pluralism implied by the adjectives "legal," "moral," "political," and "religious," each denoting different standards of judgment or different spheres of human activity. The external critic may be able to order his life in a way that acknowledges the validity of the legal judgment and that at the same time preserves the integrity of his view, based on nonlegal standards, about the correctness of the decision. He may render unto the law that which is the law's. Conflict is not a necessity, but it does occur, as it did over the extension of slavery in the 1850s and over the legalization of abortion in the 1970s. The external critic will then have to establish priorities. He may move to amend the Constitution or engage in any number of lesser and more problematic strategies designed to alter the legal standards, such as packing the court or enacting statutes that curtail jurisdiction. Failing that, he remains free to insist that the moral, religious, or political principle take precedence over the legal. He can disobey.

One of the remarkable features of the American legal system is that it permits such a broad range of responses to the external critic, and that over time—maybe in some instances over too much time—the legal system responds to this criticism. The law evolves. There is progress in the law. An equally remarkable feature of the American system is that the freedom of the external critic to deny the law, and to insist that his moral, religious, or political views take precedence over the legal interpretation, is a freedom that is not easily exercised. Endogenous change is always preferred, even in the realm of the wholly intellectual. The external critic struggles to work within the law, say, through amendments, appointments, or inducing the Supreme Court to recognize that it had made a

40. This is the message, as I understand it, of Fiss's remarkable essay, Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982). See particularly the passages at 751–62 (declaring that all moral questions are Constitutional, and therefore, adjudicative; thus, there is no pressing need for violent or quasi-violent, or even extra-systemic morally grounded protest from people of good will: all legitimate moral objections can be litigated).

mistake. An exercise of the freedom to deny the law, and to insist that his moral, religious, or political views take precedence, requires the critic to dispute the authority of the Constitution and the community that it defines, and that is a task not lightly engaged. The authority of the law is bounded, true, but as Tocqueville recognized more than a century ago, in America those bounds are almost without limits. The commitment to the rule of law is nearly universal.<sup>41</sup>

For Dworkin, the convergence of moral questions of governance and Constitutional questions is if anything even greater. Constitutionalism simply is the language, and adjudication is the vehicle, for all questions of political—hence moral—right and wrong:

Our constitutional system rests on a particular moral theory, namely, that men have moral rights against the state. The difficult clauses of the Bill of Rights, like the due process and equal protection clauses, must be understood as appealing to moral concepts rather than laying down particular conceptions . . . .

If we give the decisions of principle that the Constitution requires to the judges, instead of to the people, we act in the spirit of legality, so far as our institutions permit. . . .

Constitutional law can make no genuine advance until it isolates the problem of rights against the state and makes that problem part of its own agenda. That argues for a fusion of constitutional law and moral theory, a connection that, incredibly, has yet to take place. It is perfectly understandable that lawyers dread contamination with moral philosophy, and particularly with those philosophers who talk about rights, because the spooky overtones of that concept threaten the graveyard of reason. But better philosophy is now available . . . . Professor Rawls of Harvard, for example, has published an abstract and complex book about justice which no constitutional lawyer will be able to ignore. There is no need for lawyers to play a passive role in the development of a theory of moral rights against the state, however . . . .<sup>42</sup>

Premise Two is that Constitutional questions are, by virtue of the identification of the Constitution as “law,” therefore legal questions. The Supremacy Clause of the Constitution<sup>43</sup> itself, of course, says so—although two hundred years of interpretation has managed to erase all of the ambiguity latent in that phrase, primarily the meaning of the “Law” that the Constitution “is.”<sup>44</sup> (It does depend on the meaning of the word “is,” doesn’t

41. *Id.* at 749–50.

42. DWORKIN, *supra* note 39, at 147–49.

43. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the Unites States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the Unites States, shall be the supreme Law of the Land.”).

44. The Constitution’s drafters, it ought to go without saying, were natural lawyers who were conversant with and clearly used multiple meanings of the word “law,” particularly when discussing constitutionalism. By identifying the Constitution as law, it by no means follows that it was to be understood as a piece of ordinary positive law, to be interpreted and applied by courts accordingly.

it?) As Larry Kramer has shown in detail, the framers were far more capacious in their use of the word “law” than are we. For the framers, “law” could mean “ordinary law,” or it could mean “higher law”; it could mean what we would today call “positive law,” or it could mean “natural law”; it could mean “man’s law” or “god’s law”; it could mean the “sovereign’s law” or “moral law.”<sup>45</sup> Over the two centuries since the Supremacy Clause was crafted, however, the ambiguity in the phrase has been lost. Law is law, we now say, and if the Constitution is law, it is an instance of the same generic thing as your local municipal ordinance. That the Constitution is “Law”—even if that might have once meant that it is natural, higher, moral, or god-made—now means, unequivocally, that the Constitution is law—positive, man-made, ordinary. The ambiguity is gone and the premise is laid bare: the Constitution is law; Constitutional questions, therefore, are legal questions.

Premise Three is that because these questions are legal questions, they are for courts to ask, address, and answer, rather than political questions for legislators. Justice Marshall said something like this in *Marbury v Madison*,<sup>46</sup> although here as well the chances are very strong that we have misunderstood what he meant.<sup>47</sup> That it is the province and duty of the Court to say what the law is does not mean that it is the province and duty of the Court to say what the Constitution means, if by the word “law” in that sentence of Marshall’s opinion he meant ordinary law, and if he understood the “Law” embedded in the Constitution as something other than ordinary law. It is at least possible that this is all Marshall meant—that because the Court must determine the content of our ordinary law, it is necessary for them to also engage the task of discovering the meaning of the Constitution in order to do so. A growing number of Constitutional historians are arguing that this is what Marshall most likely meant,<sup>48</sup> but here as well, for

45. KRAMER, *supra* note 17, at 10–12; Kramer, *supra* note 17, at 25–33, 160–65. It is useful to remember that the framers were closer in time to Thomas Aquinas, and his *Summa Theologica*, in which he famously detailed at least four meanings of “law”: Divine Law, Eternal Law, Natural Law and Man’s Law, with only the latter meaning what we today think of as “positive law,” and to which the constitution has been homogenized. 2 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. I–II, Q. 91, Art. 1–6, at 996–1001 (Fathers of the English Dominican Province trans., Christian Classics 1948).

46. 5 U.S. (1 Cranch) 137, 165–66 (1803).

47. According to a number of historians, as well as political theorists, Marshall might well have meant by his declaration that it is the province of the judiciary to declare what the law is, that courts must turn to the Constitution when deciding the content of the *ordinary* law that is before them—thus preserving, not conflating, the distinction between the Constitution, as higher law, and positive law, as ordinary law. This would be fully consistent with an understanding that while courts must of course turn to the Constitution to aid their interpretive understanding of what our ordinary law is, legislatures must likewise turn to the Constitution to aid their understanding of what our ordinary law *should be*.

48. See SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* 109–75 (1990); Jeremy Waldron, *Judicial Power and Popular Sovereignty*, in *MARBURY VERSUS MADISON*:



most Constitutional lawyers, rather than historians, any ambiguity in this famous utterance has now been lost. Whatever Marshall might have meant, his declaration, followed a hundred years later by fifty years of legal realism, has firmly implanted in the legal mind what is now felt to be a near truism. If a question is a question of “law,” then it must be fodder for courts. Law just is what courts turn to when deciding legal questions, and law is what they produce once they have made up their minds.<sup>49</sup>

The conclusion from these Premises—that moral questions are Constitutional questions, that Constitutional questions are legal questions, and that legal questions are judicial questions—is overdetermined: moral questions of governance are for courts to decide, not legislatures. The judicial forum, rather than the legislative assembly, accordingly becomes the venue in which true, real, ennobling politics, rather than debased, interest group bargaining, occurs. It is a small step—maybe no step at all—to the further inference that our Constitutional obligations, as defined by courts, exhaust the moral obligations owed by state officials to the country’s governed.

