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Is Progressive Constitutionalism Possible?

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IS PROGRESSIVE CONSTITUTIONALISM POSSIBLE?

ROBIN WEST

Progressivism is in part a particular moral and political response to the sadness of lesser lives, lives unnecessarily diminished by economic, psychic and physical insecurity in the midst of a society or world that offers plenty. This insecurity is unjust and should end; the suffering should be alleviated, and those lives should be enriched. To do so must be one of the goals of a morally just or justifiable state. Not all suffering and not all lesser lives, of course, give rise to such a response. The suffering attendant to accident, disease, war and happenstance is neither entirely chargeable to our societal account, nor is it within our control. A “lesser life” marred by the early loss of a parent, a parent’s mourning occasioned by the accidental death of a child, or an adult’s ongoing trauma set off by a childhood disease, although cosmically unjust, is neither unjust in the ordinary sense, nor is it easily ameliorated through politics. In contrast, the suffering attendant to poverty or stunted opportunities for growth, the suffering attendant to the absence of supportive communities, or the suffering attendant to the desperate attempt to nurture children while unsure of one’s own physical or economic safety is largely chargeable to our moral account and may be ameliorated through politics—at least in a social world like our own, marked by abundant natural resources, vast economic opportunity, thriving neighborhoods, and competent police and security forces.

That such suffering exists on a shockingly widespread scale in our world is a product of two states of affairs. First, it is the consequence of the decision to allow not simply “property,” but vast quantities of wealth to accumulate in a few private hands, and social and sexual esteem as well as physical security and well-being to reside in one race and sex. Second, the suffering is a product of our collective, political and legal inattention to the suffering those distributions leave in their wake. Progressivism, I will assume, is marked by a distinctive moral response to that suffering. When brought on by collective inattention to private maldistributions of wealth, security or privilege, that suffering is unjust, and for that reason gives rise to a moral and political imperative: the conditions which give rise to the

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suffering must be changed, and changed through some form of collective action, which in turn may (although often times may not) require the coercive power of the state.

The question I want to raise first is whether it is possible to read the Constitution, or any part of it, as a part of this progressive moral imperative? Does the Constitution, as well as political and moral conscience, require of us ("us," meaning all citizens, or the polity, or people who vote, or those who engage in political discourse or have political influence, or anyone who pledges to uphold the Constitution) a collective response to the needless suffering attendant to private maldistributions of power, wealth, or privilege? It should already be clear that what Steve Shiffrin helpfully calls the "positive Constitution,"¹ and what I have elsewhere called the "adjudicated Constitution"² is not a part of any such moral imperative, and indeed, mutes its force. I have described the suffering that triggers the distinctive progressive imperative as caused by private power combined with state or collective neglect, and the positive Constitution, as it has been authoritatively interpreted for the last one hundred years, at best simply does not address the suffering attendant to private action and state neglect: neither private action nor state inaction, we have all been taught to say, comes within the ambit of constitutional concern. Indeed, quite the contrary. At various times in our all too familiar constitutional history, and through the construction of various individual "rights," the Constitution, far from being concerned with such suffering, has been authoritatively interpreted in such a way as to quite aggressively protect the conditions which give rise to such suffering against ordinary forms of political intervention.³ That our positive constitution is so clearly at cross purposes with the moral imperative that animates progressive politics in this country does indeed imply that that body of law does actual harm to this country's disenfranchised. That it has not been the object of sustained critique from the progressive left is indicative of the indirect harm it has done to our moral and intellectual culture.⁴

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¹ The Constitution as it has been interpreted. See generally Steven H. Shiffrin, Should Progressives Support the Constitution? 4 WIDENER L. SYMP. J. 253 (1999).
² The Constitution as it has been construed and applied by the courts. See ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT (1994).
⁴ While a number of left scholars have examined the phenomena of "Constitution worship," see J. M. Balkin, Agreements with Hell and Other Objects of Our Faith, 65 FORDHAM L. REV. 1703 (1997); MARK TUSHNET, RED WHITE AND BLUE (1988); and WEST, supra note 2, at 155-189, very few in recent years have subjected constitutional norms to sustained political or moral criticism. Exceptions include Justice Thurgood Marshall.
Nevertheless, I want to argue against the positive, posited, adjudicated Constitution, and to suggest instead that the constitutional story, properly understood, is a part of progressivism's core moral and political imperative: to wield collective action toward the end of ameliorating the suffering that is consequent to private maldistributions of wealth and security. Thus, what I want to suggest is that the Constitution and our constitutional history should be read as a part of the progressive moral response to such suffering, that it is indeed unjust and the progressive political response to it as well is unjust, and that the state or some other form of collective action representing the will and sentiment of the people must be aimed at eradicating it. Unwarranted private suffering brought on by private maldistributions of wealth or power, in other words, is of constitutional as well as moral significance, and our collective indifference to it is unconstitutional and shameful. That it is unconstitutional is a part of what makes it shameful, and the shame is what makes it unconstitutional.

