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## Toward the Study of the Legislated Constitution

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ROBIN WEST\*

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### I. INTRODUCTION

I do not know more than a handful of you. It is a safe bet, though, that most of us are either law students or lawyers and therefore have a shared and I believe quite profound experience: we were initiated into the legal profession through our legal education at an American law school sometime in the past forty years or so. Among much else, the education we received at our respective law schools impressed upon us—all of us—a set of values: an understanding of the legal profession and the lawyer’s role in social life, an aspirational vision of a way of being in law, and a way of being a professional in law, as well as a substantial body of knowledge. It impressed upon us, that is, a legal culture, as well as a legal education. That culture had much to commend it. Law schools, whenever and wherever we each went, and still today, for example, teach and model a deep respect for dialogue, for hearing both or all sides, for refraining from judgment until one has truly listened, or as it is more often called, for legal process,<sup>1</sup> and for the reasoned debate which follows. That commitment to process, debate, and dialogue carries with it both a strong commitment to the irreducible equality of human worth—we are all, by virtue of our humanity, due and owed our day in court, as Owen Fiss has so passionately argued through the

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\*Frederick J. Haas Professor of Law and Philosophy, Georgetown University Law Center. Many thanks to the Moritz College of Law, the editors and members of the *Ohio State Law Journal*, Jim Fondriest, and Professors Steven Huefner and Marc Spindelman for making possible this extraordinary couple of days, in which we collectively deliberated and debated the role of the federal constitution in our law, our political life, and our legislative endeavors. My thanks as well to my co-panelists for taking time from your demanding schedules to reflect on the work you do, its relation to our political life, and the role of the United States Constitution in the construction of that role.

<sup>1</sup>Owen Fiss of Yale Law School has done more than anyone to elaborate the legal implications that can be and should be and at least sometimes are derived from this fundamental legalist value. See generally OWEN M. FISS & JUDITH RESNICK, *ADJUDICATION AND ITS ALTERNATIVES: AN INTRODUCTION TO PROCEDURE* (2003). Professors Henry Hart and Albert Sachs derived an entire jurisprudence from the same core value. See Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, in *GETTING TO THE RULE OF LAW* 3, 12–14 (James E. Fleming ed., 2011). See generally HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF THE LAW* (1958).

course of his distinguished career<sup>2</sup>—and to the phenomenal array of our human differences that deserve—and require—our respect. We have distinctive aspirations, as well as injuries and hurts and felt injustices, which the law must hear and must respect.<sup>3</sup> Law schools, both innovative and traditional, cutting edge and hidebound, demand and therefore teach tolerance, civil respect for those whose views and dreams differ from our own, a commitment to the equal dignity of all persons, an awareness of the individuality of each of us, and the challenges that those differences and that equality pose to the generalizing impulse in law. Likewise, law schools, virtually everywhere, convey or should convey a sensitivity to bare or naked human vulnerability, mortality, weakness, and need, and therefore a sense in students of the moral need of all of us for law's protection, as well as the challenge of creating it justly and in a way that is not overly intrusive of our privacy or liberty. All of these legal values are deeply embedded in law schools' curriculum, pedagogy and faculty scholarship, and all of them have helped to forge a profession that for its known flaws has structured a morally sound body of rules for all of us to live within. That legal education so well reflects these values is very much to the credit of legal educators. They are values in which we should take pride, when we impart them successfully. They are central to the way we enculturate as well as educate: when we impart them successfully they become a part of the fabric of what it means to be a lawyer, a professional, and a member of the Bar or the Bench. They constitute the culture of lawyering, and specifically the moral culture of lawyering, that we pass on in law schools from one generation of lawyers to the next. There is much in this tradition of which legal educators should be proud.

In this Article, however, I will focus on one aspect of that acculturation that I believe is deeply problematic, and that is the century-long, near-exclusive orientation of legal education, and legal scholarship, around a judicial—rather than a legislative—perspective. As you will recall from your own experience, we teach law, in law schools, for the most part through appellate cases.<sup>4</sup> By that,

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<sup>2</sup> See generally, e.g., OWEN FISS & JUDITH RESNIK, *PROCEDURE* (1988); OWEN FISS, *THE LAW AS IT COULD BE* (2003); Owen Fiss, *Objectivity and Interpretation*, 34 *STAN. L. REV.* 739 (1982).

<sup>3</sup> Thus, process values rest on both a regard for the dignity shared by all, and the attributes that distinguish individuals.

<sup>4</sup> See AM. BAR ASS'N, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP* 236–60 (1992). The report notes that “[t]he transition during [the twentieth] century from a clerkship/mentoring system of educating lawyers to reliance on professional schools in a university setting has been traced by many observers to the acceptance of the Langdellian appellate case-method, which views the study of law as an academic science,” and offers a number of practice-oriented suggestions to law school administrators to close the “gap” between academic pursuits and the skills necessary for law practice. *Id.* at 3; see also WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 188 (2007) (“Both of these drawbacks—lack of attention to practice and the weakness of concern with professional responsibility—are the

I do not mean that we use appellate cases as simply the vehicle for teaching students the substantive law. What we do is not just methodological: we teach law through cases that apply rules rather than teaching the rules directly, just as business schools teach principles of accounting through case studies rather than through memorization of rules. Rather, we do something more substantive. American law schools not only teach law through cases; rather, we teach that the law *consists* of those cases as well as the holdings that emerge from them. We teach that the law of the Constitution, for example, is the law that emerges from cases such as *Marbury v. Madison*,<sup>5</sup> *Brown v. Board of Education*,<sup>6</sup> and *Roe v. Wade*,<sup>7</sup> as well as the rules and principles—of the Fourteenth Amendment, of state action, of privacy, of the Supremacy Clause, of Article III and so on—that inform those cases. We teach that the “law of tort” is that law of foreseeability or proximate cause that is articulated in dicta in *Palsgraf v. Long Island Railroad Company*<sup>8</sup> and that the law of contract damages is that which emerges from the holding in *Hadley v. Baxendale*<sup>9</sup> and not simply the rule that is expressed or applied in *Hadley*. The law, in other words, is what the judges do in these cases, and not simply the rules that they accurately or inaccurately, artfully or inartfully, apply. Note, then, what we do not teach, by virtue of the constancy of our pedagogical focus on adjudication. We do not teach that the law might be reflected in—much less constituted by—those political actions taken by other institutional actors. We do not teach, and rarely even acknowledge the possibility, that the “law” of the Fourteenth Amendment or of the Commerce Clause is reflected in, constituted by, or elaborated upon in the passage of the Civil Rights Acts of the 1960s and 1970s,<sup>10</sup> the Age Discrimination Act of the 1970s,<sup>11</sup> the Americans with Disabilities Act<sup>12</sup> or the proposed anti-discrimination acts regarding sexual orientation.<sup>13</sup> We do not teach, or even suggest, that the meaning of the Commerce Clause might be instantiated in the recent health care reform acts<sup>14</sup> or the Violence Against

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unintended consequences of reliance on a single, heavily academic pedagogy to provide the crucial initiation into legal education.”).

<sup>5</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>6</sup> 347 U.S. 483 (1954).

<sup>7</sup> 410 U.S. 113 (1973).

<sup>8</sup> 162 N.E. 99, 100–01 (N.Y. 1928).

<sup>9</sup> (1854) 156 Eng. Rep. 145, 149–50 (Exch.).

<sup>10</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

<sup>11</sup> Age Discrimination Act of 1975, Pub. L. No. 94-135, 89 Stat. 728.

<sup>12</sup> Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327.

<sup>13</sup> Bills prohibiting sexual orientation discrimination in employment have been proposed almost annually since 1994; the most recent is the Employment Non-Discrimination Act. See H.R. 1397, 112th Cong. (2011); S. 811, 112th Cong. (2011).