This is bad for politics—it is *very* bad for politics—but more to the point here, it is very bad for poor people. In the context of welfare rights, the logic of the “syllogism” identified above works out like this. The degree of, and meaning of, the “equality” owed to poor people—whether states *must* address, ameliorate, or rectify extreme poverty—is clearly a matter of political morality, always has been and always will be. Next, and precisely because it is a matter of political morality, it follows that in *our* form of government—adjudicated Constitutionalism—it is *therefore* a Constitutional question. (As opposed, for example, to the charity owed to poor people, which is a matter of personal morality for individuals, and therefore either a matter of conscience or a matter for civil organizations or churches to resolve.) Combine that result with Premise Two. Because this moral question—the extent of the state’s obligatory duties to the poor—is a Constitutional question, it is therefore a legal question—the Constitution, after all, is law. Combine that, finally, with Premise Three. Because it is a legal question, it is therefore one for courts rather than for legislatures to

DOCUMENTS AND COMMENTARY 181 (Mark A. Graber & Michael Perhac eds., 2002); KRAMER, *supra* note 17, at 122–27; Kramer, *supra* note 17, at 88–90.

49. The realists, somewhat inconsistently, held fast to both of these views: law is that which courts use, when deciding cases, *see* JOHN CHIPMAN GRAY, *NATURE AND SOURCES OF THE LAW* 84–99, 121–25 (2d ed. 1972), and law is that which courts produce, once so decided, *see* O.W. Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 457–62 (1897). Although the Holmesian “bad man” and predictive theory have fallen somewhat out of favor, the Grayian view, that law is whatever the courts turn to when deciding cases, has not. In fact, something much like this decidedly realist understanding of the meaning of law is at the core of Ronald Dworkin’s famous argument against Hartian positivism. *See* DWORKIN, *supra* note 39, at 14–45.

address. If we trace the logic of this to its endpoint, then the formal equality mandated and delivered by courts is not just the floor, but is the *ceiling*, of not only our legal, but also of our moral and political obligations toward poor people.

Thus, the danger posed by the Court's equality jurisprudence, given the lockbox of the legal question doctrine, is this: the Court interprets "equal protection" as requiring formal equality, and thereby declares formal equality to be the sole Constitutional obligation of a state facing an impoverished people. By reasoning backward, through the chain of inference, we reach the disheartening conclusion that formal equality likewise satisfies any moral obligation owed by the political branches to actually do something, with law, to address the multiple vulnerabilities of the country's poor. The moral and political obligation we might otherwise feel to address the well-being of poor people, and even the bare possibility that a properly functioning legislative body might feel an obligation to act on it—that it is part of their job description, so to speak, or part of their duty, or part of their calling, if they sit in a legislative assembly representing a community of equals—is thus obscured. By virtue of the legal question doctrine, the upshot as well as the ultimate import of the Court's equality jurisprudence is that the moral duty we all share, and the political duty distinctively borne by legislators, to act so as to redress suffering, particularly suffering caused by poverty, is rendered all the more remote, all the more inchoate, all the more oblique, by the formal equality that courts have found is due and owing subordinated peoples as a matter of Constitutional, and thus court-administered, legal obligation.

Now, let me re-pose this as a solvable puzzle rather than a foregone conclusion. If the Court's equality jurisprudence, combined with the legal question doctrine, gives rise to this Thayerian-redux sort of problem, and if the Court's equality jurisprudence is what I suggest above—a jurisprudential commitment, relatively unshakeable, rather than reflective of nothing but institutional constraint or the winds of politics—then how can we avoid the seemingly unavoidable conclusion that state actors in fact have no moral or political obligations to legislate in such a way as to promote the well-being of the country's poor? The possibility I want to suggest is that, rather than seek to avoid the conclusion by suggesting ever more baroque arguments to courts, based on ever more restrictive precedent, we might rather turn our attention to the legal question doctrine so as to try to sever the locked-in chain of inference identified above. So restated, three possibilities present themselves. We can try to break the definitional link, foundational to both liberal and conservative forms of contemporary

Constitutionalism,<sup>50</sup> between moral questions and Constitutional questions. Second, we can try to break the definitional link, central to our twentieth-century understanding of Constitutional law and history,<sup>51</sup> between Constitutional questions and legal questions. Third, we can try to break the definitional link, a mainstay of critical as well as liberal jurisprudence of the century just ended,<sup>52</sup> between legal questions and judicial questions.

The first position—break the connection between moral and Constitutional questions—I will call the Constitutional skeptic’s position. The idea here is very clean: the solution to the problem of the lockbox legal question doctrine is to quit thinking, speaking, and acting, whenever and wherever possible, in Constitutional terms. The problem, in short, is Constitutionalism, not judicial review, and the solution is to take the Constitution off the table, so to speak, again, whenever possible. The second possible solution I will identify with popular Constitutionalism; sometimes I will call it popular Constitutional romanticism. The problem, on this view, is not Constitutionalism per se, but judicial review. Take the Constitution away from the courts and return it to the people and all sorts of Constitutional meanings, certainly including some that are helpful to poor people, will emerge. The solution to the lockbox effect of the legal question doctrine, then, is to keep and expand the Constitution, and its reach, but limit or cabin to whatever extent possible the institution of judicial review.

I am sympathetic to both the skeptic and romantic, although there are most assuredly problems with both. The position I want to ultimately embrace (Goldilocks style), however, is one I think both skepticism and romanticism have somewhat obscured, to wit, that we break the connection between the idea of “law” and the idea of “adjudication,” and therefore that we break the connection between the idea of “Constitutional law” and the “adjudicated Constitution.” This third position requires, in turn, the development of an interpretation of the Constitution that is indeed distinctively *legal* (not just moral, not just political) but that is directed toward the legislative question of what the content of our ordinary positive law ought to be,

50. See *infra* notes 53–56 and accompanying text.

51. Throughout the twentieth century (but possibly not, in the eighteenth and nineteenth) we have identified Constitutional questions as legal questions, rather than political questions to be resolved through politics. Perhaps this is a cramped view of the document, and its role in public life. Popular constitutionalists now so contend, arguing that we should think of Constitutional questions as “political-legal questions,” or as a special kind of legal questions, or perhaps as something altogether different. See KRAMER, *supra* note 17; TUSHNET, *supra* note 17, at 185–87.

52. As discussed in the text below, see *infra* notes 57–80 and accompanying text, the identification of the legal with the judicial, is not peculiar to constitutionalism, but rather is a twentieth century jurisprudential commitment. The American legal realists cemented the view. See Holmes, *supra* note 49, at 461 (arguing law is a prediction of what the courts will do in fact); GRAY, *supra* note 49, at 113–15 (arguing law is what courts do when deciding law).

rather than the adjudicative question of what the content of our ordinary, positive law currently is. All three of these possibilities, however, as I will develop them, break the legal question doctrine lockbox, and all three hold out considerable promise for the politics of welfare. I am arguing against only an exclusive and uncritical endorsement of the first two, not their rejection. More importantly, I am arguing for a greater awareness of the third possibility and its difficulties, not that it should supplant the others.