What I do not believe or argue, just to be clear, and as the second half of my article will make clear, is that either the Constitution or progressivism is a necessary part of an imperative adjudicated response to such suffering. Thus, the interpretation or family of interpretations of the Constitution's progressive promises, for which I will argue, do not lend themselves to judicial enforcement. Rather, again, they lend themselves, I hope, to political action and then congressional enactment. I do not mean to suggest that judicial interpretations of the Constitution (the positive, or adjudicated Constitution) are irrelevant to the success of a progressive and political Constitution. Should the progressive and moral imperative at the heart of some parts of our Constitution inspire Congress to pass progressive legislation, and should such legislation be constitutionally challenged, the interpretation of the Constitution that inspired or guided the legislation at issue should be deserving of judicial deference. However, that possibility of judicial deference and the arguments for and against it are not my focus here. What I want to focus on instead is the potential Constitutional contribution to moral, and particularly progressive moral and political debate and persuasion because it is that potential contribution which has been utterly neglected and even negated by our current constitutional understandings.

Is it possible to understand the Constitution, or any part of it, as directed toward the twinned evil of private harm and public indifference, and as mandating, rather than forbidding or simply permitting, political intervention? I have argued elsewhere that it is, so here I just sketch,


5. See WEST, supra note 2.
summarily, toward that end, two arguments that might suggest as much: first a "plain meaning" if somewhat metaphoric interpretation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and then a similarly summarial understanding of the Due Process Clause.

First, equal protection. Theorists and jurists, from Antonin Scalia on the right to Ronald Dworkin on the left, concur that this phrase requires the courts to police state and congressional legislation for departures from various norms of rationality. What the Equal Protection Clause requires, ideally, is that when a state acts, it must treat similarly situated groups similarly, and differently situated groups differently. It must be rational in its demarcation of sameness and difference, and it must not mistake one for the other. In ordinary politics and in ordinary times, courts need not aggressively question such demarcations, but in extraordinary legislative enactments, such as any legislation pertaining to racial injustice, such deference is not due. The rationality of legislative perceptions of differences between the races are profoundly subject to doubt. As countless progressive and liberal commentators have pointed out, this understanding of equal protection, rooted in Carolene Products, and requiring rationality of legislators in line drawing, has not only been the touchstone of substantial moral progress particularly in race relations in this country, but it has also come with real costs. Although equal protection has at one time in this century been a vehicle for staying a conservative Court's hand when faced with progressive legislation, and at another emboldened a liberal Court to strike racially segregatory local and state law, it has more recently, in a history too familiar to all, led modern courts to strikingly regressive conclusions.

7. U.S. CONST. amend. XIV, § 1.
8. The rationality understanding of the Equal Protection Clause, particularly as it relates to social class, took hold in United States v. Carolene Products, 304 U.S. 144 (1938), and has now achieved such consensus that it has become virtually synonymous with the clause itself. See, e.g., Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175 (1989); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 147-62 (1996) (discussing affirmative action in chapter 6); see generally LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1436-672 (2d ed. 1988).
9. See United States v. Carolene Products, 304 U.S. 144 (1938) (setting forth the "rational basis" test whereby any statute will be upheld when challenged so long as the legislature had a rational basis for enacting the statute).
10. See, e.g. Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), cert. denied, 116 S.Ct. 2580, 135 L.Ed.2d 1094; Taxman v. Board of Educ. 91 F.3d 1547 (3d Cir. 1996), cert. denied, 117 S.Ct. 2506, 138 L.Ed.2d 1010, and cert. dismissed 118 S.Ct. 595, 139 L.Ed.2d 431; and City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). The courts in each of these cases struck down affirmative action programs inasmuch as they were nonremedial in nature.
Yet, the rationality reading is certainly not the most natural reading of the Equal Protection Clause. The Fourteenth Amendment says nothing of rationality, sameness, or difference, and nothing about the judicial role in policing legislation for departures from such a test. By its language, it neither requires that legislation when passed be "rational," or that the lines drawn in legislation reflect real differences in the social world, nor does it explicitly empower courts to strike legislation that fails a rationality test. What the Equal Protection Clause does require is that the state not deny equal protection to some, any or all of its citizens. If we remove the double negative, "No State . . . shall deny to any person within its jurisdiction the equal protection of the laws," what it imposes is an affirmative obligation on the states to protect citizens and to do so equally. Although the clause does not specify what the state is to protect citizens from, we might readily agree on some core applications. Surely, for example, a state may not refuse to protect some citizens, but protect others, from the threat and dangers of homicidal violence. Failing to take action against lynch mobs, for example, while protecting whites against private violence, is a paradigm failure; perhaps the paradigm failure of the state's obligation to equally protect some, any or all of its citizens. In our own time, to refuse to criminalize some violent crimes against women, such as marital rape, is strikingly close to this paradigm; it is a failure of the state's obligation to equally protect its citizens against violence.