<sup>14</sup> The health care reform provisions are found in two major acts, the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), and the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

Women Act.<sup>15</sup> In first year courses, we only occasionally acknowledge that the contract law as regards to sales is constituted primarily by the Uniform Commercial Code, and that more of tort law is to be found in various provisions of a state's traffic code than in the collected wisdom of the Massachusetts and California highest courts, and so on. We teach, in other words, that law is what the courts do, make, and produce, rather than what legislators do, make, and produce.

Some of us do this because we deeply believe it to be true—perhaps because we generalize from our understanding of the common law, or perhaps because we have taken Justice Marshall's dicta on the subject in *Marbury v. Madison*<sup>16</sup> very much to heart, and simply identify the law of the Constitution with the law as expounded by courts. Most of us do it, though, by habit rather than conviction. We encourage students, when researching the law on a subject, to turn first to precedent and only after that to search statutory authority, and typically to find the meaning of a statute in interpretive glosses supplied by courts. We teach students to resolve an "open" legal question by resort to case authority, and if no answer is forthcoming, to reason from principles discovered in those cases toward a novel solution grounded in a firm grasp of the policy issues at stake and couched in language a court might recognize as sufficiently legal. Again, look at what we do not teach: we do not teach students that perhaps the appropriate response to an open legal question should be or could be a legislative solution. We do not teach students that what a social problem—homelessness, uninsured co-citizens, police brutality, malnutrition, and so on—might need is the passage of a law, rather than a novel argument for a positive right based on a creative interpretation of a pre-existing case.<sup>17</sup> To generalize, we teach students, more or less, that the solution to virtually any articulable legal question known to man pre-exists the posing of the question; or put differently, that the legal answer is to be found in legal materials, meaning primarily cases, and can be propounded by a sufficiently wise judge with Herculean knowledge, and that to do this well is to do law. We do not typically teach students that the answer to many of the questions we face might best be found through civil debate and resolved through politics and legislation—through the political rather than the judicial process—and we certainly do not teach them that to do so is to engage in distinctively legal work of a very high

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<sup>15</sup> Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902.

<sup>16</sup> 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

<sup>17</sup> I do not mean to suggest that such arguments for the existence of welfare rights are not convincing; indeed, I believe they are. See Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. L. 221, 242–43 (2006) [hereinafter West, *Unenumerated Duties*]; Robin West, *Rights, Capabilities, and the Good Society*, 69 FORDHAM L. REV. 1901, 1911–12 (2001). See generally Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330 (2006), and Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969), for examples of such arguments, the former directed at legislatures and the latter at courts.

order. We teach and enculturate students to respect, admire, and emulate the thought, the knowledge, the wisdom, and even the style of great judges, not great legislators. We stud our “casebooks” with portraits and photographs and short biographies of judges—of Oliver Wendell Holmes, Learned Hand, and Benjamin Cardozo<sup>18</sup>—whose “thoughtful countenance” portrayed in a portrait, to quote Roscoe Pound,<sup>19</sup> is the window to an admirable judicial sensibility. We do not teach students to respect, admire, or emulate the heroic legislator, or the great orator, from Cicero to Ted Kennedy, from Daniel Webster to Orrin Hatch. Nowhere, in any casebook that I have ever seen, will one find a portrait of the congressman or senator who convinced his colleagues, constituents, or a reluctant public to follow him in his felt need to legislate a solution to a pressing issue. We know who wrote *Palsgraf*,<sup>20</sup> *Brown*,<sup>21</sup> *Lucy, Lady-Duff Gordon*,<sup>22</sup> and *Hadley v. Baxendale*,<sup>23</sup> but we do not know who wrote the Social Security Act,<sup>24</sup> the Civil Rights Act,<sup>25</sup> or the Violence Against Women Act.<sup>26</sup> We do not see the furrowed brow of these legislators. And we encourage our graduates to aspire, upon graduation, to seek out clerkships with federal and top state judges during a period of internship. We do not encourage our graduates to aspire, upon graduation, to seek out clerkships with congressmen, senators, or assemblymen—with legislators, lawmakers, or their representatives.<sup>27</sup>

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<sup>18</sup> See, e.g., JOHN P. DAWSON ET AL., *CONTRACTS* 56, 235, 268 (9th ed. 2008).

<sup>19</sup> ROSCOE POUND, *JUSTICE ACCORDING TO LAW* 90 (1959).

<sup>20</sup> Chief Judge of the New York Court of Appeals Benjamin Cardozo. See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99 (N.Y. 1928).

<sup>21</sup> Chief Justice of the United States Earl Warren. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 486 (1954).

<sup>22</sup> Then-Associate Judge of the New York Court of Appeals Benjamin Cardozo. See *Wood v. Lucy, Lady-Duff Gordon*, 118 N.E. 214, 214 (N.Y. 1917).

<sup>23</sup> Baron Alderson. See *Hadley v. Baxendale*, (1854) 156 Eng. Rep. 145, 150 (Exch.).

<sup>24</sup> Social Security Act of 1935, ch. 531, 49 Stat. 620. Frances Perkins, President Roosevelt’s Secretary of Labor, is generally credited with the policy substance of the Act. See *Social Security Pioneers: Frances Perkins*, SOC. SECURITY ONLINE, <http://www.ssa.gov/history/fpbiossa.html> (last visited Oct. 31, 2011).

<sup>25</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241. President John F. Kennedy’s administration is generally credited with sending the bill to Congress that formed the basis of the Civil Rights Act of 1964. See generally CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* (1985).

<sup>26</sup> Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902. Victoria Nourse, a staffer for then-Senator Joe Biden, is generally credited with the substance of the Act. See JOE BIDEN, *PROMISES TO KEEP* 240 (2007).

<sup>27</sup> Although this could be changing. See Robin West, *The Missing Jurisprudence of the Legislated Constitution*, in *THE CONSTITUTION IN 2020*, at 79, 79–91 (Jack M. Balkin & Reva B. Siegel eds., 2009) [hereinafter West, *Missing Jurisprudence*]; Robin West, *A Response to Goodwin Liu*, 116 YALE L.J. POCKET PART 157 (2006), <http://yalelawjournal.org/the-yale-law-journal-pocket-part/constitutional-law/-a-response-to-goodwin-liu/> [hereinafter West, *A Response to Goodwin Liu*]. See generally Dakota S. Rudesill, *Closing the Legislative Experience Gap: How a Legislative Law Clerk Program Will Benefit the Legal Profession and Congress*, 87 WASH. U. L. REV. 699 (2010).

All of this, I assume, is well understood by all of us, as it was experienced by all of us. This is the way we have always done it, in law schools, at least for the past one hundred years. In various forms over that century, it is a fact about legal education that has been much noted, often bemoaned, but never truly rectified. We can call it the “juriscentricity” of American legal education. That juriscentricity, of course, did not come from nowhere; it is based on a set of ideas about law and judging that have a history. It has a number of roots. We can trace our adulation of judges and justices, in part, to the role of the English common law judges in protecting the rights of Englishmen against a series of arrogant monarchs and parliaments.<sup>28</sup> More directly, we can trace it to Christopher Langdell’s love of the common law and the common law judges who authored it at the turn of the last century, his pride in the notion of law as a learned profession, and his contempt for public law courses and legislative bodies and eventually to the influence of those Langdellian attitudes on our pedagogy.<sup>29</sup> We can trace it to the *Lochner* Era’s Supreme Court jurisprudence disparaging legislative interventions into free markets.<sup>30</sup> More directly still, we can trace it to the Warren Court’s heroic activism in combating legislated public racism<sup>31</sup> and legislatively endorsed private racism—the black curtain that “had been dropped on my selfhood,” as Martin Luther King, Jr. said when metaphorically describing Jim Crow and literally describing the dividing material that descended from the ceiling of segregated train cars in the South.<sup>32</sup> Today, we can trace it to the Burger Court’s explicit embrace of gender equality

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<sup>28</sup> See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 67 (3d ed. 2005) (“[The common law] was also romanticized, as the birthright of free men. . . . Many jurists argued that the common law was the foundation of their freedoms; that it embodied fundamental norms of natural law.”).