First, on Constitutional skepticism. This is, for the most part, a hypothetical creation of my own; virtually no current Constitutional theorist that I am aware of holds it—a fact that speaks more to the power of our Constitutional mythology on the imagination of Constitutional lawyers, not to the strength or weakness of the position. The position, if anyone held it, would be simply that we have overly constitutionalized our discourse. We ought to be skeptical, so the skeptic would argue, not only of judicial review, but of Constitutionalism more broadly. In the context of the poor, furthermore, the case for Constitutional skepticism is particularly strong. Whatever the history and plain meaning of the Fourteenth Amendment, as Charles Beard reminded us at the beginning of the last century, the Constitution and Constitutional culture, taken in their entirety, have been almost relentlessly hostile toward the needs of economically disempowered people. That hostility continues, only slightly abated, today.<sup>53</sup> Today, at most, *at best*, our shared—and shaky—consensus is that the Constitution does not forbid state action for redistributive ends.<sup>54</sup> It's sensible enough to say that no one but cranks would suggest it requires them.<sup>55</sup>

Entirely aside from the possibly irretrievably anti-redistributive nature of the historical document, however, and even aside from the question of who or what it is that will do the interpreting—aside, that is, from the question of judicial review—there are costs to the more fundamental project of constitutionalizing moral discourse that we have not fully appreciated in this culture simply because we are so immersed in it. Two features of Constitutionalism in particular have proven costly and would continue to do so regardless of the fate of the institution of judicial review. The first might be

53. The classic text is BEARD, *supra* note 16.

54. This is, of course, the conventional wisdom following the Court's repudiation of *Lochner*-era substantive due process. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Lochner v. New York*, 198 U.S. 45, 74–76 (1905) (Holmes, J., dissenting).

55. Reva Siegel has suggested the word “cranks” in her latest piece on popular constitutionalism, Reva Siegel, *Constitutional Culture, Social Movement Conflict, and the Constitution of the Family*, 94 CAL. L. REV. (forthcoming Oct. 2006). Those cranks, of course, include some of the leading lights of late twentieth century Constitutional thought, but nevertheless, the view that the Constitution requires welfare rights is so far from the mainstream that it has to be regarded as cranky by anyone who doesn't hold it.

labeled, just for convenience, and I hope without begging any questions, the “identitarian” nature of Constitutionalism. Any moral issue, when we constitutionalize it, becomes subsumed within the identity-driven question of “what it means to be an American,” or “what it means to be part of a nation that is defined by our Constitution,” or “what this Constitution we are expounding says about *us*.” A second and related feature regards the place of historical narrative in moral and political debate. By Constitutional necessity, so to speak, when we engage in Constitutional argument, inside or outside the courts, we seek out a broad, unifying Constitutional narrative, all the better to aid us in resolving current Constitutional dilemmas. We might think of this second feature as the necessity of “Constitutional narrativity.”

So, the skeptical argument that I think is worth elaborating, even if only hypothetically, is this: when we turn moral questions of governance—questions like whether states should be able to criminalize abortion, or whether the community owes greater resources to the poor than currently committed—into Constitutional questions, no matter what the content of the Constitution and no matter who is doing the interpreting, because of these two features—“identitarian narrativity,” we might call them, if we join them—something important is lost in the translation, and what is gained might not be all that attractive. What is lost, vital to healthy democracy and to moral governance both, is a distinctive sense of these questions as moral questions, an insistence that they are at root about our human needs and what we should do to respond to them, our sense of ourselves as moral persons with obligations to neighbors, co-citizens, and co-inhabitants of planet Earth, our sense of our moral obligations as stemming from the fact that we are human beings, not from the fact that we share a nationality. Worst of all, perhaps, we lose our capacity for pure, ennobling political action, culminating not in Constitutional narrative, but in the voting booth. We lose our capacity to simply live with the plain fact of losing the vote and waiting for another day, rather than seek recompense in a comprehensive narrative that will transform the American identity.

If these are indeed costs, then what do we gain as we translate moral questions into Constitutional questions? On the plus side, we do gain a strong sense of moral imperativism; Constitutional obligations are, after all, obligations. It is worth remembering, though, or acknowledging what I think has gone relatively unnoticed by both conventional and popular Constitutionalists, and that is that we simultaneously take on the need to speak in a particular mode—a mode of Constitutional identitarian narrative, with a heavy dose of American exceptionalism. We take on the need to rational-

ize—homogenize—our current social ills and crises with stories culled from our shared past, rather than simply to respond to those needs as needs of our neighbors triggering a sympathetic response. When we constitutionalize moral questions we take on the need to smooth the edges of our disagreements so as to mold them into a Constitutionally homogenized story of past troubles and current consensus. By so doing, we might very well distort who we are, and what our demands are, in this insistent demand for Constitutional convergence. We wind up speaking in stories that might include. By necessity, they exclude as well.

The costs stemming from this identitarian, Constitutional narrativity might well be exacerbated in the project of constitutionalizing discussion regarding the moral obligations owed the poor—and regardless of whether that project turns out to imply that we do or do not have such Constitutional obligations. First, by tying, in Constitutional narrative fashion, and as the logic of Constitutional rhetoric seemingly requires, the plight of poor people to historic struggles for abolition, or the end of Jim Crow, or women's suffrage, or the struggles of any other movement for subordinated persons, we perversely flatten all of these movements and the true meaning of each. Second, by suggesting that we have Constitutional rather than simply moral and political obligations to help poor people, we perversely cast the question in a way that is unhelpfully *loaded*; it suggests that our American identity is at stake rather than the cost of an income grant. It inflames hot passions about *who we are*, and invites deep and war-like resistance among the equally Constitutionally-driven individualists among us—rather than simply inviting moral and political deliberation followed by a vote. It takes the focus off where it should be, which is on human need and the moral obligation of persons in power to respond to it. It puts the focus precisely where it need not be—on questions of identity, of history, of Constitutional narrative, and of our past. For all these reasons, it seems to me, it is not irrational to conclude that constitutionalizing moral questions, here as elsewhere, might be an unwise distraction from the purely political work of urging that as a community we ought to insist that our legislators legislate in such a way as to improve the lot of the country's poor. The cost is not only that the Courts will not buy it. It might ask the wrong questions, inflame the wrong passions, and invite a deep and unending turmoil, rather than a better political compromise. The prescription, then, is clear: we ought to quit thinking this way.<sup>56</sup> The sooner we do so, the sooner we will

56. No one that I know of today currently writing in Constitutional theory embraces the position described in the text. Jeremy Waldron's work against judicial review picks up some of these themes, although he himself casts it as an argument against judicial review, rather than against constitutionalism. See Waldron, *supra* note 48. More recently, a number of progressive and liberal scholars outside

clear-headedly pose and address the question of the extent of our state's obligations to poor people. Consequently, the sooner we leave Constitutionalism—of any sort—behind, the sooner we might actually ameliorate the pressing problems that beset the disadvantaged. The only sensible answer to the lockbox problem is to take Constitutionalism off the table.

The second possible way out of the Constitutional lockbox suggested by the legal question doctrine is not hypothetical in the slightest—it is the implicit suggestion of the explosion of Constitutional work proceeding under the banner of the “popular Constitution.”<sup>57</sup> Perhaps the problem, this work can be read as implying, is not so much that we have over-constitutionalized moral questions, but rather, that we have over-legalized Constitutional-moral questions. The Constitution is a political document, surely, no less than a legal one. It says it is “Law” but it sure does not say it is *only* law. It is much else besides. “The Constitution” is a tradition. “The Constitution” is also a culture, or at least it used to be. It is a document surely, but it is also an idea about who we are. That identity—that idea about who we are, how we “constitute ourselves”—gains content and meaning not only through judicial pronouncement, but also by its use in our history, in our myths about ourselves, and in our classic texts that express our loftiest aspirations and our angelic selves. Our Constitutional identity, so understood, is a part of our Constitutional culture, but our Constitutional culture includes so much more than can be found in your Constitutional casebook's hundred or so cases. It includes *Seneca Falls*;<sup>58</sup> it includes *I*

the law schools have tried to caution against undue reliance on American Constitutionalism, and particularly on Constitutional litigation, as ways of achieving progressive change. *See, e.g.*, GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991). Likewise, Jeremy Waldron's work arguing against judicial review sounds some of these skeptical themes, although he casts his target as judicial review rather than constitutionalism per se. *See* Waldron, *supra* note 48. Law Professor James Wilson puts forward a highly skeptical view of the moral foundations of the Constitution in JAMES G. WILSON, *THE IMPERIAL REPUBLIC: A STRUCTURAL HISTORY OF AMERICAN CONSTITUTIONALISM FROM THE COLONIAL ERA TO THE BEGINNING OF THE TWENTIETH CENTURY* (2002). Mark Kelman expressed some of the skeptical themes noted above at the ACS 2020 Conference held in Yale on April 8–10, 2005. *See* THE CONSTITUTION IN 2020, *supra* note 38 (collection of papers presented at the April 2005 meeting of ACS at Yale Law School).