There are three differences I want to stress between this "protectionist" reading of the Equal Protection Clause of the Fourteenth Amendment and the current and liberal understanding of the clause that requires the states to both equally protect its citizens and work with Congress to legislate rationally. First, on the protectionist reading, the phrase precludes state inaction, not state action. What the clause says is that no state shall deny protection, i.e. no state may fail to protect. It is state neglect, or state inaction, not action, that is the literal target of the amendment. Second, what the clause requires of states, through this double negative, is that they protect their citizens, and that they protect them equally: states are required to protect their citizens, or at minimum not neglect to do so. Failure to protect, not irrational enactment, is the target of this part of the amendment. Third, the Equal Protection Clause and the Fourteenth Amendment within which it appears, read as forbidding the states to neglect to protect their citizens, envisions a thoroughly political, not legal, response.

12. See generally JACOBUS TENBROEK, EQUAL UNDER LAW (1965) (discussing how the current Court is changing direction, aligning more with the goal of the Framers to extend the national power of protection to all citizens denied their natural and human rights by state inaction, as well as by state action).
13. See WEST, supra note 2, at 45-72.
to such failures: the clause empowers Congress, not the Court, to address those failures through federal legislation. The response envisioned by the Fourteenth Amendment itself, to states' failure to protect their citizens against violence, in other words, is passage of legislation such as an anti-lynching law, a law restricting hate groups, or the Violence Against Women Act. 14 In all cases, the envisioned federal legislation responds to the failure of states to protect citizens against the adverse affects of unchecked private violence.

This interpretation, of course, leaves important questions unanswered, the most important of which is "protection against what?" That the states must protect us against violations of our natural rights would have been an acceptable answer to such a question, but today it will not take us far. Clearly, protection against violent assault is included in a statement that echoes the historic purpose of the amendment. The states, then, must be constitutionally required to protect women seeking abortions against the life-threatening violence of co-citizens picketing abortion clinics; to protect children from the life-threatening abuse of natural or step parents; to protect students from the threats posed to life and limb by gun-wielding high-schoolers; to protect urban dwellers from the threat to safety posed by criminality; to protect the safety of all of us against the threat posed more generally by an armed populace; and to protect wives and husbands against the life threatening violence sometimes visited upon them by their spouses. Yet, in none of these cases, has the Court found there to be a constitutional mandate warranting such protection, and in at least one, the Court has found the congressional attempt to provide such protection unconstitutional. 15 These judicial holdings are anathema to progressivism and unnatural readings of the clause. The Equal Protection Clause by its terms requires precisely the provision of protection against private violence that the Court has insisted is not required. The Equal Protection Clause requires the precise congressional action regarding the states' failure to provide protection, which on occasion, the Court has found to be constitutionally suspect. 16

15. The Court struck a federal attempt to bolster the protection of school children against violence in United States v. Lopez, 514 U.S. 549 (1995). The Court held that the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q) exceeded Congress' Commerce Clause authority. One court found the Violence Against Women Act unconstitutional. See United States v. Wright, 965 F. Supp. 1307 (D. Neb. 1997), rev'd, 128 F.3d 1274 (8th Cir. 1997). In neither case was the argument propounded that the authority to pass the law in question should be grounded in section five of the Fourteenth Amendment.
16. See, e.g. DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189 (1989) (holding a state, even after receiving reports of possible abuse, has no constitutional duty to protect a child from being physically abused by his father).
It is important to stress that the Equal Protection Clause does not limit the states’ duty to protect the positive duty to protect against violence, and it seems fair to suggest that precisely because the clause is not so limited, that the duty might go even further. It is at least a permissible interpretation of the Fourteenth Amendment that the states must protect us not only against threats to our safety posed by private violence, but against threats to our safety posed by private economic exploitation as well. If that is right, then the collective indifference and even hostility toward poor children’s health and well-being evidenced by the Welfare Reform Act\(^\text{17}\) is of constitutional as well as moral significance. It reflects a disavowal of constitutional and moral obligations of citizenship. The states have a duty to protect their citizens against threats to safety posed by homelessness and malnutrition no less than a duty to protect their citizens against threats to safety posed by ropes, fists and handguns. When the states fail to do so, Congress has the duty to compensate for the failure. The delegation of the freedom to disregard this obligation back to the states rather than discharging it, is as clear a violation of a senator’s oath to uphold the Constitution as it is of his or her moral obligation to do no harm.

Now, what of the Due Process Clause, and particularly, its guarantee of liberty? Is there any credible understanding of the Due Process Clause which renders it convergent with, rather than hostile or irrelevant to, progressivism? Both conservatives and liberals have tended to view the liberty protected by the Fourteenth Amendment as essentially a negative liberty. If that is the case, then the Due Process Clause of the Fourteenth Amendment is indeed either hostile to, or at best only marginally relevant to the progressive moral case against private harm and collective indifference. If “negative liberty” includes economic liberties, as argued during the Lochner-era,\(^\text{18}\) it is hostile: if it includes essentially sexual, personal, familial liberties, as argued during the Roe\(^\text{19}\) through Casey\(^\text{20}\) era, it is marginally, but only marginally, relevant.