<sup>29</sup> See generally, e.g., Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); Anthony Kronman, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 335 (1988).

<sup>30</sup> The *Lochner* Era refers to the decades, epitomized by the *Lochner* decision itself, during which the Supreme Court aggressively struck down legislation at both the state and federal levels that intervened into private markets, toward the ends of redistribution, paternalism, or public health. *Lochner v. New York*, 198 U.S. 45 (1905) (striking down New York’s labor laws regulating bakers). For a mainstream view of the how the case epitomized constitutional culture of the time, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 567–81 (2d ed. 1988).

<sup>31</sup> See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 495–96 (1954); *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 300–01 (1955). See also the post-*Brown* per curiam opinions that struck down segregation in other public spaces: *New Orleans City Park Improvement Ass’n v. Detiege*, 358 U.S. 54, 54 (1958) (per curiam) (public parks and golf courses); *Gayle v. Browder*, 352 U.S. 903, 903 (1956) (per curiam) (intrastate buses); *Holmes v. City of Atlanta*, 350 U.S. 879, 879 (1955) (per curiam) (municipal golf courses); *Mayor of Baltimore City v. Dawson*, 350 U.S. 877, 877 (1955) (per curiam) (public beaches and bathhouses); *Muir v. Louisville Park Theatrical Ass’n*, 347 U.S. 971, 971 (1954) (per curiam) (municipal recreational facilities).

<sup>32</sup> MARTIN LUTHER KING, JR., *STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY* 6 (1958).

as a matter of quasi-constitutional doctrine after the failed attempt to achieve the same end through legislated constitutional means,<sup>33</sup> the Rehnquist Court's decision striking down anti-sodomy laws,<sup>34</sup> and the Massachusetts Supreme Court's crafting of a right to marry from the Massachusetts Constitution.<sup>35</sup> All of these heroic judicial decisions, and the eras those decisions have in part defined, have contributed to several generations of romantic attachment to the idea of litigated, progressive political victories, but also, and more concretely, to law schools' collective institutional identification of true law with the principled and intelligent work of courts, and faux law, or lower law, with the work of usurping, discriminating, invasive legislatures, and the foolish, uninformed or hate-filled constituents those legislative bodies represent. The history of this identification—of the law schools' identification of true and higher law with judicial work, and of the banality of politics with legislative work—is a history that deserves far more exploration than it has to date received. But it is not a project I will undertake here.

Rather, at the risk of belaboring just a bit of the obvious, I want to attempt something more modest, and that is a somewhat detailed accounting of the practice itself—our juriscentric practice, particularly as it affects our views of the Constitution. Then I would like to try one more time to make that practice—again, the law school practice of acculturating and educating both from and for a juriscentric perspective—seem a little bit strange. I will first look at juriscentricity in three central poles, or gravitational foci, of legal education: our jurisprudential scholarship, our constitutional scholarship, and what I will call our legal culture. I will look at these three corners of the legal academy by focusing exclusively on the pathologies to which they give rise, without denying that they also reflect moments of great insight and even some measure of moral courage. That's the first and major part of the below. Then in the concluding part I will propose a thought experiment: that we re-examine the questions and assumptions of our jurisprudence, of our constitutional law, and of our legal culture, by imagining the legislator—rather than the judge—as the hero, villain, or protagonist of our collectively shared “law stories”—the narratives by which we teach law and acculturate our students into the profession. Thus, I want to propose that we assume the existence of and the worthiness of study of a legisprudence, rather than a jurisprudence, a legislative and legislated, rather than adjudicative and adjudicated Constitution, and a legis-legal rather than a juris-legal culture. I will conclude with some practical

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<sup>33</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113, 152–54 (1973) (finding a limited right to abortion under the privacy interests of the Fourteenth Amendment); *Reed v. Reed*, 404 U.S. 71, 75–77 (1971) (barring sex discrimination in the determination of estate administrators). The momentum of the Burger Court on gender issues continued past the Chief Justice's tenure. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 898 (1992) (striking down spousal notification laws for abortions sought by married women).

<sup>34</sup> See *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

<sup>35</sup> See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969–70 (Mass. 2003).



proposals for reform of the legal academy's practices, and their potential impact on our current political stalemates.

## II. JURISCENTRIC PATHOLOGIES

U.S. jurisprudence, from the Langdellian era to our own, has been absorbed with the definitional question "what is law?"<sup>36</sup> and from that time period to our own, the answers we have provided have in some way centered on the work of judges.<sup>37</sup> We can identify a dominant and a counter-dominant trend, but both center judicial work to their conflicting definitional accounts. Let me start with the dominant. The dominant jurisprudential view, articulated most powerfully by Ronald Dworkin's writings over the last half century, identifies law with the set of rules and principles that determine the outcomes of judicial opinions.<sup>38</sup> "Law" is that which is necessary to answer the question facing a court, "What is the law of thus and so?"<sup>39</sup> That will include the rules contained in prior cases, and will also include the principles, including the moral principles, that are fairly inferable from those cases.<sup>40</sup> It might also, of course, include statutes, or at least those statutes a court will notice. But those statutes are law, if they are law, because they are in the set of those materials necessary to answer the adjudicative question, "What is the law of thus and so?"

What are some consequences of this view? First, the law on this view, meaning the law that generates the rules and principles necessary to resolve legal questions posed to courts, is that which settles questions which initially seem to be in doubt.<sup>41</sup> Law resolves the appearance of choice, or doubt, or the illusion of freedom, in favor of a settled answer, given to us from the past.<sup>42</sup> To

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<sup>36</sup> See generally, e.g., RONALD DWORKIN, *LAW'S EMPIRE* (1986); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980); H.L.A. HART, *THE CONCEPT OF LAW* (1961); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

<sup>37</sup> "The prophecies of what the courts will do in fact, and nothing more pretentious are what I mean by the law." Holmes, *supra* note 36, at 461; see also DWORKIN, *supra* note 36, at 1 (opening with the chapter "What is Law," the subsection "Why It Matters," and the sentence, "It matters how judges decide cases."); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, at vii–viii (1977) (noting that while general theory of law must include a theory of legislation, adjudication, and compliance, legislation and compliance are both largely shaped by the acts of judges).

<sup>38</sup> DWORKIN, *supra* note 37, at 14–80.

<sup>39</sup> *Id.* at 81 ("It remains the judge's duty, even in hard cases, to discover what the rights of the parties are, not to invent new rights retrospectively.")

<sup>40</sup> *Id.* at 22, 28.

<sup>41</sup> This idea is well captured in PAUL KAHN, *THE CULTURAL STUDY OF LAW* 69–70 (1999), stating that "[l]aw understands the meaning of an event as an instance of a rule that already exists. As a matter of law, that rule creates the possibility of the event. . . . Legal inquiry always asks whether an event or proposal realizes a possibility that has already been established."