57. KRAMER, *supra* note 17; TUSHNET, *supra* note 17; Kramer, *supra* note 17; Siegel, *supra* note 55.

58. Elizabeth Cady Stanton, Declaration of Sentiments and Resolutions, Seneca Falls (July 19, 1848), in *FEMINISM: THE ESSENTIAL HISTORICAL WRITINGS* 76, 77–79 (Miriam Schneir ed. 1972):

When, in the course of human events, it becomes necessary for one portion of the family of man to assume among the people of the earth a position different from that which they have hitherto occupied, but one to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes that impel them to such a course.

We hold these truths to be self-evident: that all men and women are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted, deriving their just powers from the consent of the governed. Whenever any form of government

*Have A Dream*;<sup>59</sup> it includes *The Second Bill of Rights*;<sup>60</sup> it includes, perhaps, the *Plea from the Dock*;<sup>61</sup> it certainly embraces the *Second Inaugural*,<sup>62</sup> *I Know Why the Caged Bird Sings*,<sup>63</sup> and *I Dreamt I Saw Joe Hill Last Night Alive as You or Me*<sup>64</sup> . . . . We are a multitude, and our Constitution is large; it embraces us all. When we legalize our Constitution, the popular Constitutionalist can be understood as complaining, we chop off its limbs; and that is a violent, assaultive, disfiguring act. By reducing the Constitution to positive law, we minimally strip the Constitution of its various and varied political meanings, uses, and correlative force. We also, though, recklessly, thoughtlessly, willy-nilly, excommunicate—disown—entire branches of our family and national tree.

becomes destructive of these ends, it is the right of those who suffer from it to refuse allegiance to it, and to insist upon the institution of a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object evinces a design to reduce them under absolute despotism, it is their duty to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of the women under this government, and such is now the necessity which constrains them to demand the equal station to which they are entitled.

The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her. To prove this, let facts be submitted to a candid world.

He has never permitted her to exercise her inalienable right to the elective franchise.

He has compelled her to submit to laws, in the formation of which she had no voice.

He has withheld from her rights which are given to the most ignorant and degraded men—both natives and foreigners.

Having deprived her of this first right of a citizen, the elective franchise, thereby leaving her without representation in the halls of legislation, he has oppressed her on all sides.

He has made her, if married, in the eye of the law, civilly dead.

He has taken from her all right in property, even to the wages she earns.

He has made her, morally, an irresponsible being, as she can commit many crimes with impunity, provided they be done in the presence of her husband. In the covenant of marriage, she is compelled to promise obedience to her husband, he becoming, to all intents and purposes, her master—the law giving him power to deprive her of her liberty, and to administer chastisement.

59. Martin Luther King, Jr., *I Have a Dream* (Aug. 28, 1963), in Drew D. Hansen, *THE DREAM: MARTIN LUTHER KING, JR., AND THE SPEECH THAT INSPIRED A NATION* 71–85 (2003).

60. Franklin Delano Roosevelt, *Message to the Congress on the State of the Union* (Jan. 11, 1944), in *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 32, 41 (Samuel I. Rosenman ed., 1950).

61. Nelson Mandela, *I Am Prepared to Die* (Apr. 20, 1964), in *NELSON MANDELA, I AM PREPARED TO DIE* 28–48 (1979).

62. Abraham Lincoln, *Second Inaugural Address* (Mar. 4, 1865), in *8 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS* 3477–78 (James D. Richardson ed., New York, Bureau of Nat'l Literature 1897).

63. Maya Angelou, *Caged Bird*, in *THE COMPLETE COLLECTED POEMS OF MAYA ANGELOU* 194 (1994).

64. EARL ROBINSON, *Joe Hill, on ALIVE AND WELL* (Aspen Records 1986).



This argument as well—certainly no less than the skeptic’s—has salience in the context of poor people. If the Constitution really does suggest the basis for welfare rights, the argument might proceed, it does so as a matter of politics and perhaps as a matter of culture, but surely not as a matter of law. Welfare rights may not be part of our Constitutional law, but they are most assuredly a part of our Constitutional self-imaginings. We are a constitutively generous people. We are constitutionally committed to our American brothers and sisters. We, as Americans, *love* each other. We do not abandon our beloved co-citizens to the ravages of fate. We are the country of rugged individualism and wide open opportunity, yes, but we are also the country of community and little house on the prairie, of one acre and a mule, of a chicken in every pot, of homesteaders with joint purpose, of firefighters and ambulance workers who pull little girls from deep wells at grave costs, of men who jump into the frigid Potomac to save plane crash survivors, of police officers storming the Twin Towers. We are a people who looked poverty in the eye, twice—once at the urging of Steinbeck<sup>65</sup> and Sinclair,<sup>66</sup> and once at the urging of Robert Kennedy,<sup>67</sup> at least the second time through. We are the people that vowed, “Never again.” We are Constitutionally committed—we the people—not to repeat those horrors. Whatever might be the opinion of this Court, or any other, so this argument might go, we the people, we the authors, we the beneficiaries, and we the owners of Constitutionalism, know better. We *believe in* the Constitution, as Barbara Jordan used to say,<sup>68</sup> and she did not have John Roberts’s Constitution<sup>69</sup> in mind when she said it. Our Constitutional

65. JOHN STEINBECK, *EAST OF EDEN* (1952); JOHN STEINBECK, *THE GRAPES OF WRATH* (1939); JOHN STEINBECK, *OF MICE AND MEN* (1937).

66. UPTON SINCLAIR, *THE JUNGLE* (Viking Press 1946) (1906).

67. *See, e.g.*, JACK NEWFIELD, *RFK: A MEMOIR* 81–83 (2003).

68. Barbara Jordan, Democratic Convention Keynote Address: Who Then Will Speak for the Common Good? (July 12, 1976), *available at* <http://www.elf.net/bjordan/keynote.html>.

69. In response to a question, Roberts explicitly disowned the position, held explicitly and passionately by Justice Thurgood Marshall, that it is any function of the Court to advocate for the wellbeing of the country’s poor, disadvantaged, or under-represented:

GRASSLEY: Your reference to Brown would be a good time to throw in this question. Do you agree with the view that the courts, rather than the elected branches, should take the lead in creating a more just society?