In modern discourse, conservatives are now trying with considerable success to re-enliven the Lochner reading, putting the weight of constitutional law and rhetoric once again squarely behind propertied interests,\(^\text{21}\) while liberals are trying to maintain the integrity of the Roe interpretation.\(^\text{22}\) Both sides however, view the Constitution’s protection of


\(^{22}\) See DWORKIN, supra note 8, at 44-59, 117-146.
liberty as a protection of negative liberty only. As long as the argument over the meaning of liberty is premised on the assumption that whatever its content, it must be negative, the liberty to which the Constitution entitles us will be either antagonistic or irrelevant to progressive moral arguments against class, race or even gender privilege.

For the most part, progressives have accepted this assumption, shared by conservatives and liberals alike, that the "liberty" protected by the Fourteenth Amendment is essentially negative, and accordingly either antagonistic to, or irrelevant to, the case for progressive politics. The consequence is that progressives have in effect conceded the property-protecting and status-quo-conserving role of liberty; hence the Due Process Clause. They have done so with good reason because there is plenty of constitutional history to support such a reading. A negative liberty right to property (under the Fifth Amendment)23 was the cause of the slave holder in Dred Scott v. Sanford,24 no less than the cause of the propertied classes during the Lochner era. Progressives then, as now, rarely dispute the negativity of liberty, or even the centrality of property to liberty. Progressives, like liberals, have focused instead on equality and equal protection, urging a substantive meaning of the equality guaranteed by equal protection. Success by this route is then measured to the degree to which equality emerges as a meaningful counterweight to the property protecting role of due process, rendering the Constitution neutral on issues of class, rather than unequivocally antagonistic.

This concession regarding the meaning of liberty protected by the Fourteenth Amendment is a mistake. Again, it is surely possible, and perhaps more natural, to read the Fourteenth Amendment’s liberty phrase as protecting positive, not negative liberty from undue usurpation by the states. To show why, I quote from Isaiah Berlin, the most insightful and influential critic that positive liberty has ever known. As Berlin pointed out in his early and influential article,25 negative liberty, that which is involved in the question “What is the area within which the subject . . . is or should be left to do or be what he is able to do or be, without interference by other persons?”,26 is but one of two primary meanings the ideal has taken over the course of history. The other meaning, which, according to Berlin is by far the more historically dangerous of the two, but which, he is equally clear, is just as fundamental an historical longing, is liberty in its positive sense. By liberty in its positive sense he means that which is involved in answering the question “[w]hat, or who, is the source of control or interference that

26. Id. at 121-22.
can determine someone to do or be this rather than that?\textsuperscript{27} He insists the two are quite different: a good deal of negative liberty is consistent with a deprivation of positive liberty and vice versa. Speaking of negative liberty, Berlin notes:

Freedom in this sense is not, at any rate logically, connected with democracy or self-government... [T]here is no necessary connection between individual liberty and democratic rule. The answer to the question 'Who governs me?' is logically distinct from the question 'How far does government interfere with me?' It is in this difference that the great contrast between the two concepts of negative and positive liberty, in the end, consists. For the 'positive' sense of liberty comes to light if we try to answer the question not 'What am I free to do or be?' but 'By whom am I ruled?' or 'Who is to say what I am, and what I am not, to be or do?' The connexion between democracy and individual liberty is a good deal more tenuous than it seemed to many advocates of both. The desire to be governed by myself, or at any rate to participate in the process by which my life is to be controlled, may be as deep a wish as that of a free area for action, and perhaps historically older. But it is not a desire for the same thing.\textsuperscript{28}

If Berlin's general account here is even close to accurate, then it is simply bizarre to read the liberty prong of the Fourteenth Amendment as necessarily concerned with negative liberty only. Rather, it is surely possible to read the reconstruction amendments, taken in their entirety, as essentially concerned with providing a guarantee of positive liberty, and it is equally possible to interpret each of its major provisions (the Due Process Clause and the Equal Protection Clause) in light of that overriding objective. In other words, it is surely possible to argue that what the reconstruction amendments added to the Constitution was not an ideal of equality at all, i.e. whether the requirement of formal legal rationality with its implied mandate of color-blindness, as insisted by conservatives, or a dollop of substantive racial equality, as insisted by liberals. Rather, what the amendments added was a guarantee that the states and Congress protect the positive liberty of each citizen, and a mandate that states and Congress use law to protect that freedom. The point of the Fifth and Fourteenth Amendments, is liberty, not equality at all—equal protection is the means by which the goal, liberty, is to be achieved. However, if liberty is the goal of those amendments, and understood in the context of the history that produced them, it must be positive, not negative liberty that the states are required to protect.