<sup>42</sup> *Id.* at 43–44 ("We intuitively know that law carries forward the past as an authoritative source of substantive norms. . . . This historicity of law is its single most prominent feature. Legal decision making differs from other kinds of policy formation in just

say the law of affirmative action is unconstitutional is to declare that it was already such; that if not forever, at least well before the question was posed to a court, a body of law pre-existed, by reference to which affirmative action is unconstitutional. Likewise, to say that a law criminalizing abortion “violates the Constitution” because it runs afoul of a right to privacy is to say that prior to the occurrence of the question in court there had already been a body of law, by virtue of which an abortion ban is unconstitutional. There is not, at the time the question is posed, any openness or choice in the matter: the law is thus and so. It might be hard to figure out what the law is, but the “is-ness” of the law is not in question: the law is such that the ban is unconstitutional, or the law is such that affirmative action is constitutional. The law is such that the consequential damage caused by the delay in shipping the factory part is recoverable—it governs the case, as we say. It is there to be discovered by a discerning court. The governing law is that which settles the matter. It is that which renders it already resolved, or already decided. Again, law is that which settles the unsettled. It is that which resolves the appearance of uncertainty. It is that which dispels the appearance of choice or doubt. It is law that makes the question already decided, and it is the court that is called upon to discover what that law is. We ask what the law is when we pose the question in court. We do not ask what it should be, as though we are now deciding it. Now, granted, what we think it should be might shade somewhat our perception of what we think it is, but that does not change the object of inquiry. But, nevertheless, the question is what the law is. The answer will then remove the appearance of choice, revealing the truth about the situation that gave rise to the question: the damage is recoverable, the law is or is not unconstitutional.<sup>43</sup>

Now of course we can argue about the details of this picture: whether principles are just rules in disguise; whether the law is ever truly that settled; whether there are cases in which it is not that settled; whether there are gaps that must be filled by judicial discretion and so on. Nevertheless, the general picture is one with which I would venture all American law professors and law students are familiar. Indeed, Dworkin claimed early on, and quite plausibly, that his definitional account of law was drawn heavily from the way that we—lawyers, law professors, law students, and judges all—talk, when we engage in legal discourse.<sup>44</sup> And he was certainly right: it is the way we talk, in the classroom and out. What *is* the law of consequential damages? Is affirmative action constitutional or is it not? We understand that to be a different question from the question, “Should affirmative action be constitutional or not?” And we certainly

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this way: it always begins from a set of sources that already have authority within the community’s past. . . . They begin from a commitment to the past.”)

<sup>43</sup> See Ronald Dworkin, *No Right Answer?*, in *LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOR OF H.L.A. HART* 58–84 (P.M.S. Hacker & Joseph Raz eds., 1977) (“For all practical purposes, there will be always be a right answer in the seamless web of our law.”).

<sup>44</sup> DWORKIN, *supra* note 37, at 28 (“Once we identify legal principles as separate sorts of standards, different from legal rules, we are suddenly aware of them all around us. Law teachers teach them, lawbooks cite them, legal historians celebrate them.”).

understand that to be a different question from the question, “Is affirmative action a good idea or not?” When we ask the lawyer’s question—“Is affirmative action constitutional or is it not?”—we are asking what the law is. We will be debating, if we debate that question, the meaning of prior cases, the reach of legal principles, and the existence of rules that impact it. We will be debating what the law is. When we ask the lawyer’s question—“Are consequential damages recoverable?”—likewise, we are not asking whether we think they should be or what justice requires; instead, we are asking whether they are, in point of fact, recoverable? We are asking a question about the law that is. We are not asking what the law should be, much less for an opinion poll on what people might think justice requires. We are asking what the law is. Law, in these conversations, dispels the illusion of freedom or choice. We are not free to answer the question any old which way. Whether or not those damages are recoverable is a matter of law. It is a matter of what the law is. The law, again, is that which dispels the illusion of freedom, or doubt, or choice.

Note what law is most decidedly not, on this Dworkinian account. Law is not a field within which politically engaged people *choose*. Perhaps politics is that, but law is not. Law is not the product or the process of choice. Rather, law is that which dispels the illusion of choice. It is not a field of practice within which choices are made. Law is a field within which we make complex arguments regarding the status of rules, the role of moral principles, and the justice of principles toward the end of specifying the law that dispels doubt and the illusion of choice. Again, the judge or lawyer determines what the law is. He does not decide what the law is to be, or should be, or will be, or could be. He decides what it is.

Law, then, is clearly not “what legislators produce,” on this fairly standard Dworkinian account. A statute may or may not be a law on a Dworkinian account. A statute may or may not be a part of law, depending on whether it fits within a decent conception of law itself, consistent with past institutional settlements. Less noted, perhaps, but as important, the “field” of law is not a field of practice within which legislators—lawmakers—choose between possible courses of action. It is not a field of choice at all, so it cannot be a field within which the lawmaker decides between possible actions. The legislator might be doing something else—such as politics, or horse trading, or bargaining, or representing constituent interests. What he does might produce something—a bill—that might inform a judicial conception of law. But the legislator is not doing law.

There is, of course, a well-established countertrend to this dominant jurisprudential conception, which I will identify with some simplification as “legal realism.”<sup>45</sup> According to the realists, law is not that which answers the

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<sup>45</sup> For classic realist texts, see generally, for example, Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Jerome Frank, *What Courts Do in Fact—Part One*, 26 U. ILL. L. REV. 645 (1932); Holmes, *supra* note 36; Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial*

question posed to the judge—“What is the law?”—thus closing off choice. But rather, law is the answer the judge produces: the judge does decide what the law is, but that’s because he declares it, not because he discovers it. He says what the law is, in the style of Humpty Dumpty. If the judge says the law is *x*, then the law is *x*, because the law is what the judge declares it to be. Thus, the law is what the judge says it is because the law is what the judge declares it to be.

On the realist conception, obviously, law is not that which dispels the illusion of choice or that which negates the necessity of choice, but rather, that which is chosen—and it is that which is chosen by the judge. The realist definition, then, does not render the law something that comes to us from the past closing the door to choice, quite the contrary. The law is that which the judge chooses. Law, then, underscores the need for an honest accounting of freedom and choice, and the realists demanded just that of judges: an honest accounting of their freedom and choice. Law is chosen. It is posited. It is that which we decide it to be. We must acknowledge our choice, and the freedom we had to make it, when we decide that affirmative action is unconstitutional, or that the ban on abortion is constitutional, or that the consequential damages are or aren’t recoverable. We are choosing these outcomes. We are reading the Constitution in this way, to reach this result. We are choosing this interpretation; we are reading the precedent in that way, to reach that result, when we decide the consequential damages are recoverable. The judge is deciding, not discovering the law. When he does so, he exercises choice; he does not dispel the illusion of choice’s necessity.

So, the realist conception, unlike the standard or Dworkinian account, comports much more closely with our sense, shared by most law professors, students, at least some lawyers, and quite a few if not all or most judges, that law happens within a domain of freedom—that the law, which is declared to simply “be” in judicial decisions, is at least to some degree formed by the judge and not simply discovered. It comports, then, with our sense of law as requiring the exercise of choice rather than dispelling the false illusion of its necessity. But notice who’s making the choice. The judge, as he who has the last interpretive word, is he who declares as he utters the law. He has the freedom, and therefore he has the responsibility, for the justice or injustice, the goodness or badness, of the choice he makes. If it is a good law, it is to his credit—if otherwise, to his discredit. His agency is accentuated. Note whose agency is stripped, and hence whose responsibility is denied. The words of the text the judge interprets are not the law, on the realist account; the judge’s interpretation of that text is the law. The author, then, of the text, has no responsibility for the goodness or evil, the justice or injustice of the judge’s interpretation, and it is the judge’s interpretation, after all, that is law. The author of the text, then, has no responsibility for the justice or injustice of law. This follows, of course, even if the author of the text is a legislator, or a constitution draftsman—the author

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*Decision*, 14 CORNELL L.Q. 274 (1929); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

of the legislation, or of the constitution, is not responsible for the justice or injustice of the law. That should count as a decidedly peculiar result of legal realism. It is so peculiar, I would suggest, as to merit the appellation pathological.