ROBERTS: Again, it is the obligation of the courts to decide particular cases. Often that means acting on the side of justice, as we understand it—enforcing the Bill of Rights, enforcing the equal protection clause. But it has to be in the context of the case and it has to be in the context of interpreting a provision that’s implicated in that case. They don’t have a license to go out and decide: I think this is an injustice and so I’m going to do something to fix it. That type of judicial role, I think, is inconsistent with the role the framers intended. When they have to decide a case, it may well, from time to time and in particular cases, put them in the role of vindicating the vision of justice that the framers enacted in the Constitution. . . . And that is a legitimate role for them. But it’s always in the context of deciding a proper case that’s been presented.

commitment to the well-being of each other is a part of our story. It is at the heart of that story, it is the heart of the story; it runs deep. *Dred Scott*<sup>70</sup> cannot make a dint, but neither can *DeShaney*,<sup>71</sup> or *Rodriquez*,<sup>72</sup> or *Morrison*,<sup>73</sup> or *Lopez*.<sup>74</sup> Caselaw notwithstanding, we have affirmative Constitutional commitments to the poor that for the most part we seek to honor. We honor them, furthermore, not as a matter of personal morality, but as a matter of Constitutional obligation. We have those commitments. Because we have them, precisely because we do have them, the abject failures of our governments, both state and federal, to respond to the needs of the citizens of New Orleans—to get the poor and sick and aged to high ground, and to keep them there in safety, with dignity, and in comfort—were felt by so many to be such an abominable Constitutional blight.<sup>75</sup> The prescription: don't throw out the baby with the bathwater. Judicial review may be a problem; Constitutionalism, however, is not. Another way to put it: our problem is too little Constitutionalism, not too much. The popular Constitution, if not the adjudicative, can and should be viewed as friend, not foe, of the country's poor.

Now, let me suggest some reservations (not definitive counterarguments) regarding Constitutional skepticism and Constitutional romanticism both. First on skepticism. Aside from the impracticability of the prescription—it is not going to be so easy to “quit thinking this way,” even aside from the institution of judicial review—the diagnosis is too dire. Look at even just our recent past. The Constitution has undeniably served as a cultural mandate to achieve a less racist society in the century just concluded. This is no small achievement, and it is more than sufficient to give the progressive Constitutionalist hope. The Constitution has in the past, and can in the future, inspire this country to reach for a more just self-understanding of its foundational commitments. Beyond the evidence of the occasional inspiring moment, however, just as a matter of logic, Constitutionalism has rhetorical strengths lacking in ordinary moral and political discourse. It has made, and can make again, pointed, and vivid, and *present*, our moral failings as a people. It can lend a sense of imperativism, and of urgency, to what is otherwise viewed as an agenda item. It can weave a

Transcript: Day Two of the Roberts Confirmation Hearings, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300979.html> (last visited Feb. 28, 2006).

70. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

71. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

72. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

73. *Morrison v. Olson*, 487 U.S. 654 (1988).

74. *United States v. Lopez*, 514 U.S. 549 (1995).

75. See Michael Ignatieff, *The Broken Contract*, N.Y. TIMES MAGAZINE, Sept. 25, 2005, at 15; *Names & Faces*, WASH. POST, Sept. 19, 2005, at C3.

fabric within which the claims of outsiders, marginalized persons, and people who suffer can be viewed as the claims of family to which we must respond. The plight of the poor is indeed not the same as the historical struggles of African-Americans for liberation and dignity, or of women for legal and political recognition, but there are surely important commonalities. If we as a matter of principle are committed to the equality of marginalized groups, that principle might move us toward a commitment to the eradication of crippling poverty as well.

Constitutionalism, in short, is not a cure-all, but it is not—or at least is not obviously—a poison pill either. We might be able to integrate Constitutionalism without moral sense, without unduly corrupting either. There have been moments of historical progress in our past when Constitutionalism has been cleanly and aggressively deployed in and outside the courts so as to make us a better, meaning more moral, nation. There is ambiguity and complexity in the historical record; the Constitution simply cannot be reduced to either friend or foe of moral governance.

On the other hand, the popular Constitutionalist's conception of our Constitutional context seems to me to be at least somewhat overly romanticized. We might well create culture, community, and meaning through Constitutional argument and disputation outside of the courts; and those meanings and communities might exist in some sense independent of adjudicative and authoritative rulings; but it is not at all clear that those meanings, communities, and cultures are necessarily laudable, or where the balance falls. Our Constitutional culture, outside the courts, at least these days, is populated not by the Joe Hills and Nelson Mandelas of our world, but by militias, gun collectors, and ideologues constructing, with little help from courts and no resistance from liberals, an individual Right to Bear Arms;<sup>76</sup> by Constitution Party members who refuse on principle to support the common good through the payment of taxes;<sup>77</sup> by Constitutionlists who patrol our borders in search of illegal immigrants<sup>78</sup> and the voting booths in Florida and Ohio in search of frauds and felons posing as Democ-

76. See generally *Second Amendment Symposium*, 1998 BYU L. Rev. 1 (1998); *Symposium on the Second Amendment: Fresh Looks*, 76 CHI-KENT L. REV. 3 (2000); *Symposium, The Second Amendment and the Future of Gun Regulation: Historical, Legal, Policy, and Cultural Perspectives*, 73 FORDAM L. REV. 475 (2004); Michael Johnson, Letter to the Editor, *Second Amendment Guarantees Individual's Right to Bear Arms*, BUFFALO NEWS, July 2, 2005, at A7; Robert A. Levy, *A Second Amendment Strategy*, NAT'L REV. ONLINE, Oct. 1, 2004, <http://www.nationalreview.com/comment/levy200410010740.asp>.

77. See, e.g., Constitution Party National Platform, Taxes, [http://www.constitutionparty.com/party\\_platform.php#Taxes](http://www.constitutionparty.com/party_platform.php#Taxes) (last visited Feb. 28, 2006).

78. See, e.g., The Official Minutemen Civil Defense Corps, <http://www.minutemanhq.com/hq/aboutus.php> (last visited Feb. 28, 2006).

atic voters.<sup>79</sup> Perhaps this is changeable—an increase in just the quantity of participants in popular Constitutional discourse would presumably diversify the vision. But progressives haven't much participated in the processes of popular Constitutional culture in any deep or systematic way since the New Deal Era<sup>80</sup>—perhaps we should worry about why. The myth of American individualism, rugged opportunity, and even anarchic lawlessness runs deep, and Constitutional rights of property, of privacy, and individual freedoms run wide. It may truly not be easy to articulate even a popular Constitutional vision of community, of assistance, of duties to aid, on either an individual or state level. Not only the doctrine, but the culture as well, might prove too much of a ballast against it.

Let me sum up. I have argued, first, that progressive Constitutionalists, anti-poverty lawyers, and others who have urged the existence of Constitutional welfare rights should at least entertain the possibility that courts might be jurisprudentially incapable of seeing in the Constitution a range of meanings that are quite self-evidently there, including a mandate of economic justice, simply because courts are courts. A court, because it is a court, not because it is a conservative court, will read an ambiguously legal and political document in such a way as to make it unambiguously a legal document. Along with much else, it seems to me that that is a fair characterization of what has happened along the way, over the last one hundred fifty years as the political Reconstruction Constitution we started with has been transformed into a legal code. As that transformation occurred, meanings inconsistent with the legalization of the political Constitution were tossed overboard.

And second, I have urged that we should not draw from this incompatibility of judicial identity and Constitutional meaning either the conclusion that we should abandon Constitutional discourse in all of its manifestations, embracing instead a Constitutionally-neutered moral form of argument and persuasion on this issue or others, or the near opposite conclusion that we should embrace our Constitutional culture outside the courts and even outside law so as to permit the blossoming of as many Constitutional meanings as we might have political visions. These are both credible responses to what I have characterized as the lockbox effect of the

79. Bob Egelko, *Decision Day: Huge Vote Expected; The Legal Fray: Judges Could Have Last Say*, S.F. CHRON., Nov. 2, 2004, at A1; Michael Moss, *Big G.O.P. Bid to Challenge Voters at Polls in Key State*, N.Y. TIMES, Oct. 23, 2004, at A1.