Why positive and not negative liberty? What is positive liberty? According to Isaiah Berlin, positive liberty is, simply, the polar opposite of slavery; the self-mastery at the opposite extreme from the state of being

\begin{itemize}
\item \textsuperscript{27} \textit{Id.} at 122.
\item \textsuperscript{28} \textit{Id.} at 129-31.
\end{itemize}
enslaved. It is the liberty to be free from other’s power over oneself. It is the urge to be in a state of self-mastery. Berlin wrote, in his famous and critical essay:

The positive sense of the word ‘liberty’ derives from the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be a subject, not an object; to be moved by reasons, by conscious purposes, which are my own, not by causes which affect me, as it were, from outside. I wish to be somebody, not nobody; a doer deciding, not being decided for, self-directed and not acted upon by external nature or by other men as if I were a thing, or an animal, or a slave incapable of playing a human role, that is, of conceiving goals and policies of my own and realizing them. This is at least part of what I mean when I say that I am rational, and that it is my reason that distinguishes me as a human being from the rest of the world. I wish, above all, to be conscious of myself as a thinking, willing, active being, bearing responsibility for my choices and able to explain them by references to my own ideas and purposes. I feel free to the degree that I believe this to be true, and enslaved to the degree that I am made to realize that it is not.

The reconstruction amendments, of course, are there to ensure the political and moral victories won in the Civil War, central to which is the abolition of slavery. The Fourteenth Amendment goes further, however. Not only must the states not permit slavery, but they must also not deprive the citizen of liberty. What does that add, if not simply a measure of negative liberty? For the states to be required to not deny liberty, understood in a positive rather than negative sense, means that the states must not only police against actual enslavement, but must also guarantee legal protection for this condition of self-mastery.

This abolitionist reading has the added virtue, I will quickly note, of harmonizing the Equal Protection and Due Process Clauses, and it does so in a way which is both logical and historically sensible. The point of the Due Process Clause is to guarantee the positive liberty that is the antithesis of slavery, and the point of the Equal Protection Clause, on this approach, is not equality at all (equal is in the clause as a modifier, not a noun) but protection. For the states to fail to protect a class of persons against the aggression of another class is in effect, to permit the first group to be enslaved by the other. Should the states deprive the first of the protections of the criminal laws, for example, the first would be at the mercy of and subject to the whims of the second group who would thereby become, in effect, sovereigns of the first group. That is a perfectly adequate definition of a relationship of slavery: the slave owner is not subject to the sanctions

29. Id. at 131-32.
30. Id. at 131.
of the criminal law in his relations with the slave. The state, then, is required to provide such equal protection of law because failure to do so deprives the citizen of his positive liberty without due process of law.

Of course, this leaves open the obvious question of whether economic oppression constitutes a sort of economic servitude, or put in the positive terms of liberty, whether some minimal degree of economic power is a necessary condition of self-mastery. Berlin himself, it is important to note, did not rule out the possibility, and indeed strongly suggested that it is. It is also worth noting that every important advocate of private property from Adam Smith to Jack Kemp has answered the question affirmatively. If so, then the Fourteenth Amendment speaks rather directly to economic slavery; it is unconstitutional.

The Fourteenth Amendment, so interpreted, targeted at private power and collective indifference, and mandating political intervention to ameliorate if not eradicate the suffering incident to it guides, inspires, somewhat constrains, and prompts, ideally, congressional and state action as well as the political and public debate that feeds it. The subject matter of the Fourteenth Amendment, so to speak, is the injustice that pervades our private worlds, and it is the distinctive business of states, sovereigns, leviathans, legislatures, and congresses, to respond to those injustices. We have leviathans, so said Hobbes, so that we will not have private violence. The Fourteenth Amendment makes the contract explicit and explicitly open-ended. The inequities, violations, violence, coarseness and the injustices of our social world are the appropriate and indeed incontestable subject domain of the legislator: if she sees an intolerable inequity, it is her duty as well as her power and right to address it through law. It is why we have law and lawmakers; it is continuous with the most compelling justifications of statehood.

It is not, however, why we have courts. Courts do not exist for the purpose of rectifying the existence of unjustified private oppression through the passage of ameliorative or protective laws. The courts exist to enforce the law, and to do so in a way that is, ideally, both caring and attentive to consequences, and respectful of the ideals of legal justice. To whatever degree, then, the Fourteenth Amendment requires states to protect citizens against private injustice and insure the conditions which nurture positive liberty, and to whatever degree it requires Congress to take action where the states fail to do so, to that degree the Fourteenth Amendment cannot possibly be addressed to courts, nor can courts be responsive to its mandate. The Fourteenth Amendment, in other words, no more anticipates judicial

31. Id. at 122. Berlin offers "It is argued, very plausibly, that if a man is too poor to afford something ... he is as little free to have it as he would be if it were forbidden him by law." Id.

32. THOMAS HOBBES, LEVIATHAN 139-143 (1958).
enforcement than it directs, mandates or prohibits private actions. It anticipates congressional enforcement, and by its terms, prohibits state inaction.

As countless progressive and liberal commentators have argued, the courts have been wrong to think that the Constitution requires state action. The Court is wrong to read into the Fourteenth Amendment a state action requirement, not because the Fourteenth Amendment prohibits private action as well, but rather, because the Fourteenth Amendment, properly and naturally read, prohibits state inaction in the face of private injustice or violation. That failure to protect, and the failure to protect, more specifically, the positive liberty of its citizens and not state irrationality, is the diseased state of social affairs diagnosed by the drafters of the Fourteenth Amendment.