It is common to posit realism and Dworkinian natural law (or as it is sometimes called “liberal legalism”) as polar opposites, and Dworkin certainly viewed his own jurisprudence as an alternative to then dominant realist strains in standard legal pedagogy.<sup>46</sup> Against that tendency, it is important to notice what the two share. Most obviously, what they share is their juriscentricity: the realists posit the judge as the party that makes law by declaring it, and defines law as that which the judge decides, and the Dworkinian anti-realist posits the judge as the party that discovers law, and defines law as that which dictates the judge’s decision. The vast differences between them, generally regarding the degree of freedom a judge has, should not obscure their common starting point: for both, it is the judge who either authors or discovers the law. But second, and less noted, is what both deny. It is surely noteworthy that our two dominant jurisprudential traditions either flatly deny that law is a practice that requires the exercise of choice within a domain of freedom, or assert precisely the opposite, but then identify the judge rather than the lawmaker—whether legislator or constitutionalist—as the free party making a choice. Thus, it is noteworthy that our two jurisprudential traditions either deny altogether the necessity of choice in the creation of law, or locate the moment of choice in the act of adjudication, rather than legislation. Neither realism nor Dworkinian natural law locates the legislative choice as a quintessential moment of lawmaking. Neither views the legislator’s power as a species of lawmaking, law-choosing, power. It is most noteworthy, and pathological, that these exceedingly odd presuppositions of our jurisprudence—that law, whatever it is, cannot possibly be the creation of the legislators who are empowered to make it—have so rarely been questioned.

And what of our study of constitutional law? How is constitutional law, as a field, implicated in the juriscentricity of legal education? There is too much here to say in one article, but my claim, which I have explored in more detail elsewhere,<sup>47</sup> is that the juriscentricity of our study of the Constitution’s meaning has affected, and deeply, received doctrinal meaning and constitutional politics both. Let me start with doctrinal meaning, although I will not dwell on this, as it

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<sup>46</sup> DWORKIN, *supra* note 37, at vii (setting out to argue against the liberal positivistic and utilitarian theory that is “so popular and influential that I shall call it the ruling theory of law”).

<sup>47</sup> See generally Robin West, *The Aspirational Constitution*, 88 NW. U. L. REV. 241 (1993); Robin West, *Ennobling Politics*, in LAW AND DEMOCRACY IN THE EMPIRE OF FORCE 58 (H. Jefferson Powell & James Boyd White eds., 2009) [hereinafter West, *Ennobling Politics*]; Robin West, *The Meaning of Equality and the Interpretive Turn*, 66 CHI.-KENT L. REV. 451 (1990); West, *Missing Jurisprudence*, *supra* note 27; West, *A Response to Goodwin Liu*, *supra* note 27.

has been written on extensively.<sup>48</sup> A constitution, read by a judge, will be read in a way that comports with what the judge *can do*—“ought” does imply “can”—*and* with what the judge thinks the judge must do, as a matter of professional duty—to twist the Kantian insight around a bit, “will,” often times, implies “ought.” Let me give an example of each way in which juriscentricity skews our understanding of the Constitution’s meaning.

So first, here is an explanation of how “ought” implies “can.” What a judge *can do* is decide cases according to law. The Constitution, he understands, is law—the Constitution itself of course says so.<sup>49</sup> Therefore, the judge must decide cases according to the Constitution’s mandates. The Constitution, he understands, is a form of higher but nevertheless positive law, so to decide cases according to the Constitution means to decide cases by striking provisions of a part of law that conflict with mandates of that higher legal command. A contract clause out of sorts with a more general contract clause can be struck by a court and likewise, a law out of sorts with a higher positive law will fall. So, a legislative provision that is inconsistent with a constitutional mandate can be struck. A court *can* do this, so it is within the realm of what the judge possibly ought to do. What a court cannot do is not within the realm of what he ought to do, and what he ought to do, of course, is decide cases according to law.

So, whatever might be in the Constitution, but *not* within the realm of what a court might understand as a positive law with which a lower law might be inconsistent—whatever is in the Constitution that does not seem to be a set of mandates with which a lower law might be inconsistent, and therefore null—will not be within the realm of even judicial notice. It is simply not law. It will not be noticed, much less adjudicated. It is hardly surprising, then, that courts readily read the Constitution as a series of higher legal commands, the effect of which is to nullify inconsistent lower legal commands—that is what a court can, and therefore possibly *ought* to do. The Constitution, read as law, requires that the judge do so. What a court cannot very well do is enforce purely aspirational provisions in the Constitution. It cannot enforce provisions of the Constitution that suggest general guidance to the state, or to legislators, or to lawmakers, regarding what they ought to do, rather than prohibitions stating what they cannot do. Yet there are such provisions: the general welfare clause is perhaps

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<sup>48</sup> See generally, e.g., LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM 73–143 (1994); Goodwin Liu, Brown, Bollinger, and Beyond, 47 HOW. L.J. 705 (2004); Liu, *supra* note 17.

<sup>49</sup> See U.S. CONST. art. VI, cl. 2. (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

simply the most obvious.<sup>50</sup> But a court cannot, for both institutional and jurisprudential reasons, require of the federal government that it serve the general welfare. More concretely, a court cannot enforce positive rights of citizens or positive obligations of state actors to act, rather than negative rights of citizens or negative obligations to refrain from acting in particular ways.<sup>51</sup> Yet there are such provisions.

The Fourteenth Amendment, for example, requires that no state shall deny equal protection and due process *of law*.<sup>52</sup> If one removes the double negative, the clause clearly requires that states affirmatively provide protection *of* the law to citizens, and that it do so equally, and that it provide due process likewise. What the Clause guarantees, in other words, is that the state provide equal protection *of law*, not equal protection *from* pernicious, or discriminatory, or overly intrusive law. Law, in the Equal Protection Clause, is grammatically constructed as a very good thing, protection of which states are affirmatively required to provide, not a bad thing because—pernicious, invasive, discriminatory or otherwise—individuals must be protected. The Clause requires the states to affirmatively provide protection *of law* from unspecified evils. Protection from what is unanswered, and it is a very good question, but we have only occasionally asked it—asked, that is, what the most natural interpretation of the Fourteenth Amendment requires the state to provide us equal protection of law *against*—because we so rarely have even noticed that the Clause requires protection *of* law, from some unspecified evil, rather than protection *from* pernicious law.<sup>53</sup> But a Court cannot require the states *to do* something that they haven't done. So, a court reads the phrase—certainly a

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<sup>50</sup> See *id.* art. I, § 8, cl. 1. (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .”). For examinations of how the power to provide for general welfare impacts specific areas of legislation and constitutional law, see generally, for example, Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010); Rena Steinzor, *The Constitution and Our Debt to the Future*, in BEYOND ENVIRONMENTAL LAW 145 (Alyson C. Flournoy & David M. Driesen eds., 2010); Edward C. Walterscheid, *Conforming the General Welfare Clause and the Intellectual Property Clause*, 13 HARV. J.L. & TECH. 87 (1999).

<sup>51</sup> See generally Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990).

<sup>52</sup> See U.S. CONST. amend. XIV, § 1. (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>53</sup> Jacobus tenBroek, I believe, was the first to explore the consequences of this, the main one being that the so called “state action” requirement has it exactly backwards: what the Amendment truly targets, if read naturally, is state inaction in the face of private abuse of power—such as state inaction in the face of widespread lynchings in the South, in the immediate postwar period, and before passage of the Amendments. See generally JACOBUS TENBROEK, EQUAL UNDER LAW (1965); WEST, *supra* note 48; West, *Missing Jurisprudence*, *supra* note 27; Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111 (1991).

central, and perhaps the central, command of the Fourteenth Amendment—more or less out of the Constitution, substituting for it a right to be free of pernicious state law, or pernicious state action, rather than a right to the affirmative protections of law. It reads it, in other words, as providing a right to be equally protected from bad law—a right, that is, against bad law—rather than a right to the protection *of* law—a right to state action, so to speak—against unspecified evils.

Why this fairly dramatic contortion of fairly clear textual meaning? Partly, I believe, simply because ought implies can, and what courts *ought to do* is decide cases according to law. The court cannot strike a social reality, or problem, or set of circumstances, because it is out of sorts with a higher law: it cannot readily strike down the problem of homelessness because it is inconsistent with a general mandate in the Constitution (if there is one) of a right to welfare, or strike down the problem of coercive sex if it is inconsistent with a constitutional right of liberty, or strike down the problem of hate speech or hate crimes, or domestic violence, and so on, because they are inconsistent with the protection of law. It cannot order the states or Congress to enact a legal regime that will protect citizens equally against these evils or others. And, the Constitution is law. So the conclusion: the Constitution just cannot be read to require that states provide legal regimes that protect people with law against unspecified evils, no matter how “natural” that reading may be, and no matter how consistent such a reading might be with the history of the phrase. It is hardly surprising, then, that a court will be disinclined to find in the Constitution mandates that speak to social circumstances or social injustices that the court has no power to strike, as though they were errant laws or contract provisions.