80. Reva Siegal has recently argued that the fight to enact the ERA constitutes an instance of successful popular constitutionalism—although the ERA was defeated, the courts eventually took up a meaning of equality and applied it to women that had the effect of enacting through adjudication everything that would have been won through enactment of the Amendment. See Siegal, *supra* note 55.

legal question doctrine. I just do not believe that the case for either response is so clear as to command total confidence. So long as Constitutionalism does in fact define, or help us define, the extent of our obligations to each other, and so long as it is possible to glean in our Constitutional traditions, legal or otherwise, the strands of an argument for responding to the needs of oppressed peoples, it would be reckless—or at least too reckless for my taste—to urge its abandonment. And so long as the Constitutionalism that is seemingly most vividly displayed outside the courts in the domain of popular Constitutional rhetoric is one of a relentlessly anti-communitarian cast, wedding popular Constitutionalism with a John Wayne-inspired anti-legalist individualism, the chance of some populist embrace of welfare rights through popular Constitutionalism seems even more remote than its achievement through adjudicative pronouncement. So the combination of the adjudicated constitution, its understanding of equality, and the legal question doctrine has indeed created a lockbox effect, at least with respect to Constitutionally inspired welfare entitlements. It is not so clear, though, that either abandoning Constitutionalism or embracing its popular interpretation is necessarily the best way out.

From these reservations I am drawing only the limited inference that we might want to explore the third of the three ways out that are implied by my account of the legal question doctrine. Rather than sever the chain of inference between morality and Constitutionality, or between Constitutionality and legality, we might instead want to explore the possibility of breaking the connection between legality and adjudication. It might be, that is, that Constitutionalism is not the problem, nor is the problem our sense of the Constitution as law. Rather, we might want to focus on the third of these dubious connections—the connection between legality and adjudication. Affirmatively, this means thinking through the possibility that the Constitution is indeed law, but that it is a form of law—not politics, not morality, but law—at least some parts of which are most amenable, even intended for, legislative, rather than adjudicative discovery and interpretation, and carry meanings that lend themselves to legislative enactment rather than judicial pronouncement. Constitutional welfare rights might be of such a character.

### III. THE LEGISLATED CONSTITUTION

So let me turn to what I will call the “legislated Constitution”—by which I mean the Constitution that legislators are duty-bound to uphold. Imagine for a moment an enlightened, or at least conscientious, idealized, morally astute *legislator*. That legislator, state or federal, wants to do his

moral, political, legal, and Constitutional duty by the citizenry. That legislator reads the Constitution and sees there a mandate that “no state shall deny equal protection of the laws.” For that legislator, the Constitution carries a direct, linguistically untortured command: the state must provide something, and what it must provide is equal protection of law.

How is this to be interpreted? It seems to me that there is a more natural fit between the well understood political ideals of conscientious legislators and a foundational, Constitutional commitment that the sovereign act in such a way as to equally protect the well-being, welfare, capabilities, and entitlements of all, and that it do so, in part, through the recognition of positive rights. The conscientious legislator is or ought to be accustomed to the idea that he acts so as to affect a change in social reality. His ideal for moral action—what it means for him to legislate—is for that reason alone more consistent with a Constitution that requires, in the name of equal protection of all, substantial intervention into extant social reality so as to address social and economic inequality. Just this bare minimum “fit” between commonly understood ideals of the art of legislation and the idea of positive rights contrasts pretty sharply with the position of even the conscientious judge of 2020 with the best moral and political values imaginable. There is just no such easy fit, and in fact it is an awkward fit at best and maybe no fit at all, between the understood purpose of adjudication, particularly in the Constitutional context, and a foundational commitment to act in such a way as to employ law so as to protect all and equally. The judge acts on the basis of principle toward the articulation of a body of law the purposes of which—read generously—are to build continuity with the past, hold legislation and legislators at bay, and enforce individual rights to be free of over-reaching or irrational law. He does not act on the basis of a concern for the well-being of all, or toward the end of protecting the well-being of all against unspecified evils, whether equally or otherwise.

I know this goes against the grain. The grand lesson of twentieth-century jurisprudence—from the legal realists of the early decades of the century to the critical scholars of the last decades—has been that both the judge and the legislator act, and both the judge and the legislator make law. They are both moral agents, relatively free, whose acts are properly subject to moral censure or praise. We learn from our Constitutional law, furthermore, that both judge and legislator are obligated not to deny equal protection of the law in the law that they make when they act. But our interest, over the last century, in the apparent similarity of these enterprises—particularly on the academic legal left, and both the critical and liberal wings of it—may have blinded us to the differences. The legislator, unlike

the judge, does not and should not, either ideally or otherwise, view his or her act as an attempt to secure an uninterrupted fidelity to the past, or to avoid disruption, or to maximize individual freedom by holding the legislator at bay, or to uncover and articulate otherwise opaque legal rules through the analogical method of uncovering the rational “like treatment of likes” and then papering it with a carefully verbalized generality. The legislator, rather, *unlike* the judge, presumably acts—legislates—in order to change a pre-existing status quo; he does not act—adjudicate—in order to further cement and further rationalize extant social relations. The legislator, unlike the judge, ought to realize that the work of legislating must be directed toward the protection of the interests of all citizens against various evils or harms—and that his Constitutional obligation, therefore, is to legislate in such a way so that protection is bestowed equally, rather than view his work as that of thwarting legislation toward the end of securing individualized rights. The conscientious legislator, at least, might be legitimately convinced that the duty to legislate in such a way as to protect the interests of all includes not only a duty to protect against the threat of foreign invasion, and not only a duty to protect legal entitlements bestowed by the common law, but also, given our particular history, Constitutional and otherwise, a duty to protect against exploitation and the subordination that can follow it. Likewise, given our economic and Constitutional history, such a legislator might be persuaded that the evils to be protected against, by law, bestowed equally, include the evils that are the side-product of unbridled capitalism, as evidenced by the last century’s legislative interventions: the labor legislation of the New Deal, the civil rights codes of the sixties, the environmental legislation of the seventies, the anti-age and disability discrimination acts of the eighties, and so on. Indeed, if we reverse our habitual identification of the core of “Constitutional Law” as consisting of a collection of judicial decisions, and look instead at legislative decisions made either pursuant to Constitutional mandate or in part inspired by Constitutional ideals as the “core” of Constitutional law, then it becomes quite clear that the conscientious legislator has, at more than a few moments in the history of twentieth-century Constitutional law, viewed his moral obligation and the Constitutional mandate under which he works in just this way.

So, a substantive understanding of the Fourteenth Amendment’s grand phrases is more consistent with goals of legislation than goals of adjudication. At least, there is not the glaring inconsistency between the most natural reading of those clauses and the ideals as well as practical constraints of the legislature, as there is with respect to adjudication. The lawmaker must act in such a way as to provide equal protection *of the law* to all. He must

legislate in such a manner that all are equally protected against the harms that can be deterred or prevented through law. The Constitutional mandate, understood as a directive to the lawmaker rather than the adjudicator, concerns the ways in which law should or could be used in order to promote the equal protection of all. Understood this way, the Equal Protection Clause is not about protecting people from the product of legislation. It is about how to use legislation to protect people from other evils. Understood this way, at least this part of the Constitution constructs law, in other words, as a rather good thing, all things considered. Law is the means by which the Constitutional entitlement is secured, rather than the evil against which the Constitutional entitlement guards us. The lawmaker is the agent of the Constitutional protection, rather than the irrational, whimsical, overly-emotional or impassioned, frenzied, possibly corrupt, undoubtedly racist, homophobic, misogynistic, vengeful, interest-obsessed, beer-swilling swashbuckling boozier from whom the lonely and noble individual, in his rights-bearing glory, quite sensibly seeks protection.