The cure for the disease of state inaction, or collective indifference, in the face of private injustice as mandated by the Fourteenth Amendment is state action and state protection of its citizens and their liberty. Further cure, when it is not forthcoming, mandates that Congress, not the judiciary, act in the case of such a breach, against the private injustice itself. Likewise, while legislative irrationality may be an evil, and may be one curable by an assertive judiciary, neither the evil of state irrationality nor the purported cure of a policing judiciary is the central point of the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment. Rather, the central point seems to require state intervention into those private orderings that cause undue and unjust suffering. The central point of the Fourteenth Amendment is neither liberal nor conservative, but is progressive through-and-through.

Against this suggestion, there are at least four salient objections. I will list them, and then respond to each. First is the lawyer's complaint: if the progressive aspects of the Constitution can be at best realized through politics and legislation rather than legal argument and adjudication, then the progressive Constitution, or even worse, those parts of the Constitution susceptible to congressional, but not judicial, enforcement simply are not law. The Constitution, whatever else it is, surely is law, indeed, it is the supreme law, so any interpretation of it which requires legislative rather than judicial enforcement fails. The second related objection is that the progressive Constitution, if aimed at congressional implementation and political argument rather than judicial enforcement and legal argument, is not sufficiently serious, or sufficiently imperative or binding it is merely rhetoric. The third related objection, the idea that the progressive

33. See e.g., LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 255 (1985)(arguing that since state action underlies any event in some way, the requirement is not meaningful); see also David A. Strauss, Due Process, Government Inaction, and Private Wrongs, 1989 SUP. CT. REV. 53, 59 (1989).
Constitution should be congressionally rather than judicially enforced, reflects an undue or inappropriate pessimism regarding the potential for moral progress through adjudication. The fourth objection goes to the quality of moral discourse: moral argument should be distinctively moral, and to constrain it with constitutional demands would be to pollute it in a peculiarly authoritarian and noxious way.

The first objection that a progressive reading of the Constitution, if directed at congressional rather than judicial enforcement is not law and therefore, because the Constitution is law, this reading can't be right. This simply begs the question regarding the meaning of law. We might define law as that which courts turn to when deciding cases just as we might define law as the decisions courts make, but there is no logical reason we must define it in such a counter-intuitive way, and to do so in the face of unpalatable and regressive consequences betrays the pragmatic spirit with which such definitions of law were initially propounded. We might alternatively define “law” more ecumenically as including that which legislatures turn to when deciding what they ought to do as well as what they must not do, toward the end of upholding their oath of office. If we define law in such a way, then “law” and “legal argument” have obvious overlaps with “politics” and “political argument” as well as “morality” and “moral argument.” However, that is surely true of court-centered definitions of law as well. Where it is the Constitution whose nature is in part being defined through the definition of the “law” in which it partakes, such overlap, seems entirely appropriate.

The second related objection is that a progressive interpretation of the Constitution, directed at congressional rather than judicial enforcement, cannot be taken seriously because it is merely moral, or merely political, and for that reason is even in some sense not intended to be taken seriously. Short of arbitrarily reconstructing long dead divides between law and politics, why should this be? Moral argument, precisely because it is moral argument, is more imperative, more categorical, less contingent, and more persistently demanding than legal arguments or legal conclusions. Nor is it at all clear that constitutional arguments directed at the courts and toward the end of encouraging them to strike legislation are more consequential,

34. See Ronald Dworkin, Taking Rights Seriously at 46-80 (1977). The court-centered understanding of the meaning of law is implicit in Dworkin’s early attacks on Hart’s positivism, and has been widely adopted since, although rarely explicitly.

35. See Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 461 (1897) This definition, of course, stems from the realist movement; See generally Laura Kalman, Legal Realism at Yale 1927-60 (1986)(describing the impact of legal realism on legal education at Yale University).

particularly, than a constitutional argument directed toward the legislature and toward the end of encouraging them to pass legislation. Courts do indeed have clerks who are lawyers, who read law review articles which might suggest constitutional arguments that direct judicial decisions which then have the force of law. Obviously, and likewise, senators and congresspersons have staff, the majority of whom are lawyers who also presumably read law review articles that suggest constitutional arguments that direct legislative actions which undoubtedly would have the force of law—they would be law. These senators, congresspersons, and their staffs are often serious people open to persuasion. Some of them are liberal and moderate Democrats and Republicans, hungry for precisely such constitutional and moral guidance.

The third related objection is that progressive understandings of the Constitution explicitly aiming for legislative rather than judicial enforcement unduly and unjustifiably sell the judiciary short. It is not the case, so runs the objection, that courts cannot in principle interpret the Constitution so as to further progressive ends. Rather, it is simply this particular conservative Court that is disinclined to do so, but that could change. The particular Congress we are now facing is obviously no more inclined than the particular Court to give heed to progressive understandings of constitutional imperatives. The personnel of either branch could change in the short term, but in the long run there are familiar and structural reasons to put our stock in the judiciary. Judges, unlike legislators, are not beholden to private interests and private money for re-election. They are, in short, neither as corrupt nor as corruptible. They are not by definition looking for a deal or a bargain, their votes are not up for sale, and they will not personally profit by helping the lion consume the lamb.