The court, quite naturally, and for no more subtle reason than that it is in accord with its own judicial role, will read the Constitution, including the Fourteenth Amendment, as a series of “thou shalt nots” rather than “thou shalt” even though at least the Fourteenth reads like a mandate to act, rather than a mandate to not act. Put differently, it is hardly surprising, then, that the court will be particularly sensitively attuned to the parts of the Constitution that read like “thou shalt nots” directed toward other state actors—the First Amendment, the Fourth, and so on—and be less attuned to those provisions that suggest, at least to scholars and historians, that social conditions—a white supremacy regime enforced through a regime of lynchings,<sup>54</sup> entrenched poverty,<sup>55</sup> gender

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<sup>54</sup> See TENBROEK, *supra* note 53, at 124 & n.8. Richard Posner has also indicated his agreement with the basic claim that the Equal Protection Clause was originally intended to address state passivity in response to private lynchings. See Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1374–75 (1990) (“The language of the [E]qual [P]rotection [C]lause . . . and its background in the refusal of law enforcement authorities in southern states to protect the freedmen against the private violence of the Ku Klux Klan, suggest[s] that all the [C]lause forbids is the selective withdrawal of legal protection on racial grounds. A state cannot make black people outlaws by refusing to enforce the state’s criminal and tort law when the victims of a crime or tort are black.”).



inequality or domestic violence,<sup>56</sup> inadequate education<sup>57</sup>—offend constitutional aspirations, and first empower and then guide the state's hand in responding to those conditions, rather than limit its scope or reach. It is not surprising then that courts—whether liberal or conservative, Democratic- or Republican-controlled—have not been inclined to see in the language support for positive rights of citizens, or for positive obligations of state actors to address social problems, by taking affirmative actions. The Supreme Court, and courts generally, would have little power to enforce them if such rights exist. “Ought” implies “can”: if the court cannot enforce such rights then the court cannot be morally obligated to do so. Law is what courts ought to enforce, so those rights, or their correlative state duties, just cannot be a part of our law, including the higher law of the Constitution. That is the first way in which juriscentricity perverts or limits constitutional meaning.

Let me turn to an example of the second sort. A judge, when deciding cases, attempts to do so in a way that accords with his or her understanding of his professional obligations. At the very center of virtually *all* judges' understanding of their professional obligations, is the obligation to “treat likes alike.” The duty to treat likes alike is more or less what it means to do legal justice. Whatever else a judge does, he or she must morally decide cases “according to law,” and to do so means that he or she must treat *this* litigant the same as one treated *that* litigant if the two are comparably situated.<sup>58</sup> This is, more or less what judges try to do in virtually every case that comes before them. It is not just a rule of law that requires it of them, but the Rule of Law itself, as understood by judges—their professional identity, role, ethics, and self-understanding.

If we keep this in mind, it is not so puzzling why courts, when interpreting the nature of the “equality” required by the Equal Protection Clause, reads it as requiring of legislatures, basically, rationality in line drawing. The resultant understanding of equal protection—that the Clause requires that the line drawing in which legislatures must perforce engage be minimally rational, by which is meant neither over- nor underinclusive—requires of the legislature a

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<sup>55</sup> See Michelman, *supra* note 17, at 19–22; Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 962–64 (1973).

<sup>56</sup> See generally Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45 (1990); West, *Unenumerated Duties*, *supra* note 17.

<sup>57</sup> See Liu, *supra* note 17, at 396–99.

<sup>58</sup> There is a massive literature on this obligation, and from scholars who agree on practically nothing else. See DWORKIN, *supra* note 36, at 179–86 (discussing how law's integrity is compromised by “checkerboard” solutions that result in different outcomes for similar cases); DWORKIN, *supra* note 37, at 113 (“The gravitational force of a precedent may be explained by appeal, not to the wisdom of enforcing enactments, but to the fairness of treating like cases alike.”); Dworkin, *supra* note 43. See generally, e.g., Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029 (1990); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993).

sort of “formal equality.” The Clause, as interpreted by courts, basically requires that *legislatures* treat likes alike—rather than anything more substantive. This interpretation, I would suggest, uncoincidentally parallels, or echoes, the formal equality that the Rule of Law requires of judges: just as judges must treat like litigants alike, by virtue of the Rule of Law, so legislatures must treat like groups alike, by virtue of the Equal Protection Clause. This rationality-based interpretation of equality, rather than being a politically driven interpretation, is a natural meaning of equal protection, toward which courts are drawn, simply because it tracks what judges require of themselves. Just as judges require of themselves that they treat likes alike, so the Equal Protection Clause, if read as requiring formal rather than substantive equality, requires of legislatures that *they* treat likes alike as well; if this is what equality requires of judges, then it is what equality must require of legislators as well. And, it is what equality requires of judges: to treat litigants equally is in large measure a matter of treating likes alike. From that simple understanding of the meaning of equality—so central to judicial self-understanding of the judge’s own moral role, follows the judicial interpretation of the antidiscrimination norm—the rationality model of equal protection and much else shows that legislatures must treat groups that are alike basically the same, and treat groups that are different differently, and if they stray too far from this ideal, the result will be *unequal* protection of law.

If we think of the “rational sorting” understanding of equality that dominates the judiciary’s self-understanding, it is not surprising that the rationality model of equality has come to dominate judicial understanding of the mandate of “equal protection” that the Constitution requires of legislatures. Judges read the equality demanded by the Clause against their own understanding of the equality demanded of them by their own moral roles and responsibilities. They must provide equal justice, which basically requires a rational sorting of likes and unlikes. The Constitution requires of legislatures that they provide equal protection; therefore, the Constitution requires of legislatures that they provide an equality that has the same core meaning as the equal justice courts require of themselves: that legislatures treat like groups alike, just as courts are required to treat like individual litigants alike. That is what equality means—to courts. From a juriscentric perspective, then, that is what equality means, period, and therefore what equality requires of legislatures.<sup>59</sup>

In both cases, the dominant adjudicated meaning of the constitutional phrase or word—the modifier “equal” in the Equal Protection Clause to mean “rational” rather than anything more substantive, and the substitution of the preposition “from” for “of” in the Fourteenth Amendment generally, thus generating the state action requirement and much else—is a function, at least in part if not overwhelmingly, of the juriscentric perspective of the interpreter. The

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<sup>59</sup>I have elaborated upon this argument previously. See generally West, *Missing Jurisprudence*, *supra* note 27.

meaning the Fourteenth Amendment has come to have—and particularly the Equal Protection Clause—has been determined, in part, by the simple fact that it is judges rather than some other legal actor doing the interpreting.

What if we were to read the Equal Protection Clause, and the Fourteenth Amendment generally, from the perspective of the legislator—the actor with power to make new law, rather than from the perspective of the judge? The Constitution requires of state lawmakers that they provide “equal protection of law.” Wouldn’t we be naturally inclined, if we were such a state lawmaker, to ask: equal protection of law *against what*? What is the evil against which the mantle of law is to protect us—and protect us equally? Is the evil that the Fourteenth Amendment requires us to address with the protection of law really *bad law*? Does the Constitution require of the lawmaker that the lawmaker provide equal protection of law against bad law? That’s not what it says, and does not comport with its history. It seems overwhelmingly clear, as Richard Posner among others has said repeatedly, the Clause was most immediately intended to direct the states to provide equal protection of law against the evil of private violence.<sup>60</sup> Of course it does not say that. It does not specify the evil. But the Constitution contains general provisions that require interpretation. It is at least odd that in the mountains and mountains of interpretive writings on and about the Equal Protection Clause almost none of it addresses that simple and haunting question: equal protection of law against what? What is it that the Clause directs the legislator to protect us from?