I do think it would behoove us to develop the argument that the Constitution requires of the conscientious legislator a legislated response to the myriad problems that beset disempowered people in this increasingly stratified, pyramidal, winner-take-all economy: the exploitative labor markets oppressing workers; the unchecked factory and car emissions that are poisoning our children's lungs; the under-funded schools with their lead paint, asbestos, and appallingly lousy curricula that are not educating our children; the belittling, dehumanized working conditions in increasingly insecure and always non-remunerative shit jobs; and so on. I believe there is indeed a badly underdeveloped Constitutional as well as moral obligation on the legislator to resist this accelerating trend into oligarchy. I do not think it is unfair to characterize our current social economy as consisting of an aristocratic privileged class serviced by a disempowered class of laborers whose lives are fundamentally *unprotected* by law—unprotected by law against unsafe workplaces, unprotected by law against private violence, unprotected by law against avoidable disease and injury, unprotected by law against unemployment, unprotected by law against the risks of retirement, and so on, and so on, and so on. As we have begun to lose, politically, over the last thirty years of only fitfully interrupted one-party rule, the so-called "safety net," the long-lasting protections of the New Deal, and the more recent protections of the War on Poverty, we have not developed in response a coherent argument or even a generalized sense of what might be the *content* of a legislature's Constitutional, legal, and moral obligation to protect citizens against extreme harm. We have not done so in part, I believe, because we have been massively distracted by the Siren song of



the adjudicated Constitution—a Constitution that spells out what legislatures cannot do, rather than what they must do; when the presence of law, rather than its absence, violates rights; when the legislator’s malignancy goes beyond the line separating the legal from the illegal so that the law he passes must be struck down, rather than when his neglect, willful or otherwise, lets fester an inequality so profound as to be at odds with our own Constitution. We have not attended, in short, to what the Constitution requires that law *be*. We have attended, instead, only to what the Constitution forbids it from being.

Let me just suggest what would be required, jurisprudentially, to make the promise of the equality guaranteed by the legislated constitution coherent. We do not currently have a Constitutional jurisprudence that supports even the existence, much less the coherence, of the legislated Constitution. We have instead a jurisprudence overwhelmingly committed to three definitional and foundational propositions which, when taken together, virtually foreclose any possibility of developing a legislated Constitution. They echo, uncoincidentally, the last two premises of the legal question doctrine. The first proposition is this: law is, definitionally, some combination of that to which courts turn when deciding cases, and that which courts make when declaring their holdings, reasoning, and conclusions. Law, either way, is understood to be a part of the adjudicative, not the legislative process—judges either discover it, or make it, or both, but it is judges that produce it. The second proposition is this: the Constitution is law. Combining these two premises yields the third: the Constitution, as law, is a body of doctrine to be interpreted and produced by courts, and exclusively so. The legislated Constitution is thus definitionally ruled out.

To develop a legislated Constitution we would have to upset that conventional apple-cart—which should not be all that hard to do. None of these definitional equivalencies is required by our Constitutional history, and even more clearly, none is required by a sound jurisprudence. Yes, the Supremacy Clause identifies the Constitution as Law, but as noted above, the Supremacy Clause does not then define “law” as being “whatever courts say” and “whatever courts turn to when saying it.” The exclusively juridical focus of American definitional accounts of law came a good hundred years after the framing of the Constitution. Likewise, when Marshall declared in *Marbury v. Madison* that it is the Court’s role to say what “the law” is, he was likely referring to the Court’s duty to state the content of ordinary law and the need to refer to the Constitution in order to do so.<sup>81</sup>

81. See KRAMER, *supra* note 17, at 207–08; SNOWISS, *supra* note 48, at 109–12; Waldron, *supra* note 48, at 191–201.

This duty to state the content of ordinary law does indeed require an inquiry into the Constitutionality of legislative or common law pronouncements. It does not follow, however, from either the Supremacy Clause or Marshall's utterance, that the Court is the only, the ultimate, or the primary interpreter of Constitutional meaning. In short, neither the Supremacy Clause nor Marshall's dicta, nor the two taken jointly, preclude the Constitutional possibility, or the Constitutional necessity, of a legislated Constitution—a developed body of statutory law that, with accompanying secondary literature, articulates the meaning of Constitutional guarantees as understood and implemented by legislating bodies. The Constitution, and inquiry into its meaning, may well be a part of the judicial inquiry into what ordinary legislated or common law *is*, and it is the Court's duty to state what that ordinary law is. The Constitution, however, might *also* be a part of the legislative inquiry into what the ordinary law *should be*. If so, then it is the legislature's duty to act accordingly. Both branches, on this view, must read the Constitution, and both branches must interpret it. They do so, however, toward different ends. The Court does so toward the end of defining the content of ordinary law, and the legislature does so toward the end of ascertaining a decent, Constitutional, and moral direction for legislation-in-the-making.

So where does this leave us? The historical work that needs to be done to sustain the case for the legislated Constitution is well underway, or at least the contours of that work have been adequately articulated. Larry Kramer's book is an important milestone in that historical project, as was Mark Tushnet's. To the contrary, however, with respect to the jurisprudence needed to sustain the legislated Constitution. We lack—we profoundly lack—a jurisprudential understanding of the nature of law, its relation to politics and morality, and most importantly its distinctive ideals or virtues that would constitute the ground of a developed, thought-through, debated, and hence internalized, rather than ad hoc and unnoticed, legislated Constitution. We have lost the legislated Constitution, furthermore, more by default and our own neglect than because of the adverse judicial rulings regarding the powers of Congress under Section 5 of the Fourteenth Amendment<sup>82</sup>—rulings that are as much a consequence as a cause of this development. We do not have it, in other words, not because the Court has been hostile to its creation. We do not have it because we have not produced it.

82. See *United States v. Lopez*, 514 U.S. 549 (1995); *Morrison v. Olson*, 487 U.S. 654 (1988).

Finally, we have not produced it, I believe, because the basic logic of such a jurisprudence, at least the only basic logic of such a jurisprudence that I can envision, is so deeply at odds with the ruling jurisprudence of the last century. We—all of us, the critical and liberal academic legal left as well as mainstream and right—are now at the tail end of a full century’s worth of nearly uninterrupted judge-focused jurisprudence, both positivist and natural, that has rolled in, one wave following the other—formalism, realism, processualism, rights jurisprudence, critical jurisprudence, and postmodernism alike—all committed to the political nature of law, but all also, and much more problematically, identifying, from realism on through, the heart of politics with the adjudicative moment.<sup>83</sup> This has left very little room indeed for even the intellectual development of a set of moral imperatives that might be viewed as ideally guiding the legislated, rather than adjudicative moment. Thus, there has been no scholarly development that I am aware of among Constitutionists or jurists who think of themselves as “natural lawyers” of an understanding of the Constitution as a source of Higher Law, that imperfectly embodies a set of moral principles of governance, that might in turn guide and direct the legislative hand of action rather than the judicial hand of constraint. Likewise, there has been no development that I am aware of among utilitarian positivists of an understanding of the Constitution as a set of authoritative commands that might direct the legislature toward a people’s happiness or well-being. Such a development, within positivism, would be most welcome. It might, for example, serve as a counter to the insistence that the sole legitimate role of law is to act as a sort of handmaiden to the accumulation of wealth and the efficiency that greases its wheels—an insistence that now overwhelmingly drives the legislative articulation of public policy. Put in classical, jurisprudential terms, there is no development in the scholarly literature of which I am aware of even the articulation, much less the recognition, or god forbid enforcement, of a set of directives aimed at the sovereign lawmaker—be it monarchical, democratic, aristocratic—rather than law-interpreter, that might direct that lawmaking sovereignty in a morally defensible direction. There is no jurisprudential, expansive understanding of the moral imperatives that such a government must pursue as a matter of moral obligation. We have not articulated, elaborated, or even begun to imagine the content of a moral obligation on the part of an idealized gover-

83. Critical Legal Studies writings, for example, almost invariably accepted this paradigm of law, and if anything further entrenched it by insisting on the lack of a difference between law and politics—all so as to underscore the political nature of adjudication. For examples, see the essays collected in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed., 3d ed. 1998), and see generally MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 242–68 (1987).

nor—a governor whose duty it is to legislate in such a way as to promote the happiness, through the protective mantle of law, of his country’s peoples.