This objection, I think, rests on a misapprehension of both the peculiar virtue required of judges, and the peculiar vice to which they are susceptible. First, judicial virtue. The progressive impulse, I suggested at the outset, is a moral response to a kind of human suffering, and likewise, progressive legislation is grounded in precisely that moral response. The lesser life, because it is lesser, evidences social injustice, and the suffering attendant to it must be ameliorated. The progressive legislator sees and responds to this qualitative difference in the lives of citizens. These people, for no good reason, suffer more, and that suffering is unjust and the conditions which give rise to it must change. Progressivism rests, in other words, on discernment of and then an appropriate moral response to a particular difference that divides and defines us; the difference, again, of lesser lives. Good judging is also rooted in a moral response, but it is a different moral response resting on a different moral virtue and aimed at a different evil, aspiring toward a different moral ideal than that which drives progressivism.

37. Id.
and progressive legislation. Good judging is an attempt to do legal justice, and legal justice, in turn, requires the judge to attend to what is universal and to willfully blind herself to what is particular, in every case that comes before her. The good judge decides the case by treating likes alike, and is peculiarly equipped and trained to discern similarity even in the face of apparent dissimilarity. Our sense of legal injustice is triggered not by the phenomenon of lesser lives lived out in a society of plenty, but rather, by the phenomenon of like cases being treated dissimilarly, and for no apparent reason: by the aristocrat not convicted of poisoning his wife;38 the celebrity athlete acquitted of double homicide; of William Zanzinger, to quote from Bob Dylan, the Eastern Shore millionaire convicted and sentenced to only six months in jail for whimsically murdering poor Hattie Carroll (a black maid and mother of ten) at a Baltimore Hotel Society Gathering;39 and Mr. Peacock, convicted and sentenced to only eighteen months in a work release program for killing his adulterous wife, because the judge found so eminently understandable his act of rage.40 These cases are revolting and offensive, presumably even to those of us who believe with good reason that incarceration and execution are not morally responsible communal responses to criminality because they are examples of legal injustice. They exemplify a court's or judge's inability to treat and even see that we universally share blameworthiness for homicidal acts and to blind herself to what distinguishes us: wealth, privilege, race, class and sex. Accordingly, decisions that are unjust in this way do profound damage to the parties and to the society they deserve; by treating some of us so very differently, they discommunicate some part of the community in an extremely radical way; they alienate and divide the community accordingly. The good judge tries to not do that, and she or he tries not to do that by respecting our universality, and by so doing, the judge strengthens our community.41

The impulse to treat likes alike, to apply the law even-handedly, to attend to the universal, and the virtue on which it rests, is not exclusively the province of adjudication in criminal cases. It is not too rash to suppose that there is not a single case in any area of law that cannot be described as an attempt to do justice between the parties by attending to what is universal in the conflict, and weeding out what is particular. That is certainly as true in constitutional law and more particularly in equal protection doctrine as in any area of law imaginable, and it is easy to see that the dominating influence of this background judicial virtue has indirectly steered equal

41. I discuss the cases mentioned and others like them, and the judicial virtue or lack thereof that they evidence, in CARING FOR JUSTICE 27-28, 78 (1997).
protection jurisprudence, as developed by the Court. Thus, to take just one obvious example: it is certainly not just an incidental feature of Brown v. Board of Education\textsuperscript{42} that the Court relegated to a footnote the evidence of the lesser lives to which segregation in fact led,\textsuperscript{43} and in the opinion itself obviated the need to attend to difference by declaring separate schools \textit{by definition}, rather than in social reality, unequal.\textsuperscript{44} More generally, it is not at all surprising and it may not be entirely “political” that the Court is persuaded by a reading of the Equal Protection Clause which imposes upon the legislature and the public a “color blindness” as a response to our history of racism. Color blindness, like sex blindness, wealth blindness, nobility blindness, and where-one-is-from blindness is central to the moral mission of the judge, just as undue attentiveness to such particularizing details is the vice that defines failure in the enterprise. More generally still, perhaps, it is not surprising that for seventy-some years now, the courts have read the word “protection” out of the Equal Protection Clause, and have foisted upon us instead an unnatural interpretation requiring it to police against irrational discrimination. This reading has the virtue of allowing the courts to simply treat legislatures as lower courts and police the rationality of their decision making, precisely what the Court is required to do when assessing, interpreting, and applying precedent, as well as when assessing and evaluating the handiwork of lower courts. The Court, in other words, may have happened upon a reading of the clause that requires rationality, rather than protection, from legislatures, because such a reading then requires of legislatures precisely the same virtue that is required of courts, that the legislature treat likes alike, that the legislature dispenses legal justice. The Court, of course, is exceedingly well equipped to review such determinations. This reading, in other words, seems natural to courts, because it suggests a substantive interpretation that makes sense of their reviewing role.