It is not an unanswerable question. There is a rich history of the phrase “equal protection of law,” both before and after the creation of America, both before and after the drafting of the Constitution and the drafting of the Reconstruction Amendments.<sup>61</sup> That history points to a meaning of the “equal protection of the law” that requires legislators to act—rather than to refrain from acting—and to act in such a way as to provide protection of the law against certain evils, with violence from outsiders or from crime being core. My point here is that the question—protection against what—only comes into view if and when we look at the phrase from the perspective of the actor to whom the Fourteenth Amendment is most clearly addressed: the state legislator. It is, after all, the state that is the addressee of the phrase, “no state shall deny,” which logically entails that all states shall provide. They shall provide “equal protection of law.” Equal protection of law against what? It is a simple, elementary question. It is astounding that we do not have volumes of scholarship elaborating different answers, different theories of government that might imply different answers, and so forth. And we do not. We do not have, for example, different competing theories about what the Constitution, or the Fourteenth Amendment, seemingly assumes to be the evil against which states

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<sup>60</sup> See Posner, *supra* note 54; see also TENBROEK, *supra* note 53; Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 DUKE L.J. 507, 508–09 (1991).

<sup>61</sup> See generally Heyman, *supra* note 60.

must protect citizens. We do not have different competing theories about the possible conception of government and sovereignty and state power that underlies the Fourteenth Amendment. And we do not have it simply because the question is not naturally posed, given the juriscentric perspective. Courts must apply law, not create law, to protect citizens against evils. It must apply the Constitution, as law, to errant state action. It must, then, re-write the Fourteenth Amendment so it can be put to that end.

Let me turn now to our constitutional politics, by which I mean simply the general political sense of the point, rather than doctrinal meaning, of constitutionalism. In law, in law schools, and in law school courses, we read and learn and absorb the Constitution as a document or instrument that negates pernicious power. It limits legislative power to enumerated ends. It separates the power of the state into competing branches. Basically, it constructs power, particularly political power of states, as the problem to be solved, and it then solves it by limiting, balancing, splitting and separating it. The Supreme Court, of course, and courts, is the enforcer of all this limiting and splitting and balancing and separating.

There are two consequences of this. First, it is at least arguably contrary to the spirit of the Constitution itself, which is hardly hostile to the project of state-building. The original drafters of the Constitution drafted the Constitution in order that the federal government it constituted might be empowered to do something—not refrain from doing things—and they envisioned it as empowered to do more, not less than what had come before, under the Articles of Confederation. The drafters of the Reconstruction Amendments likewise drafted those amendments in order to empower, not disempower, the federal government, and the constitutional moment we experienced in the first few decades of the twentieth century likewise moved toward an empowerment, not a disempowerment, of the state. Further, the drafters of the Constitution and the Reconstruction Amendments likewise hardly envisioned state power as the *sole* problem to be solved by their exercises in draftsmanship. The problem of private power, unchecked by state authority, also loomed large, particularly for the Reconstruction Amendment drafters and certainly for the architects of the unstated amendments to the Constitution that facilitated the New Deal.<sup>62</sup>

Second, the virtually unchecked interpretive construction of constitutional politics as demonizing legislative authority creates, at least in the legal academy, a distrust of the legislator and valorization of the judge that does not bode well for our deliberative, democratic processes.<sup>63</sup> It simply sets the bar too low. It presupposes legislative actors who are interest-driven, power hungry horse traders and that are bound to the infantile desires of constituents and their

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<sup>62</sup>For a history not unsympathetic to these broad claims, see generally BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109 (1989); Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749 (1999).

<sup>63</sup>I have detailed this argument previously. See generally West, *Ennobling Politics*, *supra* note 47.

equally infantile desire to retain and expand power all on the one hand; and on the other hand, a principled, smart, Herculean, judiciary equipped with encyclopedic knowledge of our legal past, and an unparalleled sensitivity to the country's long-term as well as short-term interests, our true and fundamental rights, even when they run contrary to our felt needs, and so forth. It expresses a contempt for representative government, and grounds it in constitutional authority—an authority that is both law, which we are bound to obey, and expressive of a moral and aspirational narrative of our country's fundamental identity. It equates our deepest, most constitutional, constitutive identity, in effect, with a hostility to our own deliberative democracy—an adversarial relationship with our own felt needs and interests, on which basis we cast votes, and a disavowal of the value our own participation in a government of equals. It sets us against our own democracy, which represents us. It sets us, and powerfully, against ourselves. It does it by investing our true natures—our deep interests, our rights-bearing selves, our long-term interests, and so forth—in the authority of our courts, while we invest our apparent, or childish, or ephemeral, or inessential natures—our felt interests, wishes, desires, views, and needs, on which basis, again, we vote—in untrustworthy legislative bodies, which, above virtually all else, simply must be stopped. It teaches us to hate ourselves. That is pathological and virtually unexamined in contemporary American law schools.

Lastly, let me turn to legal culture. Americans have a distinctive and much-studied ambivalence toward the idea of law: we revere our “higher law”—constitutional law, sometimes natural law, the law of intuition, the law in the hearts of white-hat-sporting cowboys, and in all of us who recognize the good. We do not, though, have a particularly high regard for ordinary law—ordinary law being the domain of Lilliputians, as David Luban described the Pentagon's view of the organized Bar during the struggles over the torture and detention of suspected terrorists, who in turn create a drag on the powers of intuition, of strength, of personal power.<sup>64</sup> The domain of ordinary law is the domain of the hapless sheriff, so disparaged in countless John Wayne movies. It is the domain of the faceless bureaucrat, the petty, smothering nanny-state, the overly intrusive paternalist looking to regulate our intake of cigarettes and s'mores in the name of our true nutritional selves, or our enjoyment of online gambling and pornography in the name of our own true moral being, or our robust debates with one another in the name of civility. At times this veers toward a romance with the outlaw, at times with a romance toward the little guy crushed by the state, and at times with a romance with the hero who fights his own government

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<sup>64</sup>David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981, 2020 (2008) (“Some commentators regard lawfare as an insidious tool of America's enemies, including internationalist NGOs with an agenda to promote. Lawfare, on this view, is an effort by the Lilliputians to bind Gulliver in a network of rules. Perhaps the most striking statement of this lawfare theory appears in the 2005 National Defense Strategy of the United States, produced by the Pentagon and signed by the Secretary of Defense: ‘Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism.’”).

no less than wrongdoers. At other times, though, it leads us to a punitiveness toward criminals unmatched worldwide, a criminal code that matches the violence and the rebelliousness of the outlaw with violence of the state. We harbor ambivalence, not unalloyed hostility, toward the rule of ordinary law.

That ambivalence in turn leads us, as a way of mediating these rough terrains, toward an unequivocal, unabashed, unchecked love of the Constitution. Like Barbara Jordan nearly forty years ago, many of us, perhaps most, are ready to declare that “my faith in the Constitution is . . . total.”<sup>65</sup> It is a complicated faith. It is a faith which, in the name of law, expresses contempt for law—that which, in the name of the highest law to which we owe unwavering allegiance, in turn expresses a distrust of the organs of government. It is the way by which we can be law abiding—we love and revere the Constitution on law day, graduation day, commencement day—and at the same time contemptuous of government. The law to which we owe our allegiance, which we love, which we embrace, with which we identify. The law of the Constitution is the law which invalidates, potentially, the law we create through our democratic processes. Our love of the law that expresses our contempt for law, is a love for deeply antidemocratic impulses. It pretends to express a love of individuality, of robust rebelliousness, of some uniquely American love affair with the open frontier, with self-government at the most local level, meaning of and for and by the individual. It is also, though, in its contempt of the democracy we create, expressive of a desire that is very much the opposite—it is also the expression of a desire, ultimately, to be ruled, rather than to rule, by some force, some higher authority, some deity, some paternalist, some corporate overlord—that is larger and greater and more powerful than the mere “we the people.” That is pathological. It is a disavowal of self-rule that does not befit a free people.