Such a Constitutional “legisprudence” would consist, I think, of four largely forgotten, certainly not novel, claims. First, it would require the development (or recapture) of an ancient understanding of the idea of “Law,” to wit, the idea of “Law” as consisting of a set of moral imperatives that can and ought to guide the art of legislation.<sup>84</sup> Second, it would require an understanding of “Constitutional Law” as a part of that Law. We lost that, I believe, at the mid-twentieth-century mark, when we began to understand Justice Marshall’s ambiguous declaration in *Marbury* that the Court’s duty is to say “what the law is” as an unambiguous declaration that it is the Court’s duty to say what Constitutional Law requires of law. Third, it would require an understanding of the state as under a moral duty, and a legal duty, and a Constitutional duty, to act in the interest of all, and not just a prohibition against acting in certain discriminatory ways. We lost that understanding, I believe, dating from the mid-twentieth-century civil rights era successes, with that period’s profound distrust of state actors and its correlative sense that legalist ideals can only be achieved through constraining, rather than guiding, the legislator’s hand.<sup>85</sup> Fourth, it would require an understanding of law’s point or purpose as being the protection of people from the oppressions of each other, and not just protection of the individual from the state. We lost that, likewise, dating from the commencement of our “civil libertarian” tradition, given a boost by the reproductive and sexual freedom cases of the last three decades.<sup>86</sup>

The four-pronged legisprudential orientation that I am encouraging us to rediscover is by no means foreign to our legal or even our liberal heritage. On the first point, Morris Cohen, a legal realist, called himself a natural lawyer for more or less the reason cited above: he deeply believed in the

84. This is the heart of Augustine’s famous elucidation of the various meanings of the word “law” as alternately, positive, natural, eternal, and divine. Natural law, discernible through reason, is the “law” that constitutes the moral ideal for positive law, the latter defined in a way that Hart, Hobbes, or Bentham would find familiar and largely acceptable. ST. THOMAS AQUINAS, *supra* note 45, at 996–97.

85. The moral obligations of state legislators, from this point forward, I believe, came to be understood almost exclusively in negative terms—what they must not do, rather than what they must. Thus, in Dworkin’s *Taking Rights Seriously*, the moral duty of the legislator is described almost exclusively as that of legislating in light of individual rights, and the rights at stake are again, almost exclusively, rights to be free of the state’s irrational or malign hand. See DWORKIN, *supra* note 39, at 202–05, 220.

86. This is a complex story that goes well beyond the perimeters of this paper. Generally, our understanding of the “equality” legislators are constitutionally obligated to provide came to be identified as purely formal, at the same time that our civil liberties to be free of noxious moralistic legislation expanded. I am suggesting only that these developments are related. They both speak to what is lacking: a positive obligation on the part of the legislator to legislate for the well being of all.

natural reality of moral truths that might guide legislation and adjudication both.<sup>87</sup> Jeremy Bentham, the great English legal positivist and the intellectual forefather of both Holmes and the realist movement Holmes inspired, was above all else interested in articulating how legislation could best serve the well-being, interest, and happiness of all, understood in a rigorously egalitarian no less than utilitarian fashion. That is, after all, why he was perceived as a radical.<sup>88</sup> Tom Paine, our pamphleteering Constitutionalist, despised courts and the common law, but also argued strenuously toward the end of his life for Constitutionally grounded, legislated welfare rights for those who stand to lose rather than gain by the social contract. He believed, in other words, that what we today call welfare rights could and should be Constitutionally grounded, and that Constitutionalism ought to be a matter of legislative, not judicial development.<sup>89</sup> There is a lost canon, in other words, for the canon-builder, from which to fashion a Constitutional jurisprudence to guide legislative action. Very little of it, however, is either aimed at or the product of adjudication.

So, I hope that over the next few decades, progressive Constitutional theorists and lawyers will attend to the need to develop a jurisprudence that might support the legislated Constitution. Without it—without an understanding of what the Constitution requires the legislator to do, instead of only an understanding of what the Constitution forbids; without an understanding of the positive value of law, instead of only an understanding of its dangers; without an understanding of what, morally, a conscientious legislator must do in order to fulfill his or her distinctly political obligations when acting as a free and moral agent—without all of this, I am afraid, the very basic claim that Constitutionalism, best understood, supports, or at least is not antithetical to, the progressive hope of creating a more equal and less treacherous world, hovers between the radically counter-factual and the flatly oxymoronic. A Constitution, interpreted by courts as ordinary law, will yield precious little by way of progress, albeit quite a bit by way of law.

Let me emphasize the narrowness of my point. Obviously, progressivism over the next half century will require a good deal more than a richer jurisprudence than that we have taken with us out of the last century. It will

87. See Morris R. Cohen, *Jus Naturale Redivivum*, 25 PHIL. REV. 761 (1916); Morris R. Cohen, *Positivism and the Limits of Idealism in the Law*, 27 COLUM. L. REV. 237 (1927).

88. See JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* 1–7 (Prometheus Books 1988) (1781); see generally ELIE HALÉVY, *THE GROWTH OF PHILOSOPHICAL RADICALISM* (1928).

89. See THOMAS PAINE, *THE RIGHTS OF MAN* (E.P. Dutton & Co. 1951) (1791); see generally Robin West, *Tom Paine's Constitution*, 89 VA. L. REV. 1413 (2003).

also require, for example, sooner rather than later, that the Republican party lose either its moderate-libertarian or its religious base, and hence its stranglehold, through the last decade's worth of gerrymanders, legislation, and judicial appointments, on American governance. That might come to pass or it might not, but either way we have little control over it. We do have some control, though, over our own intellectual climate, and even more so, over how we pick our intellectual projects. Progressives need and surely could produce a Constitutional jurisprudence that centers, rather than marginalizes, the legislative rather than the judicial product; that understands and takes seriously what should be the most important legislative, rather than judicial instantiations of our Constitutional promise: the New Deal legislation; the Civil Rights Acts;<sup>90</sup> the Voting Rights Act;<sup>91</sup> the Clean Air and Water Acts;<sup>92</sup> the Age Discrimination Act;<sup>93</sup> the Violence Against Women Act;<sup>94</sup> the Disabilities Act;<sup>95</sup> and so on. We need and do not have conceptions of law, both positive and natural, that support this re-shuffle—of natural law as a set of moral guidelines directing sovereign will, rather than constraining it; of positive law as the product for better or worse of legislative politics, rather than of adjudicative interpretation. With such jurisprudence in place, I think, we could at least begin to make sense of the specific claim that the Equal Protection Clause might actually require a congressional, legislated response to substantive inequality. More largely, with such a jurisprudence in place, we might begin to make sense of the very grand claim that progressive politics is somehow supported by, or required by, or at least not antithetical to, Constitutional mandates, properly understood. With such a jurisprudence in place, Charles Black's utopian claim that the Constitution requires welfare rights might even become a matter of common sense.<sup>96</sup>

90. The Civil Rights Act, 42 U.S.C. § 1981 (2000).

91. The Voting Rights Act of 1965, 42 U.S.C. § 1971 (2000).

92. The Clean Air Act, 42 U.S.C. § 7401 (2000); The Clean Water Act of 1977, 33 U.S.C. § 1251 (2000).

93. The Age Discrimination in Employment Act, 29 U.S.C. § 621 (2000).

94. The Violence Against Women Act, 42 U.S.C. § 13701 (2000).

95. The Americans with Disabilities Act, 42 U.S.C. § 12101 (2000).

96. I have elaborated this view of the Paineian Constitution, in West, *supra* note 89.