These two virtues, the generous attempt to alleviate through collective action undue and unjust private suffering, on the one hand, and the judicial attempt to underscore through decision-making the universality of human nature, human aspirations and the human community on the other, are distinct virtues. The institutions and actors upon which these two virtues rest, inter-relate, are sometimes in tension with each other, and they are sometimes complementary. It is clearly the case, for example, that a judge who is utterly indifferent to all societal consequences of her or his decision and is determined to do nothing but justice between the parties, is and will be perceived as a zealot and will likely do great damage through the course

\textsuperscript{42} Brown v. Board of Education of Topeka, 347 U.S. 483 (1954)(declaring separate educational facilities are inherently unequal).

\textsuperscript{43} Id. at 494 n.11 (citing social science literature).

\textsuperscript{44} Id. at 495.
of such a career. A legislator unconcerned about the rationality of his decisions and blind to legal justice will be, and be perceived, a tyrant. Nevertheless, they most often have nothing to do with one another, and it is not unduly formal to note that judging is more concerned with the former, and legislating with the latter. A good judge, even a good progressive judge, tries to do legal justice between the parties, and through training and inclination, will bring to that task an attentiveness of our universally shared traits: that is what it means to do legal justice. A conscientious legislator will try to ameliorate suffering by eradicating unjust social conditions: that they ground institutions which might both be necessary to a just society does not collapse the differences between them.

Lastly, it might be objected to that constitutionalizing moral and political discourse has the unpalatable consequence of diluting it, for two reasons. First, a moral argument might gain in political force, but it loses in moral authority if it has the might of the Constitution behind it. Second, a moral argument should be universal and principled which it cannot be if it depends on the authority of an historical and political document for its force and validity. To think otherwise confuses right with might, or moral truth with political power. “I have the right to bear arms, because it is morally right that I should have the right to bear arms,” is an entirely different sort of claim than “I have the right to bear arms because the Constitution grants me such a right.” Whether it is right for the state to protect citizens against the harsh effects of extreme poverty, likewise, is an entirely different question from whether or not the Constitution requires the states to do so. It does not strengthen the case for the right to bear arms or the duty to guarantee welfare to co-mingle such claims with their legal necessity. The claim that the Constitution guarantees me the right to bear arms, or requires the welfare state are nothing but contested assertions of positive law; the first are contested moral claims. It weakens both to confuse them. The legal claims must stand or fall on the strength of the chain of legal inferences, and the moral claims must stand or fall on the strength of the moral argument given to support it. To argue for the latter on the strength of the former does little but suggest the weakness of the moral argument.

Whatever the merits of this positivist clarity in other areas of law may be, however, it is not so clearly appropriate in constitutional argument, at least in constitutional argument outside the courts. When we argue over what a moral agent ought to do in a hypothetical situation, it may well make some sense to abstract away from particularizing details of place, era, and history. But when we argue over whether we do or do not have the right to bear arms or whether the state does or does not have an obligation to guarantee decent work or a minimum living wage, we are not talking about abstracted moral agents, we are arguing about what kind of society we should become, and hence what kind of society we are and have been in the past. In these sorts of moral arguments, stories about our past carry great weight, whether
as cautionary tales or tales of heroism or virtue. Constitutional argument has precisely the same structure: to decide whether we have a right or the state a duty, we argue over how we have constituted ourselves in the past, and whether we ought to continue to do so or change course. The stories we tell regarding our constitutional past are of obvious relevance to our current debates about our political and moral dilemmas. That we have so divorced constitutional argument from political argument, or rather, that we so strenuously insist that political argument is a proper part of constitutional argument, but that constitutional argument should not be brought to bear on the directly political, is a peculiar overhang from a formalist era. Our moral and political arguments are not so formally pure as to be uninformed by our culture and history, and our cultural and historical heritage is not so rooted in "nothing but the facts" as to have no normative or aspirational content.

All that follows from this is that the progressive dimensions of the Constitution and of our constitutional history ought to have some persuasive power in political and moral contestations over the value of a progressive agenda. It need not be definitive, and it would rarely be unchallenged, but there is no good reason to neglect it, and even less to negate it. Political liberalism has been enriched by the careful and public elucidation of the liberal impulses in the Constitution put forward by Ronald Dworkin, and conservatism has likewise been strengthened by the elaboration by a handful of conservative constitutionalists of the Constitution’s conservative themes. There is no reason to think that we could not articulate a stronger case for progressive politics in this country by elucidating the perhaps negligible, but nevertheless perceptible, degree to which we have chosen to constitute ourselves around progressive rather than regressive moral imperatives, and as evidenced by this foundational document.


46. See generally RONALD DWOR KIN, A MATTER OF PRINCIPLE (1985)(presenting a series of essays discussing legal interpretation and the role of liberalism); RONALD DWOR KIN, TAKING RIGHTS SERIOUSLY (1977)(arguing that the apparent judicial deference to prior decisions is inconsistent with the positivist ideology of judicial discretion); RONALD DWOR KIN, LAW'S EMPIRE (1986)(examining what the author refers to as the interpretive "defects of position" in legal reasoning and the development of law); and RONALD DWOR KIN, FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996)(addressing societal and jurisprudential notions of life, death, and race).