The law schools, with their unchecked valorization of the judicial person, are complicit. Simply contrast the federal judge with the state legislator, as constructed by the legal academy of the last half century. The former debates, and deliberates, and reasons, on the basis of his encyclopedic knowledge of our past and with an eye steadily on the future; the latter reacts to constituent desire on the basis of his desire to stay in their good graces. This basic contrast underlies our teaching in constitutional law, much of our scholarship, and our basic public law curriculum. It is at the heart of our insistence on the distinction between law—which is good—and politics—which is depraved. It is at the heart of our claim that law is the realm of reason and politics that of passions—and rarely if ever to the credit of the latter. It is the essence of our conviction that law is a learned profession, expressive of our better natures, the angel on our shoulder, while politics is the expression of our debasement. It is the source of our sour conviction that the man of politics has fallen, while the man of the law is exalted.

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<sup>65</sup> “My faith in the Constitution is whole, it is complete, it is total.” *Debate on Articles of Impeachment: Hearing on H.R. Res. 803 Before the H. Comm. on the Judiciary*, 93d Cong. 111 (1974) (statement of Rep. Barbara Jordan, Member, H. Comm. on the Judiciary).

Yet, all of this is in the name of law. Remember, it is law school, legal scholarship, the legal profession in which we engage. We have, begrudgingly, over the last century, come to understand that our law and our judges are not quite so pure as we might have been led to believe. First, the realists, and then critical scholars in the seventies and eighties, argued, again and again, and eventually convincingly, that law too is polluted by the political being, that law too, as expressed by the judge, is influenced by politics both large and small, interrupted by passion, filtered through desire, reflective of needs both of litigants and of judges, informed by the quest for power. Law is not so pure, not so distilled of the thirst for power after all. But look at what we have not done. We have not looked at the other side of the new wisdom—that the gulf between law and politics might not be so gigantic after all; we have not looked, that is, at the legalist impulse in politics. We have not shifted our baseline assumption that politics is lacking in reason. We do not assume the best of our legislators that produce it: that they too are operating on the basis of knowledge of the past, with an eye toward the future, from a genuine desire to serve the general welfare; that the legislator can be reasonable, and principled, and judicious, just as the judge can be irrational, unprincipled, and political, in the perjorative sense. We have not extended, that is, the cumulative wisdom of the critical legal studies and legal realist movements—in a nutshell, that law, meaning adjudicated law, is political—to its logical corollary, that politics, and its product, is legal, sharing in the values for which we revere it. Nor have we moved even an inch toward the more basic realignment that passion, of course, has a rightful role to play on the throne of sovereignty; that law, both adjudicative and legislative, should of course be informed by need and desire; that our needs, desires, and passions are expressions of our humanity—our vulnerability, our mortality—no less than our flights of reason and principle are expressive, perhaps, of our potential for immortality, for the lasting imprint, unchecked by our own biological deaths. This steadfast refusal to do so—this refusal to articulate a conception of law, democracy and politics all, that embraces rather than alienates our biological being and the needs and vulnerabilities and fears and passions that arise from it—I believe, is the most fundamental conviction shared by virtually all parties in the enterprise of legal education, across the spectrum of left- and right-wing politics, across the spectrum of liberal and conservative, of gender, race and sexual orientation. That we need not and should not rest law, particularly our highest law, on the ephemeral—on that which will die—including our desires, needs, passions, emotions, fears and aspirations, is the excluded other of our deepest legal values. We aim in law for the eternal, the undying, the principled, the reasonable, the Herculean—that which connects us to the greatest mysteries of the universe as Holmes said in his ode to jurisprudence—and to do so, we must chuck, throw under the bus, the temporal, the dying, the immediate, the felt need, feeling itself, and the politics, including the democracy, that reflects all of that mush. That disavowal of our biological being, its needs and the politics that

respects and reflects those needs, is pathological, and the law schools are complicit. Our juriscentricity is symptomatic of it.

### III. THE LEGISLATED CONSTITUTION

Let me conclude by suggesting a thought experiment, and then two concrete proposals. The thought experiment is simply this: what might be the answers to our deepest, most challenging, most engaging, jurisprudential, constitutional, and legal cultural questions, if we addressed them from the perspective of a legislator, state or federal, rather than a federal judge? Jurisprudence: What is law? Might a legislative perspective, rather than a judicial, yield a rather different set of answers than the traditional and realist alternatives suggested above? Might the answer to that question, for example, center the lawmaker and at least describe the product of the lawmaker's efforts as being law? Might the virtues that follow from such an answer tend to honor, or at least respect, legislative effort? And what of the Constitution? How might a legislator, rather than a court, interpret the Supremacy Clause, which declares that the Constitution is Law? Might it be closer to the spirit of the way Thomas Paine interpreted it, when he praised the Constitution for its democratic character, declaring that every family owned a copy, and every member of the government kept the text in his pocket?<sup>66</sup> How might the legislator rather than the judge interpret the command to provide protection of the law and to all equally? How might the legislator rather than the judge respond to the suggestion that the government should promote the general welfare? If we centered the perspective of the elected legislator, how might we describe the relationship between law, democracy, adjudication, and politics? Might those answers be different than those now generated by our juriscentric legal academy? And might the graduates of a school that did so think rather differently about themselves, their democracy, and their profession? Might they come to feel, perhaps, a sense of fiduciary obligation rather than contempt toward the democracy and the democratic process that yields the law that they, as lawyers, will practice?

I would like to see us develop, as a core part of the law school's public law curriculum, a course to accompany, not supplant, the traditional course in constitutional law—that one could be called something like “the legislated Constitution,” or “legislative constitutionalism.” What does the Constitution mean, from the perspective of the legislator, and as reflected in legislative work? What is the meaning of the Constitution, as expressed in the New Deal legislation, the Civil Rights Acts, the Anti-Discrimination Acts, or the Violence Against Women Act? What did the legislators who drafted and debated those laws think of the Constitution that empowered them to do so? What did they think it meant? What did they think they were doing, as constitutional actors? And, necessarily, what might the Constitution mean to such actors? What does

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<sup>66</sup> THOMAS PAINE, *Rights of Man Part the Second: Combining Principle and Practice*, in COLLECTED WRITINGS 574 (Eric Foner ed., Library of America 1995) (1792).



it suggest that such actors might do, or should do, or must do, that they are not doing? What does it suggest they should not do that they currently do? What are the unenumerated or penumbral duties, not rights, as felt by legislators, not judges? What is the Constitution, as it has been articulated and formed and reformed in our great legislative achievements of the twentieth century? What are the stories behind passage of those laws?

My second suggestion, now shared by a sizeable number of law school deans and a broad base of bipartisan support in Congress, is that we urge the creation of a legislative clerkship program. What if we were to send our best and brightest graduates off, when they complete their studies, for a capstone clerkship in legislatures, both state and federal, rather than courthouses? What if our graduates were to put their oar in the water and labor side by side, for one or two years upon graduation, with the legislators that work to craft the terms of our shared social experiments? Might that engender respect for the labor?

I leave elaboration of these two proposals to subsequent consideration—what a course in the legislated constitution might look like, and how we might model a post-graduate legislative clerkship program, modeled on the judicial clerkship model now in place, and the problems they undoubtedly carry that I have not foreseen. But they seem to me to be modest proposals that could take us some way toward fulfilling the promise of the thought experiment I briefly described above: a law school education, and acculturation, that would usher a new generation of lawyers into the profession, and that would respect and honor the democratic work and the political process that yields, through the noble methods of debate, deliberation, and, just as important, compromise between people of good faith with clashing principles, the legal regimes we have sworn to uphold, and more important, within which we live our political lives, and make the political choices that determine the quality and aspirations of our shared community.